(46)

No. 91-902-CFX Title: Robert P. Casey, et al., etc., Petitioners
Status: GRANTED v.
Planned Parenthood of Southeastern Pennsylvania, et al.

Docketed:
December 11, 1991 Court: United States Court of Appeals for the Third Circuit

Vide:
91-744 Counsel for petitioner: Knorr III,John G.

Counsel for respondent: Kolbert,Kathryn

40 copies ea pet & appd

Entry	Date	Note	Proceedings and Orders
1	Dec 11 1991	G	Petition for writ of certiorari filed.
2	Dec 11 1991		Appendix of petitioner filed.
4	Dec 17 1991		Brief of respondents Planned Parenthood, et al. in opposition filed.
3	Dec 18 1991		DISTRIBUTED. January 10, 1992
5	Jan 7 1992	X	Brief amici curiae of William J. Guste, et al. filed.
7	Jan 13 1992		REDISTRIBUTED. January 17, 1992
10	Jan 21 1992		The petition for a writ of certiorari is granted limited to the following questions: 1. Did the Court of Appeals err in upholding the constitutionality of the following provisions of the Pennsylvania Abortion Control Act: a. 18 Pa. Cons. Stat. Ann. Sec. 3203 (definition of medical emergency); b. 18 Pa. Cons. Stat. Ann. Sec. 3205 (informed consent); c. 18 Pa. Cons. Stat. Ann. Sec. 3206 (parental consent); d. 18 Pa. Cons. Stat. Ann. Secs. 3207, 3214 (reporting requirments)? 2. Did the Court of Appeals err in holding 18 Pa. Cons. Stat. Ann. Sec. 3209 (spousal notice) unconstitutional? The case is consolidated with No. 91-744 and a total of one hour is allotted for oral argument.
			**********
12	Feb 28 1992		Record filed.
		*	Original proceedings U.S. District Court, Eastern District of Pennsylvania (2 Boxes)
23	Mar 3 1992	D	Motion of Alan Ernest to represent children unborn and born alive filed.
24	Mar 3 1992	D	Motion of Legal Defense for Unborn Children for leave to file a brief as amicus curiae filed.
11	Mar 4 1992		SET FOR ARGUMENT WEDNESDAY, APRIL 22, 1992. (1ST CASE).
14	Mar 6 1992		Brief of petitioners /cross-respondents Planned Parenthood of S.E.Penn., et al. filed. VIDED.
15	Mar 6 1992		Joint appendix filed. VIDED.
		*	(Two Volumes)
16	Mar 6 1992		Brief amici curiae of Certain Members U.S.House of Representatives and U.S. Senate filed. VIDED.
17	Mar 6 1992		Brief amici curiae of NAACP Legal Defense and Education Fund, et al. filed. VIDED.
18	Mar 6 1992		Brief amici curiae of American College of Obstetricians and Gynecologists, et al. filed. VIDED.

3pp

No. 91-902-CFX

Entry	Date	Note	Proceedings and Orders
19	Mar 6 1992		Brief amici curiae of 250 American Historians filed. VIDED.
20	Mar 6 1992		Brief amici curiae of City of New York, et al. filed. VIDED.
21	Mar 6 1992		Brief amici curiae of 178 Organizations (Abortion Rights Mobilization, et al.) filed. VIDED.
22	Mar 6 1992		Brief amicus curiae of American Psychological Association filed. VIDED.
25	Mar 6 1992	X	Brief amici curiae of Pennsylvania Coalition Against Domestic Violence, et al. filed. VIDED.
26	Mar 6 1992	X	Brief amici curiae of State of New York, et al. filed. VIDED.
27	Mar 6 1992	X	Brief amici curiae of Alan Guttmacher Institute, et al. filed. VIDED.
13	Mar 11 1992		CIRCULATED.
28	Mar 23 1992		Motion of Alan Ernest to represent children unborn and born alive DENIED.
29	Mar 23 1992		Motion of Legal Defense for Unborn Children for leave to file a brief as amicus curiae DENIED.
30	Mar 23 1992	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
31	Mar 30 1992		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
32	Apr 3 1992	X	Brief amicus curiae of University Faculty for Life filed. VIDED.
37	Apr 3 1992	X	Brief amici curiae of Feminists for Life of America, et al. filed. VIDED.
33	Apr 6 1992	X	Brief amici curiae of Catholics United for Life, et al. filed. VIDED.
34	Apr 6 1992	X	Brief amici curiae of Certain American State Legislators filed. VIDED.
35	Apr 6 1992	X	Brief amici curiae of Focus on the Family, et al. filed. VIDED.
36	Apr 6 1992	D	Motion of James J. Crook for leave to file a brief as amicus curiae filed.
38	Apr 6 1992	X	Brief amici curiae of United States Catholic Conference filed. VIDED.
40	Apr 6 1992	X	Brief amicus curiae of National Legal Foundation filed. VIDED.
41	Apr 6 1992	X	Brief amicus curiae of Knights of Columbus filed. VIDED.
42	Apr 6 1992	X	Brief amicus curiae of Nineteen Arizona Legislators filed. VIDED.
43	Apr 6 1992	X	Brief amicus curiae of American Academy of Medical Ethics filed. VIDED.
44	Apr 6 1992	X	Brief amici curiae of Rutherford Institute, et al. filed. VIDED.
45	Apr 6 1992	X	Brief amicus curiae of United States filed. VIDED.
46	Apr 6 1992	X	Brief amicus curiae of Texas Black Americans for Life filed. VIDED.
47	Apr 6 1992	X	Brief of respondents Robert P. Casey, et al. filed. VIDED.
48	Apr 6 1992	D	Motion of America 21, Family Values for the Twenty-First Century for leave to file a brief as amicus curiae filed.
49	Apr 6 1992	X	Brief amicus curiae of Southern Center for Law & Ethics filed. VIDED.
50	Apr 6 1992	X	Brief amicus curiae of National Right to Life, Inc. filed. VIDED.
51	Apr 6 1992	X	Brief amicus curiae of Agudath Israel of America filed. VIDED.
52	Apr 6 1992	X	Brief of American Association of Prolife Obstetricians, et al. filed. VIDED.
54	Apr 6 1992	X	Brief amici curiae of Hon. Henry J. Hyde, et al. filed.
55	Apr 6 1992	X	Brief amicus curiae of Life Issues Institute filed.
53	Apr 10 1992	G	Motion of Arlen Specter to join amici curiae brief of Don Edwards, et al. filed.
56	Apr 15 1992	X	Reply brief of respondent Planned Parenthood, et al. filed.
57	Apr 20 1992		Motion of James J. Crook for leave to file a brief as amicus curiae DENIED.
58	Apr 20 1992		Motion of America 21, Family Values for the Twenty-First Century for leave to file a brief as amicus curiae DENIED.
59	Apr 20 1992		Motion of Arlen Specter to join amici curiae brief of Don Edwards, et al. GRANTED.
61	Apr 21 1992	X	Supplemental brief of respondent Planned Parenthood, et al. filed.
62	Apr 22 1992		ARGUED.

(1)

91-902

Supreme Court, U.S.
FILED
DEC 11 1991
OFFICE OF THE CLERK

No.

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1991

ROBERT P. CASEY, et al.,
Petitioners

v.

PLANNED PARENTHOOD OF
SOUTHEASTERN PENNSYLVANIA, et al.,
Respondents

Petition for Certiorari to the United
States Court of Appeals for the
Third Circuit

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether the "spousal notice" provision in Pennsylvania's Abortion Control Act, which with certain exceptions requires a woman to notify her spouse before she undergoes an abortion, violates the Due Process Clause?

2. Whether the court should adopt a standard of review of state abortion law that affords the states greater latitude in the regulation of abortion?

LIST OF PARTIES

The petitioners are Robert P. Casey, the Governor of Pennsylvania; Allan S. Noonan, Acting Secretary of the Pennsylvania Department of Health[1]; and Ernest D. Preate, Jr., the Attorney General of Pennsylvania.

The respondents are Planned Parenthood of Southeastern Pennsylvania; Reproductive Health and Counselling Center; Women's Health Services, Inc.; Women's Suburban Clinic; Allentown Women's Center; Northeast Women's Center; and Thomas Allen, representing himself and a class of similarly situated physicians.[2]

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[1] Substituted for former Secretary of Health N. Mark Richards, see Sup. Ct. R. 35.3.

[2] The caption on the opinion of the Court of Appeals reflects the presence of Michael D. Marino as a party, but in fact the parties stipulated to his dismissal in the District Court. Pet. App. 130a n.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	6
REASONS FOR GRANTING THE WRIT	17
I. THE VALIDITY OF SPOUSAL NOTICE PROVISIONS IS A SUBSTANTIAL ISSUE OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, ADDRESSED BY THE COURT	17
II. THE COURT SHOULD TAKE THIS OPPORTUNITY TO FORGE A NEW CONSENSUS ON THE PROPER REVIEW OF ABORTION LEGISLATION	21
CONCLUSION	27

TABLE OF AUTHORITIES

CASES — PAGE(s)

Bellotti v. Baird, 428 U.S. 132 (1976)..... 20

Colautti v. Franklin, 439 U.S 379 (1979)..... 18

Hodgson v. Minnesota, No. 88-1125 (June 25, 1989).. passim

Marks v. United States, 430 U.S. 188 (1977)..... 13, 23

Ohio v. Akron Center for Reproductive Health, No. 88-805 (June 25, 1990)... 18

Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976)..... 19

Roe v. Wade, 410 U.S. 113 (1973)..... 12, 22

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986)..... 9, 12 18

Webster v. Reproductive Health Services, 492 U.S. 490 (1989)..... passim

CONSTITUTIONAL PROVISIONS

U.S. Const., Amend. XIV, § 1..... 3

STATUTES AND RULES

28 U.S.C. § 1254(1)..... 2

Pennsylvania Abortion Control Act, 18 Pa. Cons. Stat. § 3201-3220 (1990)..... passim

Sup. Ct. R. 35.3..... ii

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported but is reprinted in the Appendix at p. 1a. The opinion of the District Court is reported at 744 F. Supp. 1323 and is reprinted in the Appendix at p. 104a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on October 21, 1991 and this petition is being filed within 90 days thereafter. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment's Due Process Clause provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const., Amend. XIV, §1.

2. Section 3209 of the Pennsylvania Abortion Control Act, 18 Pa. Cons. Stat. § 3209 (1990), provides as follows:

> § 3209. Spousal notice
>
> (a) Spousal notice required.--In order to further the Commonwealth's interest in promoting the integrity of the marital relationship and to protect a spouse's interest in having children within marriage and in protecting the prenatal life of that spouse's child, no physician shall perform an abortion on a married woman, except as provided in subsection (b) and (c), unless he or she has received a signed statement, which need not be notarized, from the woman upon whom the abortion is to be performed, that she has notified her spouse that she is about to undergo an abortion. The statement shall bear a notice that any false statement made therein is punishable by law.
>
> (b) Exceptions.--The statement certifying that the notice required by subsection (a) has been given need not be furnished where the woman provides the physician a signed statement certifying at least one of the following:
>
> (1) Her spouse is not the father of the child.
> (2) Her spouse, after diligent effort, could not be located.
> (3) The pregnancy is a result of spousal sexual assault as described in section 3128 (relating to spousal sexual assault), which has been reported to a law enforcement agency having the requisite jurisdiction.
> (4) The woman has reason to believe that the furnishing of notice to her spouse is likely to result in the infliction of bodily injury upon her by her spouse or by another individual.
>
> Such statement need not be notarized, but shall bear a notice that any false statements made therein are punishable by law.
>
> (c) Medical emergency.--The requirements of subsection (a) shall not apply in a case of a medical emergency.

(d) Forms.--The department shall cause to be published forms which may be utilized for purposes of providing the signed statements required by subsections (a) and (b). The department shall distribute an adequate supply of such forms to all abortion facilities in this Commonwealth.

(e) Penalty; civil action.--Any physician who violates the provisions of this section is guilty of "unprofessional conduct," and his or her license for the practice of medicine and surgery shall be subject to suspension or revocation in accordance with procedures provided under the act of October 5, 1978 (P.L. 1109, No. 261), known as the Osteopathic Medical Practice Act, the act of December 20, 1985 (P.L. 457, No. 112), known as the Medical Practice Act of 1985, or their successor acts. In addition, any physician who knowingly violates the provisions of this section shall be civilly liable to the spouse who is the father of the aborted child for any damages caused thereby and for punitive damages in the amount of $5,000, and the court shall award a prevailing plaintiff a reasonable attorney fee as part of costs.

STATEMENT OF THE CASE

This action challenges the constitutionality of Pennsylvania's Abortion Control Act, 18 Pa. Cons. Stat. §§ 3201-3220 (1990). The Court of Appeals upheld most of the Act, but struck down the Act's "spousal notice" provision, which with certain exceptions requires a woman to tell her husband before she undergoes an abortion. Petitioners, the Governor of Pennsylvania and other state officials, ask the Court to review that holding.

1. Spousal notice is governed by Section 3209 of the Act, 18 Pa. Cons. Stat. § 3209 (1990).[3] Enacted "to further the Commonwealth's interest in promoting the integrity of the marital relationship and to protect a spouse's

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[3] Section 3209 is reprinted in full at p. 3-5, supra.

interests in having children within marriage and in protecting the prenatal life of that child," ibid, Section 3209 requires that a married woman who is about to undergo an abortion notify her husband and provide her doctor with a signed statement that she has done so. Id., § 3209(a).

The spousal notice requirement does not apply in the case of a medical emergency, id., § 3209(c). Nor does it apply where the woman provides a statement that she has not notified her husband because he is not the father of the child or could not, after diligent effort, be located; or because the pregnancy resulted from a reported incident of spousal sexual assault; or because she has reason to believe that notifying her spouse will likely subject her to bodily injury. Id., § 3209(b).

These statements -- that the woman has notified her husband or that she is invoking one of the statutory exceptions -- need not be notarized, but must bear a notice that false statements are punishable by law, id., § 3209(a),(b); the Pennsylvania Department of Health is required to prepare and furnish forms for this purpose. Id., § 3209(d). A knowingly false statement is punishable as a third degree misdemeanor, id., § 3218(c).[4] A physician who violates Section 3209 does not face criminal prosecution, but may be subject to professional licensure sanctions and to civil liability to the woman's spouse. Id., § 3209(e).

---

[4] Under Pennsylvania law, a third degree misdemeanor is punishable by up to one year in prison and a fine of up to $2500. Id., §§ 1101(5), 1104(3).

2. The Abortion Control Act was enacted in 1982 and substantially amended in 1988, in the wake of the Court's decision in Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (striking down 1982 Abortion Control Act). Before the amended Act could go into effect, the respondents brought this action in the United States District Court for the Eastern District of Pennsylvania, seeking declaratory and injunctive relief against a wide array of the Act's provisions. Pet. App. 105a-106a. The District Court issued a preliminary injunction. Pet. App. 108a. In 1989, while the case was still pending in the District Court, the Pennsylvania legislature further amended the Act by, inter alia, adding the spousal notice provision. Respondents amended their complaint to encompass the

1989 amendments, and the District Court likewise expanded the preliminary injunction. Pet App. 109a-110a.

After a bench trial, the District Court issued a permanent injunction granting respondents virtually all the relief they had requested. The District Court permanently enjoined the implementation of the spousal notice provisions of Section 3209, Pet App. 406a-429a; as well as those provisions of the Act relating to informed consent (Section 3205), Pet. App. 377a-395a; parental consent for abortions on minors (Section 3206), Pet. App. 396a-406a; public disclosure of certain information (Sections 3207 and 3214), Pet. App. 435a-441a; and the collection of certain other information (Section 3214), Pet. App. 447a-450a, 452a-453a. In addition, the District Court enjoined the implementation of all provisions of the

Act that contain an exception for medical emergencies, on the ground that that exception was inadequate (see Section 3203, defining "medical emergency"), Pet. App. 371a-377a. The petitioners, but not the respondents, appealed.[5]

3. The Court of Appeals largely reversed the District Court, the three-judge panel unanimously holding that most of the challenged provisions of the Act are constitutional. The sole exception was the spousal notice provision, on which the panel divided:

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5 The respondents had asked the District Court to enjoin the collection of virtually all information on abortions, and to enjoin the Act's requirement that the gestational age of the unborn child be ascertained, but the District Court was unwilling to go so far. Pet. App. 429a-434a, 442a-444a, 450a-452a, 453a-462a. These were the only respects in which the respondents were unsuccessful in the District Court, and they did not appeal.

the two judges of the majority held Section 3209 unconstitutional and therefore affirmed the District Court's judgment on this point, while the dissenting judge, believing Section 3209 to be constitutional, would have reversed the District Court on this point as well.

a. The Court of Appeals first considered the issue of the appropriate standard of review. The Court of Appeals observed that in such cases as Roe v. Wade, 410 U.S. 113 (1973), and Thornburgh, a majority of the Court held that all abortion legislation must be measured against "strict scrutiny"; that is, "it must be justified by a 'compelling state interest' and 'must be narrowly drawn' to serve that interest." Pet. App. 10a, quoting Roe, 410 U.S. at 155. However, after a

painstaking analysis of the Court's more recent decisions, particularly the fragmented decisions in Webster v. Reproductive Health Services, 492 U.S. 490 (1989), and Hodgson v. Minnesota, No. 88-1125 (June 25, 1990), the Court of Appeals concluded that a majority of the Court had abandoned the strict scrutiny standard, but that no majority had coalesced around any single alternative standard. Pet. App. 24a-30a.

The Court of Appeals then turned for guidance to Marks v. United States, 430 U.S. 188 (1977), on which it relied for two principles: first, that "a legal standard endorsed by the Court ceases to be the law of the land when a majority of the Court in a subsequent case declines to apply it", Pet. App. 20a; and second, that "the controlling opinion in a splintered decision is that of the Justice or Justices who concur on

the 'narrowest grounds'", Pet. App. 21a. In light of Marks, the Court of Appeals identified Justice O'Connor's concurring opinions in Webster and Hodgson as embodying the controlling standard of those cases. Pet. App. 29a-30a. That standard, which the Court of Appeals called the "undue burden" standard, "appl[ies] strict scrutiny review to regulations that impose an undue burden [on the right to abortion] and rational basis review to those which do not." Pet. App. 30a.

b. Applying this undue burden standard to the Abortion Control Act, the Court of Appeals held that most of the challenged provisions did not impose an undue burden and did have some rational basis on their face.[6] Pet.

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[6] Since the Act has never been allowed to go into effect, the respondents' attack on it could only be a facial one.

App. 33a-60a. The sole exception was Section 3209's provision for spousal notice.

The two judges of the majority held that spousal notice exposed married women to economic and psychological abuse from hostile spouses intent on preventing or penalizing their abortions, and that this imposed an undue burden. Pet. App. 60a-70a. They went on to hold that at least some of the interests served by spousal notice were legitimate, but none were compelling, and the provision thus could not survive strict scrutiny. Pet. App. 71a-74a.

Judge Alito, dissenting in part, agreed that it was "doubtful" that Section 3209 could pass strict scrutiny, Pet. App. 87a, but would not have subjected it to that test. In his view,

the respondents had not satisfactorily established that Section 3209 would have the "broad practical impact," Pet. App. 91a, of severely limiting the availability of abortions for large numbers of women. Pet. App. 90a-96a. He would therefore have held that Section 3209, on its face, does not impose an undue burden and that it passes rational basis review. Pet. App. 99a-103a.

REASONS FOR GRANTING THE WRIT

The issue in this case--the validity of spousal notice provisions in state laws regulating abortion--is one of first impression for the Court, and is of substantial public importance. In addition, this case presents the Court with the opportunity to provide much-needed guidance on the legal standard against which such laws should be reviewed.

I. THE VALIDITY OF SPOUSAL NOTICE PROVISIONS IS A SUBSTANTIAL ISSUE OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, ADDRESSED BY THE COURT.

Controversies about the extent to which the States permissibly may regulate abortion are among the most recurrent and intractable in the contemporary legal landscape. Pennsylvania's legislature, for example, has been struggling for 17 years to

enact an abortion control law that will pass constitutional muster; each effort has been immediately challenged and --so far--ultimately invalidated. See Colautti v. Franklin, 439 U.S. 379 (1979)(Abortion Control Act of 1974); Thornburgh (Abortion Control Act of 1982). The Court, too, has addressed this issue on innumerable occasions, issuing eight decisions just on the validity of parental consent and notification provisions. See Ohio v. Akron Center for Reproductive Health, No. 88-805 (June 25, 1990)(parental notice); Hodgson, slip op. at p. 15, n. 22 (parental notice; listing six previous decisions).

The Court, however, has never addressed the validity of a spousal

notice provision. In Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 67-72 (1976), the Court struck down a provision of a Missouri statute that required spousal consent to an abortion, but this is of little relevance to the validity of requiring spousal notice. In the related context of parental notice and consent provisions, four members of the Court have recognized that

> [t]he difference between notice and consent ...is apparent.... Unlike parental consent laws, a law requiring parental notice does not give any third party the legal right to make the minor's decision for her, or to prevent her from having an abortion should she choose to have one performed. We have acknowledged this distinction as "fundamental" and as one "substantially modify[ing] the federal constitutional challenge."

Hodgson v. Minnesota, slip op. at p. 17 (Kennedy, J., concurring and dissenting),

quoting Bellotti v. Baird, 428 U.S. 132, 145, 148 (1976). The Court's decisions on consent statutes are thus not easily applied to notice statutes.

Similarly, while the Court has devoted substantial attention, as noted above, to the issue of parental notice of abortions on minors, these decisions are of only limited help on the issue of spousal notice, with its very different calculus of interests.

Given the history of abortion litigation since Roe, it seems likely that this issue will continue to recur until the Court addresses it; and the decision of the Court of Appeals produced thoughtful and detailed opinions on each side. There is therefore little reason to delay the resolution of this issue, and the Court should take this opportunity to resolve it.

II. THE COURT SHOULD TAKE THIS OPPORTUNITY TO FORGE A NEW CONSENSUS ON THE PROPER REVIEW OF ABORTION LEGISLATION.

In its most recent decisions reviewing state laws regulating abortion, the Court was deeply divided over the outcomes, but still more deeply divided over the nature of the review process itself. In Webster v. Reproductive Health Services, five Justices voted to uphold the challenged Missouri statute, on three different grounds: three Justices would have held that the right to obtain an abortion is a liberty interest subject only to rational basis review, id., 492 U.S. at 513-521 (Opinion of Rehnquist, C.J.); one Justice applied the undue burden standard, id., 492 U.S. at 522 (O'Connor, J., concurring in part and concurring in the judgment); and one

Justice would have overruled Roe outright, id., 492 U.S. at 532 (Scalia, J., concurring in part and concurring in the judgment). Four Justices voted to invalidate the statute: three Justices would have applied strict scrutiny, id., 492 U.S. at 537 (Blackmun, J., concurring in part and dissenting in part); and one Justice did not specifically discuss the standard of review, id., 492 U.S at 560 (Stevens, J., concurring in part and dissenting in part).

In Hodgson v. Minnesota, the result was the same: the Chief Justice, with Justices White, Scalia and Kennedy, applied rational basis review; Justice O'Connor applied the undue burden standard; and Justices Brennan, Marshall and Blackmun applied strict scrutiny. Justice Scalia, although joining in the application of the rational basis test,

again called for overruling Roe, and Justice Stevens again did not argue for any specific standard of review.

The Court of Appeals in this case thus faced the task of sorting through these splintered decisions to find, and then apply, the correct legal standard. Finding the correct standard was fairly simple: the Court of Appeals correctly relied on the principles of Marks v. United States to guide it through this tangle, and correctly identified the opinions of Justice O'Connor as embodying the currently binding rule.

Applying that standard, once it had been identified, proved far more difficult. No other member of the Court has endorsed Justice O'Connor's undue burden standard. Consequently, in applying that standard, the Court of Appeals was forced to rely upon the views, and conjectures as to the possible

views, of a single Justice, a task which the Court of Appeals aptly compared to "read[ing]...tea leaves." Pet. App. 34a, n.

This is obviously unsatisfactory. The lower courts, and state legislatures as well, need some surer benchmark to guide them in this difficult and contentious area. The Court should review this case, continue the journey it began in Webster and Hodgson, and attempt to arrive at a new consensus.

Should a majority of the Court coalesce around the undue burden standard, the petitioners submit that that standard, properly applied, requires that Pennsylvania's spousal notice provision be upheld. The petitioners believe that the approach of Judge Alito in the Court of Appeals is the correct one, and that the respondents did not demonstate that the statute, on its face, imposes an undue burden.

Another approach is to subject all abortion legislation to rational basis review; this approach has already attracted the support of four Justices. See Hodgson (Kennedy, J., concurring in part and dissenting in part). Under this approach as well, Pennsylvania's spousal notice provisions would be upheld.

Still another approach is to overrule Roe altogether. See Webster, 492 U.S. at 532 (Scalia, J., concurring in part and concurring in the judgment). Under this approach, it is not clear how, or whether, review of abortion legislation would differ from review under the rational basis standard, but it presumably would be more deferential to state regulation than either strict scrutiny or undue burden review. Again, Pennsylvania's statute would survive such a regime.

Regardless of which approach is destined eventually to command a majority of the Court, the petitioners submit that it is imperative that the Court end the current uncertainty in the law of abortion. To that end, the Court should review this case.

CONCLUSION

For these reasons, the Court should grant this petition for certiorari and, upon review, the judgment of the Court of Appeals should be reversed in relevant part.

Respectfully submitted,

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DATE: December 9, 1991

91-902

Supreme Court, U.S.
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DEC 11 1991
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No.

IN THE SUPREME COURT OF THE
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October Term, 1991

ROBERT P. CASEY, et al.,
Petitioners

v.

PLANNED PARENTHOOD OF
SOUTHEASTERN PENNSYLVANIA, et al.,
Respondents

Petition for Certiorari to the United States Court of Appeals for the Third Circuit

---

APPENDIX TO PETITION FOR CERTIORARI

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INDEX TO APPENDIX

	Page
Opinion of the Court of Appeals	1a
Opinion of the District Court	104a
Order of the District Court (merits)	473a
Order of the District Court (partial summary judgment)	478a

Filed October 21, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 90-1662

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA
REPRODUCTIVE HEALTH AND COUNSELING CENTER WOMEN'S HEALTH SERVICES, INC.
WOMEN'S SUBURBAN CLINIC
ALLENTOWN WOMEN'S CENTER
NORTHEAST WOMEN'S CENTER
ALLEN, THOMAS, M.D., on behalf of himself and all others similarly situated

v.

CASEY, ROBERT P.
RICHARDS, N. MARK
PREATE, ERNEST, personally and in their official capacities, and
MARINO, MICHAEL D., personally and in his official capacity, together with all others similarly situated

Robert P. Casey,
N. Mark Richards and
Ernest D. Preate, Jr.,

Appellants

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civil Action No. 88-3228)

Argued February 25, 1991

BEFORE: STAPLETON, ALITO, and SEITZ,
Circuit Judges

(Opinion Filed October 21, 1991)

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OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

Five abortion clinics and one physician (the "clinics") raise a facial constitutional challenge to certain 1988 and 1989 amendments to the Pennsylvania Abortion Control Act of 1982 (the

"Act"). *See* 18 Pa. Cons. Stat. Ann. §§ 3201-3220 (1983 & Supp. 1991). The United States District Court for the Eastern District of Pennsylvania held that §§ 3205 (informed consent), 3206 (parental consent), 3209 (spousal notice), 3214(a) (reporting requirements), and 3207(b) and 3214(f) (public disclosure of clinics' reports) violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Commonwealth defendants (the "Commonwealth") appeal. Because we find unconstitutional only § 3209, which requires notice to a spouse of a planned abortion, we will affirm in part and reverse in part.

I.

The clinics filed a complaint alleging that certain 1988 amendments to the Pennsylvania Abortion Control Act of 1982 were facially unconstitutional. The district court issued a preliminary injunction. Thereafter, the court stayed all proceedings pending the Supreme Court's decision in *Webster v. Reproductive Health Services* in the summer of 1989. After the *Webster* decision, the Pennsylvania legislature passed further amendments to the Act. The clinics filed an amended complaint to include the 1989 amendments within the scope of their challenge, and the district court extended the preliminary injunction to include the 1989 amendments. The district court then conducted a three-day trial and issued an opinion holding several sections of the Act unconstitutional. The Commonwealth filed this timely appeal. The clinics have not cross-appealed on the provisions upheld by the district court. The district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331,

1343. We have appellate jurisdiction pursuant to 28 U.S.C. § 1291.

II.

In *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), the Supreme Court declined to reconsider *Roe v. Wade*, 410 U.S. 113 (1973), because the Missouri abortion regulations at issue in *Webster* did not conflict with *Roe*, which held that a statute which "criminalized the performance of *all* abortions, except when the mother's life was at stake . . . unconstitutionally infringed the right to an abortion." *Webster*, 492 U.S. at 521 (opinion of Rehnquist, C.J.). Like *Webster*, this appeal does not directly implicate *Roe*; this case involves the regulation of abortions rather than their outright prohibition. The threshold question is whether the standard of review of abortion regulations promulgated by the Court in *Roe* and in later cases such as *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), has survived *Webster* and the Court's subsequent decision in *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990).

As Justice O'Connor cogently observed in an equal protection case alleging racial discrimination, a "dispute regarding the appropriate standard of review may strike some as a lawyers' quibble over words, but it is not. The standard of review establishes when the Court and Constitution allow the Government to employ racial classifications. A lower standard signals that the Government may resort to racial distinctions more readily." *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3033 (1990) (O'Connor, J.,

dissenting). Similarly, the standard of review used for abortion legislation establishes the degree to which the government may regulate abortion. Because of its importance to the resolution of the issues before us, we discuss at some length our reasons for selecting the standard we will subsequently use in analyzing the challenged provisions of the Pennsylvania Act. We will first examine the different standards of review that have been suggested by various Justices as appropriate for reviewing abortion regulations. Then we will consider the rules of *stare decisis* that must be employed in determining which of these standards we must apply in this case.

A.

The choice of a standard of review in a substantive due process case turns on whether a "fundamental right" is implicated. The Justices of the Supreme Court were divided in *Roe v. Wade* and have continued to be divided over whether the right to an abortion is a fundamental right under the Due Process Clause.[1] Accordingly, they have

1. The Due Process Clause of the Fourteenth Amendment states: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. xiv. Though the Due Process Clause, read literally, is a guarantee only of fair procedures when the government deprives a person of life, liberty, or property, the Supreme Court has held under the "substantive due process" doctrine that there is more to the Due Process Clause than this guarantee of procedural fairness. Government interference with personal rights within the scope of the life, liberty, or property umbrella of the Due Process Clauses must be justified by a legitimate state interest; government interference with a "fundamental right" may be justified only by the most important of state interests.

disagreed over the proper standard to apply in reviewing abortion regulations. The majority in *Roe* concluded that abortion was a fundamental right and, therefore, applied strict scrutiny review, the standard of review generally applied in fundamental rights cases. *See Roe*, 410 U.S. at 155. The dissenters in *Roe* contended that abortion was not a fundamental right and thus judicial review of abortion regulations under the Due Process Clause should be no different from review of any social or economic legislation implicating a liberty interest. Therefore, they urged that the Court apply the deferential rational basis test traditionally used to review social and economic legislation. *See id.* at 173 (Rehnquist, J., dissenting).[2] Justice O'Connor has referred to the right to abortion as a "limited" fundamental right and adopted a middle ground between these two positions. She uses the strict scrutiny standard if the regulation at issue causes an "undue burden" on a woman's abortion decision and the rational basis standard if it does not. *See Akron*, 462 U.S. at 453, 465 n. 10 (O'Connor, J., dissenting).

2. The *Roe* dissenters argued that only those rights "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition" are fundamental rights and that the right to an abortion does not meet that standard. *See Roe*, 410 U.S. at 174 (Rehnquist, J., dissenting); *Thornburgh*, 476 U.S. at 793 (White, J., dissenting). The *Roe* majority stated that there is a fundamental right to privacy. This right includes "the right of the *individual*, married or single, to be free from unwarranted government intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

1.

In *Roe*, the Court held that the fundamental right of privacy protected by the Due Process Clause of the Fourteenth Amendment was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe*, 410 U.S. at 153. Thus, the Court stated that a regulation limiting that fundamental right must meet the strict scrutiny test; it must be justified by a "compelling state interest" and "must be narrowly drawn" to serve that interest. *Id.* at 155. The Court held that the state's interests in maternal health and in the potential life of the fetus become compelling at different points in a woman's pregnancy. The state's interest in maternal health is compelling during the second and third trimesters; the state's interest in potential life is compelling when the fetus is viable, that is, during the third trimester. *Id.* at 162-64.

In dissent in *Hodgson*, the most recent abortion case, Justice Marshall, joined by Justices Brennan and Blackmun, summarized the approach of cases such as *Roe*, *Doe v. Bolton*, 410 U.S. 179 (1973), *Akron*, and *Thornburgh*: "we have subjected state laws limiting [the abortion] right to the most exacting scrutiny, requiring a State to show that such a law is narrowly drawn to serve a compelling interest. Only such strict judicial scrutiny is sufficiently protective of a woman's right to make the intensely personal decision whether to terminate her pregnancy." *Hodgson*, 110 S. Ct. at 2952 (Marshall, J., dissenting) (citations omitted).

2.

A statute is struck down under rational basis review only if it is not rationally related to a legitimate state interest. The test is a deferential one, and state legislation is rarely invalidated as not rationally related to a legitimate state interest. *See Williamson v. Lee Optical*, 348 U.S. 483, 487 (1955); *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

In *Roe*, Justice White and then-Justice Rehnquist dissented and, applying rational basis review, would have upheld Texas' criminal prohibition of abortion. In dissent in *Thornburgh*, Justice White, joined by Justice Rehnquist, stated his reasoning:

> State action impinging on individual interests need only be rational to survive scrutiny under the Due Process Clause, and the determination of rationality is to be made with a heavy dose of deference to the policy choices of the legislature. Only "fundamental" rights are entitled to the added protection provided by strict judicial scrutiny of legislation that impinges upon them. I can certainly agree with the proposition—which I deem indisputable—that a woman's ability to choose an abortion is a species of "liberty" that is subject to the general protections of the Due Process Clause. I cannot agree, however, that this liberty is so "fundamental" that restrictions upon it call into play anything more than the most minimal judicial scrutiny.

Thornburgh, 476 U.S. at 789-90 (White, J., dissenting) (citations omitted). In *Webster*, the plurality of Chief Justice Rehnquist, Justice White,

and Justice Kennedy asked whether the challenged regulation "permissibly furthers the State's interest in protecting potential human life," *Webster*, 492 U.S. at 519-20, a standard that, at least for present purposes, we equate with rational basis review. *See also Hodgson*, 110 S. Ct. at 2969 (Kennedy, J., concurring and dissenting) (two-parent notification requirement represents "permissible, reasoned" attempt to further parents' rights).

3.

Justice O'Connor has taken middle ground between these two positions. She has consistently stated that she would subject an abortion regulation to strict scrutiny review *only if* the regulation "unduly burdens" a woman's freedom to decide whether to terminate her pregnancy; otherwise, she would employ rational basis review. *See Akron*, 462 U.S. at 453 (O'Connor, J., dissenting) (citation omitted) ("If the particular regulation does not 'unduly burden' the fundamental right, then our evaluation of that regulation is limited to our determination that the regulation rationally relates to a legitimate state purpose."); *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting) (repeating undue burden standard and citing dissent from *Akron*); *Webster*, 492 U.S. at 530 (O'Connor, J., concurring) (same); *Hodgson*, 110 S. Ct. at 2949-50 (O'Connor, J., concurring) (same).

Justice O'Connor has adopted the undue burden standard because of the "limited nature of the fundamental right that has been recognized in the abortion cases." *Akron*, 462 U.S. at 465 n.10 (O'Connor, J., dissenting). In support of her

position, she has referenced both previous abortion cases and other fundamental rights cases.[3]

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3. In the abortion context, the pedigree of the undue burden standard can be traced to Justice Powell's opinion for the majority in *Maher v. Roe*, a government funding case:

> *Roe* did not declare an unqualified "constitutional right to an abortion," as the District Court seemed to think. Rather, the right protects the woman from *unduly burdensome* interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion.

Maher v. Roe, 432 U.S. 464, 473-74 (1977) (emphasis added). Chief Justice Burger added, "The Court's holdings in [*Roe* and *Doe v. Bolton*] simply require that a State not create an *absolute barrier* to a woman's decision to have an abortion." *Id.* at 481 (Burger, C.J., concurring) (emphasis added). In a later funding case, Justice Stewart stated for the Court that *Roe* protects the woman from "unduly burdensome interference," such as the "severe criminal sanctions" in *Roe* or the "absolute requirement of spousal consent" in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). *Harris v. McRae*, 448 U.S. 297, 314 (1980). Though *Maher* and *Harris* involved funding and thus presented a somewhat different analytical problem than general regulation of abortion, Justice O'Connor has interpreted those cases as providing the correct standard of review for all abortion regulations. *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting) ("These principles for evaluating state regulation of abortion were not newly minted in my dissenting opinion in *Akron*."). Justice O'Connor has also pointed out that the results reached in *Danforth* and *Bellotti v. Baird*, 443 U.S. 622 (1979) ("*Bellotti II*"), the most important non-funding cases between *Roe* and *Akron*, are consistent with the undue burden approach. *See Akron*, 462 U.S. at 461-62 n.8, 464 (O'Connor, J., dissenting). Beyond the abortion context, Justice O'Gonnor has pointed to other fundamental rights cases where the Court has required a significant or substantial infringement on the fundamental right in order to trigger strict scrutiny. *See, e.g., Carey v. Population Services International*, 431 U.S. 678, 689 (1977) (addressing state ban on nonmedical contraceptives, Court stated that strict scrutiny

With respect to the concept of "undue burden," Justice O'Connor explained in *Akron* that an undue burden occurs when a regulation imposes an "absolute obstacle[] or severe limitation[] on the abortion decision," not merely when a regulation "may 'inhibit' abortions to some degree." *Akron*, 462 U.S. at 464 (O'Connor, J., dissenting). She repeated this definition in other cases. In *Thornburgh*, she stated that "an undue burden will generally be found in situations involving absolute obstacles or severe limitations on the abortion decision." *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting). And in *Hodgson*, she observed that "the 'primary constitutional deficiency lies in [the notification statute's] imposition of an *absolute limitation* on the minor's right to obtain an abortion.'" *Hodgson*, 110 S. Ct. at 2950-51 (O'Connor, J., concurring) (emphasis added) (quoting *Planned Parenthood v. Danforth*, 428 U.S. 52, 90 (1976)). Also in *Hodgson*, Justice O'Connor approved the judicial bypass procedure for the two-parent notification requirement on the grounds that it "would not impose parental approval as an *absolute condition* upon the minor's right." *Id.* at 2951 (quoting *Danforth*, 428 U.S. at 91) (emphasis added).[4]

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is appropriate only when law imposes "significant burden" on protected right); *Zablocki v. Redhail*, 434 U.S. 374, 387 (1978) (heightened scrutiny is appropriate when law interferes "directly and substantially with the right to marry" and "citizens suffer a serious intrusion into their freedom of choice in an area in which we have held such freedom to be fundamental.").

4. As we read Justice O'Connor's explications of the concept of "undue burden," they are all consistent with the view that

B.

Having identified the three approaches that the Justices have suggested for reviewing abortion regulations, we must now decide which standard is presently the law of the land. As we have noted, the Court applied strict scrutiny review in *Roe*, *Doe*, *Akron* and *Thornburgh*. We thus must review *Webster* and *Hodgson* to determine if the standard of review used in those cases displaced strict scrutiny as the standard binding on lower courts. In making that determination, we will apply several principles of law that constrain lower courts in their decisionmaking.

1.

Decisions of the Supreme Court regarding federal law and the Constitution are binding on the lower courts. There is no room in our system for departure from this principle, for if it were otherwise, the law of the land would quickly lose its coherence. *See Hutto v. Davis*, 454 U.S. 370, 375 (1982). The Supreme Court with its limited docket would become irrelevant in all but the handful of cases that reached it.

To say that such decisions are binding, however, does not suffice in the current context. We must determine what components of a Supreme Court

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the right to elect not to carry to term is a constitutional right of each individual woman. Where it is clear that a governmental regulation will restrict the ability of *some* women to choose an abortion, we believe the issue of whether there is an undue burden turns on the degree of restriction that the affected women will experience. Accordingly, whether the adversely affected group is but a small fraction of the universe of pregnant women desiring an abortion seems to us irrelevant to that issue.

decision constitute precedent binding on lower courts. In constitutional cases, the Court's opinions usually include two major aspects. First, the Court provides the legal standard or test that is applicable to laws implicating a particular constitutional provision. This is part of the reasoning of the decision, the *ratio decidendi*.[5] Second, the Court applies that standard or test to the particular facts of the case that the Court is confronting—in other words, it reaches a specific result using the standard or test. *See, e.g., Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991) (applying four-part *O'Brien* test and holding ban on nude dancing constitutional); *Employment Division, Dept. of Human Resources v. Smith*, 110 S. Ct. 1595 (1990) (applying new Free Exercise Clause standard to uphold state ban on peyote use).

5. For almost every constitutional provision in the Bill of Rights and the Fourteenth Amendment, the Supreme Court has adopted a standard or test, usually known afterwards by the name of the case adopting it, to flesh out the constitutional language and guide future resolution of cases that arise under those provisions. A brief and inexhaustive list includes: *Lemon v. Kurtzman*, 403 U.S. 602 (1971), for the Establishment Clause; *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), for libel; *Employment Division, Dept. of Human Resources v. Smith*, 110 S. Ct. 1595 (1990), for Free Exercise claims; *Brandenburg v. Ohio*, 395 U.S. 444 (1969), for threatening speech; *United States v. O'Brien*, 391 U.S. 367 (1968), for First Amendment expressive conduct; *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), for drug testing; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), for state affirmative action; *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990) for federal affirmative action; *Mathews v. Eldridge*, 424 U.S. 319 (1976), for procedural due process; *Blockburger v. United States*, 284 U.S. 299 (1932), and now *Grady v. Corbin*, 110 S. Ct. 2084 (1990), for double jeopardy.

As a lower court, we are bound by both the Supreme Court's choice of legal standard or test and by the result it reaches under that standard or test. As Justice Kennedy has stated, courts are bound to adhere not only to results of cases, but also "to their explications of the governing rules of law." *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) (Kennedy, J., dissenting); *see also Marks v. United States*, 430 U.S. 188, 194 (1977) (previous case provided "governing standards"). Our system of precedent or *stare decisis* is thus based on adherence to both the reasoning and result of a case, and not simply to the result alone. This distinguishes the American system of precedent, sometimes called "rule stare decisis," from the English system, which historically has been limited to following the results or disposition based on the facts of a case and thus referred to as "result stare decisis." *See* Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 Colum. L. Rev. 756, 757 n.7 (1980) ("The American system of precedent places substantially greater reliance on the reasoning component of judicial decisions than, for example, the British system, where the House of Lords issues individual opinions with the understanding that only the specific result will have precedential force."); *see generally* R. Aldisert, *The Judicial Process* 618-35, 777-801 (1976).[6]

6. The lower courts in constitutional matters universally follow both the Supreme Court's choice of legal standard and the specific results the Court has reached by applying that legal standard. *See, e.g., Reuber v. Food Chemical News, Inc.*, 925 F.2d 703, 714-18 (4th Cir. 1991) (applying *New York Times* actual malice standard in defamation case); *Vandiver v. Hardin County Board of Education*, 925 F.2d 927, 931-34 (6th

2.

Like lower courts, the Supreme Court applies principles of *stare decisis* and recognizes an obligation to respect both the standard announced and the result reached in its prior cases. Unlike lower courts, the Supreme Court is free to change the standard or result from one of its earlier cases when it finds it to be "unsound in principle [or] unworkable in practice." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546 (1985). Accordingly, when a majority of the Justices announce in the course of deciding a case that they are substituting a new standard or result for that used in a prior case, the substitution is effected, and the lower courts are thereafter bound to follow the new standard or result. *See, e.g., Employment Division, Dept. of Human Resources v. Smith*, 110 S. Ct. 1595 (1990); *Vandiver v. Hardin County Board of Education*, 925 F.2d 927 (6th Cir. 1991) (applying new *Smith* test).

Occasionally, the Supreme Court's decision in a case reveals that a standard established in an earlier case no longer commands the allegiance of a majority of the Justices, but also reveals that no single substitute is endorsed by that majority of the Justices. Thereafter, the lower courts must determine whether to apply the old standard or, if

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Cir. 1991) (applying *Smith* Free Exercise Clause standard); *United States v. Pungitore*, 910 F.2d 1084, 1109-1112 (3d Cir. 1990) (applying *Grady v. Corbin* double jeopardy test); *United States v. Cruz*, 910 F.2d 1072, 1078-79 (3d Cir. 1990) (applying *Duckworth* test for adequacy of *Miranda* warnings); *United States v. American Investors of Pittsburgh, Inc.*, 879 F.2d 1087, 1106-07 (3d Cir. 1989) (applying *Leon* standard for defective search warrants).

not, what standard to apply. Fortunately, the Supreme Court has instructed the lower courts on how to resolve these issues.

Marks v. United States, 430 U.S. 188 (1977), was a criminal prosecution under a statute barring the interstate transportation of obscene materials. The Court had previously established that the statute was to be interpreted in accordance with the definition of obscenity fashioned by the Supreme Court under the Free Speech Clause of the First Amendment. In response to a contention based on the Ex Post Facto Clause, the Supreme Court in *Marks* had to determine what the law of the land regarding obscenity had been at the time of the defendant's alleged offense. It therefore reviewed its more recent obscenity jurisprudence. In *Roth v. United States*, 354 U.S. 476, 489 (1957), the Court had declared the test to be "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." Some years later in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), a plurality opinion joined only by three Justices announced that a work is not obscene unless "three elements . . . coalesce:"

> [I]t must be established that (a) the dominant theme of the material taken as a whole appears to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

383 U.S. at 418. The plurality opinion in *Memoirs* decided that *Fanny Hill* was not obscene when

judged by this standard and, accordingly, that the defendants' conviction had to be overturned. Three additional Justices concurred in this result but did so utilizing different rules of law: two stated that the First Amendment shields all speech including obscenity; one stated that the First Amendment protects all but "hard core pornography." Three Justices dissented.

The *Marks* Court was required to determine whether the legal standard announced in *Roth* had remained the law of the land after *Memoirs* or whether it had been superseded by a new standard in *Memoirs*. Despite the fact that no new legal standard had commanded the allegiance of a majority of the Justices in *Memoirs*, the *Marks* Court held that *Roth*'s standard did not survive *Memoirs* because a majority of Justices in *Memoirs* rejected the *Roth* standard. *Marks* thus stands for a very important proposition: a legal standard endorsed by the Court ceases to be the law of the land when a majority of the Court in a subsequent case declines to apply it, even if that majority is composed of Justices who disagree on what the proper standard should be.

Having decided that the *Roth* standard had ceased to control, the *Marks* Court also determined what standard had taken its place. The Court concluded that the *Memoirs* plurality opinion had become the law of the land. The court explained that "[w]hen a fragmented court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks*, 430 U.S. at 193

(quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). The Justices in the plurality in *Memoirs* were those who concurred on the narrowest grounds.

Thus, *Marks* stands for a second important proposition: the controlling opinion in a splintered decision is that of the Justice or Justices who concur on the "narrowest grounds." The principal objective of this *Marks* rule is to promote predictability in the law by ensuring lower court adherence to Supreme Court precedent. This objective requires that, whenever possible, there be a single legal standard for the lower courts to apply in similar cases and that this standard, when properly applied, produce results with which a majority of the Justices in the case articulating the standard would agree. In a run-of-the-mill case where a majority of the Justices endorse a single legal standard, *see, e.g., Lemon v. Kurtzman*, 403 U.S. 602 (1971), lower courts simply follow that standard. In splintered decisions such as *Memoirs* where no single rationale "enjoys the assent of five Justices," the situation becomes more complex, but the controlling principle is the same. Where a Justice or Justices concurring in the judgment in such a case articulates a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree, that standard is the law of the land. In a constitutional case where (1) there is a 5-4 decision or where there are only two opinions in the majority and (2) the majority votes to uphold a law as constitutional, the "narrowest grounds" principle will identify as authoritative the standard articulated by a Justice or Justices that would uphold the fewest laws as constitutional.

Conversely, in a constitutional case where (1) there is a 5-4 split or there are only two opinions in the majority and (2) the majority strikes down a law as unconstitutional, the authoritative standard will be that which would invalidate the fewest laws as unconstitutional.[7]

In splintered Supreme Court decisions where there has been a common denominator standard that would necessarily produce results with which a majority of the Justices from the controlling case would agree, the Supreme Court and the lower courts have consistently identified as binding precedent the opinion setting forth that standard. *See Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (identifying three-Justice plurality opinion from *Furman v. Georgia*, 428 U.S. 238 (1972), as binding); *S.J. Groves & Sons Co. v. Fulton County*, 920 F.2d 752 (11th Cir. 1991) (following Chief Justice Burger's opinion from *Fullilove v. Klutznick*, 448 U.S. 448 (1980)); *Lundblad v. Celeste*, 874 F.2d 1097 (6th Cir. 1989) (following Justice Stewart's opinion in *Elrod v. Burns*, 427 U.S. 347 (1976)); *Stegmaier v. Trammell*, 597 F.2d 1027 (5th Cir. 1979) (same); *Islamic Center of Mississippi,*

7. When six or more Justices join in the judgment and they issue three or more opinions, the situation is slightly more complex. In those cases, the idea is to locate the opinion of the Justice or Justices who concurred on the narrowest grounds *necessary to secure a majority*. In other words, a lower court should not follow an opinion that, though part of the majority in that case, was unnecessary to secure a five-Justice majority. Thus, if three Justices issue the broadest opinion, two Justices concur on narrower grounds, and one Justice concurs on still-narrower grounds, the two-Justice opinion is binding because that was the narrowest of the opinions necessary to secure a majority.

Inc. v. City of Starksville, 876 F.2d 465 (5th Cir. 1989) (following Justice O'Connor's opinion in *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, 483 U.S. 711 (1987) ("*Delaware Valley II*"); *Student Public Interest Research Group of New Jersey, Inc. v. AT&T Bell Laboratories*, 842 F.2d 1436 (3d Cir. 1988) (same).[8]

The binding opinion from a splintered decision is as authoritative for lower courts as a nine-Justice opinion. While the opinion's symbolic and perceived authority, as well as its duration, may be less, that makes no difference for a lower court. This is true even if only one Justice issues the binding opinion. In *Blum v. Witco Chemical Corp.*, 888 F.2d 975, 981 (3d Cir. 1989), for example, we concluded, as has every other court of appeals to address the issue, that Justice O'Connor's concurring opinion in *Delaware Valley II* governed subsequent counsel fee cases even though no other Justice joined that opinion. We acknowledged that, "[a]lthough there is some awkwardness in attributing precedential value to an opinion of one Supreme Court justice to which no other justice adhered, it is the usual practice when that is the determinative opinion." *Blum*, 888 F.2d at 981.

In sum, the effect of following the wrong opinion from a splintered decision is the same as affirmatively declaring that a Supreme Court majority opinion is not binding. By following the

8. In rare cases, no common denominator exists beyond agreement on the result in that particular case. *See United States v. Eckford*, 910 F.2d 216 (5th Cir. 1990) (finding no common denominator and thus no binding opinion in *Baldasar v. United States*, 446 U.S. 222 (1980)); *Schindler v. Clerk of Circuit Court*, 715 F.2d 341 (7th Cir. 1983) (same).

opinion that comports with the *Marks* principle, we respect the decision of a majority of the Court and thus fulfill our obligation to comply with decisions of the Supreme Court.

3.

With this background, we turn to the Supreme Court's abortion jurisprudence to determine whether the strict scrutiny legal standard endorsed by the Court in *Roe*, *Akron*, and *Thornburgh* remains the applicable standard after *Webster* and *Hodgson*. The primary issue in *Webster* was the constitutionality of Missouri's viability testing provision. The five Justices in the majority issued three opinions in upholding that viability testing provision. Chief Justice Rehnquist's opinion, joined by Justices White and Kennedy, upheld the provision under the "permissibly furthers" standard, the equivalent of rational basis review. Justice Scalia concurred, similarly rejecting strict scrutiny review of abortion regulations and arguing that *Roe* should be explicitly overruled. The four Justices in dissent would have applied the traditional strict scrutiny test.[9]

In her concurring opinion, Justice O'Connor used the undue burden standard that she had articulated in past dissents. She concluded that Missouri's viability testing requirement was

9. Four Justices dissented over the interpretation of the Missouri statute. The dissenters agreed, however, that the statute as interpreted by the majority survived strict scrutiny review. Thus, all nine members of the Court concluded that the statute as interpreted by the majority was constitutional, but for four different reasons. In any event, five Justices rejected strict scrutiny, and the narrowest opinion of those five Justices was that of Justice O'Connor.

constitutional because it did not impose an undue burden on a woman's abortion decision and was rationally related to a legitimate state interest. She stated:

> It is clear to me that requiring the performance of examinations and tests useful to determining whether a fetus is viable, when viability is possible, and when it would not be medically imprudent to do so, does not impose an undue burden on a woman's abortion decision. *On this ground alone* I would reject the suggestion that § 188.029 as interpreted is unconstitutional.

Webster, 492 U.S. at 530 (O'Connor, J., concurring) (emphasis added).[10]

10. Although Justice O'Connor's discussion in *Webster* did not end with her analysis under the undue burden standard, it did rely on and adhere to her undue burden approach for abortion regulations. Interpreting Justice O'Connor's opinion as agreeing with the *Akron* strict scrutiny standard for reviewing all abortion regulations would not only be inconsistent with that portion of her opinion that we have quoted in the text, but would also be plainly incompatible with her consistent approach in cases before and after *Webster*: that the undue burden approach is the proper analysis for review of abortion regulations.

We note that Justice O'Connor *herself* has subsequently interpreted her opinion in *Webster* as relying on the undue burden standard. In *Hodgson*, she again put forth the undue burden approach as the proper standard for abortion cases. In doing so, she cited her opinion in *Webster* in support of her understanding that if a regulation does not unduly burden the fundamental right, "then our evaluation is limited to our determination that the regulation rationally relates to a legitimate state purpose." *Hodgson*, 110 S. Ct. at 2949-50 (O'Connor, J., concurring).

Hodgson was decided in a similar manner. There the Court addressed the constitutionality of a two-parent notification requirement without a judicial bypass option and a two-parent notification requirement with a judicial bypass option. Five Justices—Justices O'Connor, Brennan, Marshall, Blackmun, and Stevens—held that a two-parent notification statute without a judicial bypass procedure was unconstitutional. Justice O'Connor found that the regulation caused an

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Moreover, in addition to Justice O'Connor, her colleague read her opinion as we do. Justice Scalia in concurrence in *Webster* interpreted Justice O'Connor's opinion to rely on the undue burden standard in upholding the viability testing provision. He stated: "Justice O'Connor would nevertheless uphold the law because 'it does not impose an undue burden on a woman's abortion decision.'" *Webster*, 492 U.S. at 536 n.* (Scalia, J., concurring).

To understand Justice O'Connor's further discussion in *Webster*, it is necessary to remember that the trimester framework establishes what types of abortion regulations meet the strict scrutiny standard. Under the trimester framework, the state's interest in maternal health is compelling only in the second and third trimesters, and the state's interest in the fetus is compelling only in the third trimester. The plurality in *Webster* found that the viability testing provision was in conflict with the trimester framework. But the plurality upheld the provision after discarding the trimester framework as "unsound in principle and unworkable in practice." Justice O'Connor stated that she continued to have problems with the trimester framework, but she saw no need in *Webster* to address the serious constitutional question raised by its reconsideration. In effect, Justice O'Connor's opinion, after stating why she believed the viability testing provision was constitutional, agreed with the dissent that the plurality was reaching out unnecessarily in addressing the trimester framework.

undue burden and failed to survive strict scrutiny review. She articulated the standard as follows:

> It has been my understanding in this area that "[i]f the particular regulation does not 'unduly burde[n]' the fundamental right, . . . then our evaluation of that regulation is limited to our determination that the regulation rationally relates to a legitimate state purpose." *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 453 (1983) (O'Connor, J., dissenting); see also *Webster v. Reproductive Health Services*, 492 U.S. ___, ___ (1989) (O'Connor, J., concurring in part and concurring in judgment). . . . I agree with Justice Stevens that Minnesota has offered no sufficient justification for its interference with the family's decisionmaking processes created by subdivision 2—two-parent notification.

She gave two reasons why the viability testing provision did not implicate the trimester framework. First, under her approach, it did not cause an undue burden and therefore strict scrutiny and the trimester framework derived from it were simply not applicable. Second, even if the provision triggered strict scrutiny, thus implicating the trimester framework, the Court had always held—consistent with the trimester framework—that the state has a compelling interest in determining the critical point of viability. In sum, according to Justice O'Connor, the trimester framework was neither triggered by nor inconsistent with the viability testing provision.

For our purposes, the most important point about Justice O'Connor's opinion in *Webster* is the following: in arguing that strict scrutiny was not triggered and thus that the trimester framework should not have been reconsidered, Justice O'Connor in no way retreated from, and indeed she affirmatively relied on, her consistent view that a threshold undue burden determination is necessary before strict scrutiny is to be employed.

Hodgson, 110 S. Ct. at 2949-50 (O'Connor, J., concurring). Three of the other four Justices in the majority applied strict scrutiny review without determining as a threshold matter whether the regulation caused an undue burden. Justice Stevens agreed that the statute was unconstitutional, noting that "[u]nder any analysis, the Minnesota statute cannot be sustained if the obstacles it imposes are not reasonably related to legitimate state interests." *Id.* at 2937 (opinion of Stevens, J.). He concluded both that the state had no legitimate interest in assuring that a particular individual parent participate in the child's abortion decision and that requiring the minor to notify both parents did not further the state's interest in seeing that a minor's abortion decision be informed. *Id.* at 2937, 2945. The four dissenters would have applied rational basis review and upheld the provision.

Also in *Hodgson*, five Justices—Justice O'Connor, Chief Justice Rehnquist, and Justices White, Scalia, and Kennedy—held that a two-parent notification requirement with a judicial bypass option was constitutional. Justice O'Connor concluded that it did not cause an undue burden and passed rational basis review:

> In a series of cases, this Court has explicitly approved judicial bypass as a means of tailoring a parental consent provision so as to avoid *unduly burdening* the minor's limited right to obtain an abortion. In *Danforth*, the Court stated that the
>
> > "primary constitutional deficiency lies in [the notification statute's] imposition of an

> > *absolute limitation* on the minor's right to obtain an abortion. . . ."
>
> Subdivision 6 passes constitutional muster because the interference with the internal operation of the family required by subdivision 2 simply does not exist where the minor can avoid notifying one or both parents by use of the bypass procedure.

Hodgson, 110 S. Ct. at 2950-51 (O'Connor, J., concurring) (emphasis added) (citations omitted). The other four Justices in the majority on this issue in *Hodgson* found that the statute passed rational basis review without first deciding if it caused an undue burden. The dissenters would have used strict scrutiny and struck down the provision.

Justice O'Connor thus concurred in *Webster* and on one issue in *Hodgson* by holding that an abortion regulation that imposes no undue burden on a woman's decision to have an abortion does not violate the Due Process Clause so long as it is rationally related to a legitimate state interest. While the views of the other Justices concurring in the judgment on those issues differed from those of Justice O'Connor, all of them would uphold as constitutional any regulation meeting that standard.

Moreover, Justice O'Connor concurred in the Court's judgment on the other issue in *Hodgson* on the ground that an abortion regulation that imposes an undue burden on the decision to abort violates the Due Process Clause if does not meet the strict scrutiny standard. Here also, the other Justices concurring in the judgment on this issue did not join her opinion, but they would strike

down as unconstitutional any regulations struck down under the undue burden standard.

In these circumstances, we conclude that it would be inconsistent with the teachings of *Marks* for lower courts to apply the strict scrutiny test of *Roe*, *Akron*, and *Thornburgh* to all abortion regulations. We also conclude that only by applying the undue burden standard of review, that is, only by applying strict scrutiny review to regulations that impose an undue burden and rational basis review to those which do not, can we remain faithful to *Marks*. Only by following the rationale of Justice O'Connor's concurring opinions will the lower courts decide abortion regulation cases in a way consistent with the way the Court decided them in *Webster* and *Hodgson*.

4.

Having concluded that the undue burden standard is binding on us, one issue of *stare decisis* remains: Are we required to follow *results* reached by the Supreme Court in cases prior to *Webster* and *Hodgson* even though we are not bound by the rationale which produced those results? In the instant case, this issue is relevant because the Supreme Court, engaging in strict scrutiny review in *Akron* and *Thornburgh*, struck down informed consent provisions almost identical to the provisions at issue here. If we were constrained to follow the *results* reached in *Akron* and *Thornburgh*, we would hold unconstitutional the informed consent provisions of the Pennsylvania Act. We are convinced, however, that such a course would be improper.

It would be anomalous if the results reached under a constitutional standard remained binding

after the standard or test was repudiated. To take a variation[11] of a familiar constitutional story, suppose that the Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), had required that states no longer run segregated school systems by repudiating the *Plessy* separate but equal doctrine and stating that the Equal Protection Clause forbids invidious racial classifications by government. Although *Brown* of course involved schools, a lower court in the aftermath would apply that principle to all racial classifications by government, regardless of whether before *Brown* the Supreme Court had upheld racial classifications in the particular context at issue. Thus, if pre-*Brown*, the Court had stated that state-segregated public pools did not violate the Equal Protection Clause, a lower court faced with a challenge to state-segregated pools after the *Brown* decision would apply the new principle to pools rather than upholding the segregated pools on the basis of the result reached by the Supreme Court under the discarded standard.

In order to change course in a particular area, it simply is unnecessary for the Supreme Court to go case-by-case through fact patterns that the Court had previously addressed under a repudiated standard. If the standard is replaced, decisions reached under the old standard are not

11. We say variation because the Court in *Brown* actually seemed to rest its decision on the context—schools—rather than a blanket principle about the Equal Protection Clause. For our example here, we will assume that the latter had occurred.

binding.[12] We thus conclude that a change in the legal test or standard governing a particular area is a change binding on lower courts that makes results reached under a repudiated legal standard no longer binding.[13]

In sum, Justice O'Connor's undue burden standard is the law of the land, and we will apply that standard to all provisions of the Pennsylvania Act at issue in this appeal.

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12. While results reached under a discarded standard are no longer binding, that does not mean that the old results are necessarily wrong; it simply means that the fact patterns producing those results must be analyzed under the new standard. That is why, though we conclude that the strict scrutiny standard applied in *Akron* and *Thornburgh* is no longer governing and the results no longer binding, the provisions held unconstitutional there are not necessarily constitutional; we must instead analyze the provisions under the newly minted undue burden standard.

13. We are of course mindful that only the Supreme Court "may overrule one of its precedents." *Thurston Motor Lines v. Jordan K. Rand Ltd.*, 460 U.S. 533, 535 (1983); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). The Court rejected anticipatory overruling in *Rodriguez*: A lower court may not disregard a result reached under a controlling standard, even when that result is inconsistent with other results reached under the same standard. Similarly, a lower court may not reject a governing standard unless a majority of the Justices in a single case declines to apply it. Thus, while a regulation must constitute an undue burden to trigger strict scrutiny, the trimester framework is still binding when strict scrutiny is triggered. Although five sitting Justices of the Supreme Court have criticized or rejected the *Roe* trimester framework, they have not rejected it in a single case. *Cf. Sojourner v. Roemer*, Nos. 91-2247, 91-2422 (E.D. La. Aug. 7, 1991) (invalidating criminal prohibition on abortion).

III.

An abortion regulation can infringe upon the abortion right in at least seven ways: (1) causing a delay before the abortion is performed; (2) raising the monetary cost of an abortion; (3) reducing the availability of an abortion by directly or indirectly causing a decrease in the number of legal abortion providers; (4) causing or forcing the woman to receive information she has not sought; (5) causing the woman to find the person or persons whom the state has required that she notify or obtain consent from; (6) causing the woman to endure any negative or hostile response from a person whom the state has required the woman to notify or obtain consent from; and (7) taking away the power to decide whether to have an abortion by giving another person, usually a parent or spouse, a veto power on the abortion decision. Almost all abortion regulations implicate the first three of these; informed consent requirements also involve the fourth; and notice and consent statutes also implicate the fifth, sixth, and seventh.

A review of the abortion case law, and *Webster* and *Hodgson* in particular, suggest that no undue burden is caused by abortion regulations that do not have a "severe" or "drastic" impact upon time, cost, or the number of legal providers of abortions. *Webster*, 492 U.S. at 529-30 (O'Connor, J., concurring); *Thornburgh*, 476 U.S. at 827-33 (O'Connor, J., dissenting); *Akron*, 462 U.S. at 464-67, 472-74 (O'Connor, J., dissenting). Similarly, the case law indicates that a state's requirement that abortion providers communicate information to a woman, which is typically in the form of an informed consent requirement, will not

constitute an undue burden if the information that the abortion provider must give is relevant, accurate, and non-inflammatory. *Thornburgh*, 476 U.S. at 830-32 (O'Connor, J., dissenting).[14]

The primary manner in which an abortion regulation can constitute an undue burden, other than by banning some or all previability abortions, is by taking away the woman's unilateral power to decide whether to have a previability abortion. Thus, a regulation in which the state gives a veto power to the woman's husband or, for a minor woman, to a parent constitutes an undue burden. *See Hodgson*, 110 S. Ct. at 2949-50 (O'Connor, J., concurring); *Akron*, 462 U.S. at 464 (O'Connor, J., dissenting); *Bellotti II*, 443 U.S. at 646-48; *Danforth*, 428 U.S. at 67-72. However, a parental consent or notice provision combined with an adequate judicial bypass procedure does not constitute an undue burden. *See Hodgson*, 110 S. Ct. at 2950-51 (O'Connor, J., concurring).

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14. We have held that the undue burden standard adopted by Justice O'Connor in *Webster* and *Hodgson* is the binding standard. The definition of that standard—"absolute obstacle or severe limitation"—used by Justice O'Connor in those cases is binding, as is her application of that standard to the viability testing provision and two-parent notification provision. However, her application of that standard in past dissents—the results she would have reached in those cases—is not binding on us. Nonetheless, we will often refer to her application of the undue burden standard in past dissents as evidence (though not conclusive) of how the undue burden standard might apply here. As we stated earlier, lower courts cannot read the tea leaves in overruling precedent, but lower courts can do so with respect to open issues or new areas; and that, in effect, is what we confront here, since for most of the provisions involved in this case, the Court has never applied the undue burden standard.

With this overall orientation, we turn now to the individual provisions of the Act. We may overrule the district court's factual findings based on the evidence before it only when clearly erroneous. We exercise plenary review, however, over the district court's determination of constitutionality and thus over whether the facts found regarding the effect of a particular statutory provision constitute an "undue burden." We also exercise plenary review over the question whether a provision passes strict scrutiny or rational basis review.

A. *The Medical Emergency Exception*

We first address an issue that would affect virtually all of our later analysis if not resolved at the outset. Section 3203 of the Act defines the term medical emergency. A medical emergency is:

> that condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate termination of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function.

18 Pa. Cons. Stat. Ann. § 3203 (1983 & Supp. 1991). When a medical emergency exists, the Act permits doctors and women to forego a number of the Act's requirements, including the waiting period, parental consent, and spousal notice requirements. The district court declared the definition in § 3203 unconstitutionally narrow and struck down all provisions of the Act that contained this medical emergency exception: for certain

provisions, this was only an alternative basis for the district court's holding of unconstitutionality.

The Supreme Court indicated in *Roe* and subsequent cases that the state's interest in the fetus is not sufficient to prevent a woman: (1) from having a previability abortion; or (2) from having an abortion at any point during the pregnancy, immediately if necessary, to prevent a serious threat to her life or health. In *Roe*, the Court stated that third trimester abortions may be banned except where "necessary to preserve the life *or health* of the mother." 410 U.S. at 164 (emphasis added); *see also Harris v. McRae*, 448 U.S. 297, 316 (1980) ("It could be argued that the freedom of a woman to decide whether to terminate her pregnancy for health reasons does in fact lie at the core of the constitutional liberty identified in [*Roe*]."). From *Roe* and subsequent cases, it thus appears that any abortion regulation which might delay or prevent an abortion must contain a medical emergency exception.

The Commonwealth does not dispute that its abortion regulations would be constitutionally deficient if they did not contain an exception for those situations in which compliance would pose a serious risk to the life or health of the woman. The clinics acknowledge that the Act's medical emergency exception is intended to protect the life and health of the woman, but they seek to demonstrate that it is deficient by pointing to three conditions encountered by pregnant women with some frequency: preeclampsia, inevitable abortion, and prematurely ruptured membrane. In the clinics' view, these conditions are not covered by the medical emergency exception because each

"could pose a serious threat to a woman's health without immediately creating a serious risk of substantial and irreversible impairment to a major bodily function." Brief for Appellees at 16. The clinics insist that this renders the Commonwealth's regulations unconstitutional.

The Commonwealth does not challenge the assertion that its regulations would be unconstitutional if women having preeclampsia, inevitable abortion, or prematurely ruptured membrane were required to satisfy all of the requirements of the Act before having an abortion. Rather, the Commonwealth responds that preeclampsia, inevitable abortion, and prematurely ruptured membrane are "medical emergencies" as defined in the Act because "all of these conditions, if left untreated, could progress to such a point that death or substantial and irreversible impairment of a major bodily function will occur." Reply Brief for Appellants at 4 n.2.

It is thus apparent that our initial issue for resolution is one of statutory interpretation and is governed by Pennsylvania law. There is no helpful Pennnsylvania case law construing the medical emergency provision of the Act. There are, however, Pennsylvania cases indicating that statutes of the Commonwealth should be construed to sustain their constitutionality. *See Commonwealth v. Blystone*, 549 A.2d 81, 87 (Pa. 1988) ("Any doubts are to be resolved in favor of sustaining the legislation."); *Hughes v. Commonwealth Dept. of Transportation*, 523 A.2d 747, 750-51 (Pa. 1987) ("We must presume that an Act of the legislature is intended to be constitutional and wherever a legislative act can be preserved from unconstitutionality it must be

preserved."); *see also Webster*, 492 U.S. at 514 (statutes should be interpreted to avoid constitutional difficulty); *Frisby v. Schultz*, 487 U.S. 474, 483 (1988) (same). With this case law in mind, we turn to the symptoms and the risks of each of the conditions identified by the clinics.

Preeclampsia is a combination of symptoms related to an immunological disorder. When diagnosed as having preeclampsia, "the patient develops hypertension, she can have destruction of the liver, hemorrhage into the liver, she can have destruction of the kidneys and she may go on to have clampsia, which is a seizure disorder of the brain." Trial Testimony of Dr. Bolognese, Witness for the Clinics ("Bolognese Testimony"), App. at 614. Both Dr. Bolognese for the clinics and the doctor who testified for the Commonwealth agreed that preeclampsia requires an abortion. Trial Testimony of Dr. Bowes, Witness for the Commonwealth ("Bowes Testimony"), App. at 889.

The symptoms of inevitable abortion are bleeding from the uterus and cramps in the lower abdominal area. The failure to terminate the pregnancy immediately when this condition exists can lead to extensive blood loss, shock, infection, and, if there is serious hemorrhaging and shock, even death. 744 F. Supp. at 1346-47. The Commonwealth's expert at trial agreed with the clinics' expert that the universally recommended treatment of an inevitable abortion is immediate termination of the pregnancy. Bowes Testimony, App. at 888.

The major risk from a prematurely ruptured membrane is that an infection will occur. If an infection occurs, a woman can be exposed to spread of the infection, an overwhelming septic

infection, hemorrhaging, shock, and even death. Bolognese Testimony, App. at 611.

There is no dispute between the parties that preeclampsia, inevitable abortion and prematurely ruptured membrane *can lead to* a substantial and irreversible impairment of a major bodily function. The record is clear that a failure to obtain an abortion when a woman is diagnosed with preeclampsia can lead to irreversible damage to the liver, kidneys and more; that failure to perform an abortion when a woman is diagnosed with inevitable abortion can eventually lead to death; and that a failure to obtain an abortion when a woman is diagnosed with prematurely ruptured membrane can eventually lead to death. The dispute between the parties concerns the meaning of the phrase "serious risk." The Commonwealth insists that whenever these conditions exist, there is a "serious risk" of substantial and irreversible impairment of a major bodily function. The clinics argue that no such "serious risk" exists until the woman has actually experienced shock or contracted an infection. We conclude that the clinics' interpretation is unduly restrictive.

The word "risk" necessarily implies an event that may or may not happen in the future. Neither "risk" nor the addition of the adjective "serious" implies that the probability assessed is the probability of the hypothesized event occurring immediately following the time of assessment. Accordingly, we do not believe the risk that prematurely ruptured membrane, if untreated, will lead to substantial and irreversible injury only after progressing through shock or infection necessarily means that there is no "serious risk" at the onset of the condition. We assume that the

risk of substantial and irreparable impairment of a major bodily function will be quantitatively less at the onset of a prematurely ruptured membrane than after shock has occurred, but this does not mean the risk at onset is not "serious."

The Pennsylvania legislature did not choose the wording of its medical emergency exception in a vacuum, and we do not believe the words chosen should be interpreted in one. In the case of all three conditions pointed to by the clinics, the treatment uniformly prescribed by the medical profession at the time of the legislature's choice was an immediate abortion. This was the recommended treatment in all pregnancies in which these conditions arose, including planned and desired pregnancies. This medical consensus that the risk occasioned is sufficiently serious to call for an immediate abortion was a part of the context in which the medical emergency provision was fashioned.

Moreover, we read the medical emergency exception as intended by the Pennsylvania legislature to assure that compliance with its abortion regulations would not in any way pose a significant threat to the life or health of a woman. We believe it should be interpreted with that objective in mind. While the wording seems to us carefully chosen to prevent negligible risks to life or health or significant risks of only transient health problems from serving as an excuse for noncompliance, we decline to construe "serious" as intended to deny a woman the uniformly recommended treatment for a condition that can lead to death or permanent injury.

The essence of the definition in § 3203 is that it allows a woman and her doctors to forego many

of the Act's requirements when there is a medical emergency to the woman's physical health, and that includes where a woman has symptoms of preeclampsia, inevitable abortion, or prematurely ruptured membrane. We interpret § 3203 to allow women and doctors to forego the Act's requirements when a woman is diagnosed as having one of these conditions. If the Commonwealth were to choose, in contradiction to its representations to this court, to prevent doctors and women from foregoing the Act's requirements when a woman has been so diagnosed, that application would almost certainly be unconstitutional under present Supreme Court law.

Any doubt on our interpretation of § 3203 is resolved by the procedural posture of the case. This is a facial challenge. The Supreme Court has instructed on numerous occasions that a court is not to strike down a law as unconstitutional on the basis of "a worst-case analysis that may never occur." *Ohio*, 110 S. Ct. at 2981. The Supreme Court recently applied this principle in a very similar context in *Rust v. Sullivan*, 111 S. Ct. 1759 (1991). There, the regulations at issue did not contain an explicit exception for cases where a woman's pregnancy placed her life in imminent peril, but the Court rejected a facial claim that the regulations would not allow abortion referral in such circumstances. The Court stated that on a facial challenge without "any application by the Secretary to a specific fact situation," it would not read the regulations to bar referral in such cases. *Id.* at 1773. Similarly presented with a facial challenge, we uphold the medical emergency exception defined in § 3203.

In an alternative challenge, the clinics argue that the medical emergency definition is void for vagueness. The district court did not consider this issue; we do so here and reject it. The Act provides criminal and civil sanctions against doctors who violate the Act's provisions. However, the Act allows doctors and women to forego the Act's requirements when, "on the basis of the physician's good faith clinical judgment," a condition exists that meets the definition of medical emergency in § 3203. The Commonwealth argues that the terms of § 3203 are not vague. They also contend that the subjective standard of "good faith clinical judgment" saves the statute from any problem of vagueness.

In *United States v. Vuitch*, 402 U.S. 62, 69-72 (1971), the Supreme Court upheld against a vagueness challenge a requirement that an abortion be "necessary for the preservation of the mother's life or health." In *Doe v. Bolton*, the Court upheld against a vagueness challenge a requirement that the physician determine, on the basis of his or her "best clinical judgment," that an abortion is "necessary." 410 U.S. at 191-92. In contrast, in *Colautti v. Franklin*, 439 U.S. 379, 390-97 (1979), the Court struck down on vagueness grounds a requirement that the physician determine if the fetus "is viable" or "may be viable" before performing an abortion. The Court stated that it was unclear whether the Act incorporated a subjective or objective standard. In addition, the definition of "may be viable" was elusive and did not provide sufficient notice.

In this case, the statute requires a physician to violate his or her own good faith clinical judgment in order to be criminally liable. This is a

subjective, not an objective standard, thus making the case more similar to *Vuitch* and *Doe* than to *Colautti*. We fail to see how any physician practicing in good faith could fear conviction under the Act.

Moreover, as we have already concluded, the language of § 3203, apart from the "good faith clinical judgment" language, does not prohibit doctors from foregoing the Act's requirements when what are commonly perceived to be medical emergencies exist. The clinics here came up with three medical emergencies that they argued were not covered by the statute. We have held that they are. Physically threatening emergencies are covered; determining whether, in a physician's good faith clinical judgment, one of those emergencies is present is the type of "judgment[] that physicians are obviously called upon to make routinely whenever surgery is considered." *Doe*, 410 U.S. at 192. Section 3203 provides the fair warning required by the Due Process Clause; it is not void for vagueness.

B. *The Informed Consent Requirement*

Section 3205(a) contains the informed consent provisions of the Act. Three aspects of that section are at issue in this appeal: two information disclosure requirements and a requirement that the woman wait 24 hours between the time she receives this information and the time the abortion is performed.[15] We address these provisions in turn.

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15. Section 3205 of the Act states in relevant part:

1. *Physician-Disclosed Information*

Section 3205(a)(1) requires that the referring or performing physician inform a woman contemplating an abortion of: (i) the nature of the abortion procedure and of those risks and

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(a) GENERAL RULE.– No abortion shall be performed or induced except with the voluntary and informed consent of the woman upon whom the abortion is to be performed or induced. Except in the case of a medical emergency, consent to an abortion is voluntary and informed if and only if:

(1) At least 24 hours prior to the abortion, the physician who is to perform the abortion or the referring physician has orally informed the woman of:

(i) The nature of the proposed procedure or treatment and of those risks and alternatives to the procedure or treatment that a reasonable patient would consider material to the decision of whether or not to undergo the abortion.

(ii) The probable gestational age of the unborn child at the time the abortion is to be performed.

(iii) The medical risks associated with carrying her child to term.

(2) At least 24 hours prior to the abortion, the physician who is to perform the abortion or the referring physician, or a qualified physician assistant, health care practitioner, technician or social worker to whom the responsibility has been delegated by either physician, has informed the pregnant woman that:

(i) The department [Pennsylvania Department of Health] publishes printed materials which describe the unborn child and list agencies which offer alternatives to abortion and that she has a right to review the printed materials and that a copy will be provided to her free of charge if she chooses to review it.

(ii) Medical assistance benefits may be available for prenatal care, childbirth and neonatal care, and that more detailed information on the availability of such assistance is contained in the printed materials published by the department.

alternatives to the procedure or treatment that a reasonable patient would consider material to the

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(iii) The father of the unborn child is liable to assist in the support of her child, even in instances where he has offered to pay for the abortion. In the case of rape, this information may be omitted.

(3) A copy of the printed materials has been provided to the woman if she chooses to view these materials.

(4) The pregnant woman certifies in writing, prior to the abortion, that the information required to be provided under paragraphs (1), (2) and (3) has been provided.

(b) EMERGENCY.– Where a medical emergency compels the performance of an abortion, the physician shall inform the woman, prior to the abortion if possible, of the medical indications supporting his judgment that an abortion is necessary to avert her death or to avert substantial and irreversible impairment of major bodily function.

(c) PENALTY.– Any physician who violates the provisions of this section is guilty of "unprofessional conduct" and his license for the practice of medicine and surgery shall be subject to suspension or revocation . . . . Any physician who performs or induces an abortion without first obtaining the certification required by subsection (a)(4) or with knowledge or reason to know that the informed consent of the woman has not been obtained shall for the first offense be guilty of a summary offense and for each subsequent offense be guilty of a misdeameanor for the third degree. No physician shall be guilty of violating this section for failure to furnish the information required by subsection (a) if he or she can demonstrate, by a preponderance of the evidence, that he or she reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physicial or mental health of the patient.

(D) LIMITATION ON CIVIL LIABILITY.– Any physician who complies with the provisions of this section may not be held civilly liable to his patient for failure to obtain informed consent to the abortion within the meaning of that term as defined by the act of October 15, 1975 (P.L. 390, No. 111), known as the Health Care Services Malpractice Act.

decision whether or not to obtain an abortion; (ii) the probable gestational age of the fetus; and (iii) the medical risks associated with carrying a child to term. Such a provision can be expected to cause four types of burdens: time delay, higher cost, reduced availability, and forcing the woman to receive information she has not sought. We conclude, however, that none of these potential burdens can be characterized as an undue burden.

The time required to provide medical risk information of this kind is acknowledged to be insignificant. While the district court found that higher costs would be occasioned by § 3205(a)(1)'s requirement that physicians rather than counselors provide this information, the district court did not quantify the increase, and this record would not support a finding of an increase of sufficient size to constitute an absolute obstacle or severe limitation on the abortion right. *See Webster*, 492 U.S. at 530 (O'Connor, J., concurring); *Akron*, 462 U.S. at 467, 473 (O'Connor, J., dissenting). Similarly, this requirement will not cause abortion providers to stop providing any or all abortions and, accordingly, will not cause a drastic or severe reduction in the availability of abortion. Finally, the information provided is accurate and necessary for a woman to make an assessment for her abortion decision. Indeed, the record shows that the clinics, without exception, insist on providing this information to women before an abortion is performed. Thus, the "burden" of forcing a woman to listen to it is not an absolute obstacle or severe limitation. In sum, we agree with Justice O'Connor's characterization of nearly identical requirements in *Akron*: such requirements "impose

no undue burden or drastic limitation on the abortion decision." *Akron*, 462 U.S. at 472 (O'Connor, J., dissenting).

We also have no difficulty concluding that § 3205(a)(1) is rationally related to a legitimate state interest. In *Akron*, all nine Justices agreed that the state may require a woman contemplating an abortion to receive information about the nature and risks of the abortion procedure. This type of information "clearly is related to maternal health and to the State's legitimate purpose in requiring informed consent." *Akron*, 462 U.S. at 446. The Court in *Akron* also found that the state has a legitimate interest in requiring that an abortion provider inform the woman of the probable gestational age of the fetus. Finally, there is nothing irrational about a requirement that the provider inform the woman of the medical risks of carrying the pregnancy to term since this is obviously the only medical alternative to abortion. *See Thornburgh*, 476 U.S. at 830 (O'Connor, J., dissenting) (such a requirement provides "the kind of balanced information I would have thought all could agree is relevant to a woman's informed consent").[16]

Turning from the content of the required advice to the manner of its presentation, we think it patent that a state may rationally decide that physicians are better qualified than counselors to

16. The district court stressed that a woman who has decided upon an abortion has no need to know about the risk of carrying to term. This misses what we perceive to be the relevant point. The state may rationally require that a woman not move forward on a decision to abort without evaluating that decision on an informed basis.

impart this information and answer questions about the medical aspects of the available alternatives. While the record contains evidence that counselors at the clinics are often capable of informing women about the abortion procedure, that is not the issue; the issue is whether the state may rationally conclude that physicians as a class are better equipped to provide such medical information and answer questions about the abortion procedure and the alternative. We believe the Commonwealth could rationally so conclude and, accordingly, that § 3205(a)(1) is a constitutionally valid regulation. *Cf. Williamson v. Lee Optical*, 348 U.S. 483, 487 (1955).

2. *Counselor-Disclosed Information*

Section 3205(a)(2) requires that a physician or counselor ("any qualified agent of the physician") inform a woman: (i) that medical assistance benefits may be available for prenatal, childbirth, and neonatal care and that more information about the benefits is available in state-printed materials; (ii) that the father of the child is liable to assist in support of the child (this information is not required to be given in rape cases); and (iii) that the Pennsylvania Department of Health publishes printed materials which describe the fetus at various intervals and list agencies which offer alternatives to abortion and that such materials are available free of charge.[17] Applying the threshold undue burden standard, we conclude that this provision does not cause an undue burden; in addition, we find it rationally

17. Section 3205(a)(3) requires that a copy of these printed materials be available if the woman chooses to see them.

related to a legitimate state interest. Therefore, we uphold it against the clinics' challenge.

Once again, the time required to provide the required information is minimal. While requiring that a physician or counselor impart this information will add some cost to the pre-abortion procedure at those clinics that do not already provide options counseling, nothing in the record suggests that the increase will be drastic or even substantial. Similarly, there is no evidence that any abortion provider will stop providing abortions because of this requirement. Indeed, the record indicates that most clinics already require that a counselor consult in person with the woman about alternatives to abortion before the abortion is performed.

Justice O'Connor stated in *Thornburgh* that informed consent requirements could constitute an undue burden if the information required to be given was irrelevant, inaccurate, or inflammatory. *See Thornburgh*, 476 U.S. at 830-31 (O'Connor, J., dissenting). The information that § 3205 requires a physician or counselor to impart is relevant, accurate, and non-inflammatory. The information regarding the financial assistance to which the woman may be entitled is relevant in that it provides a woman with information necessary to make an informed choice. There is nothing on the face of the statute that suggests that this information is inaccurate. Nor do we see any threat that such information is inflammatory. Moreover, the printed materials concerning the fetus and alternatives to abortion are not forced on the woman; the woman is merely told that such information is available to her if she desires it. As Justice O'Connor stated in *Thornburgh*, "If the

materials were sufficiently inflammatory and inaccurate the fact that the woman must ask to see them would not necessarily preclude finding an undue burden, but there is no indication that this is true of the description of fetal characteristics [or alternatives to abortion] the statute contemplates." *Id.* at 831 (O'Connor, J., dissenting). For these reasons, we conclude that this provision causes nowhere near the kind of burden that must result for a regulation to constitute an undue burden.

We further conclude that this provision is rationally related to a legitimate state interest. *Roe* recognized that the state has a legitimate interest in the potential life of the fetus throughout pregnancy, and a state may rationally conclude that this interest will be served by assuring that a pregnant woman have knowledge of the resources available to her should she elect to carry to term.

3. *First Amendment Implications of Section 3205(a)*

The clinics claim that § 3205(a) requires that a physician or counselor act as an instrument for the dissemination of an ideological message in violation of their First Amendment rights. We find the argument unpersuasive.

This case involves commercial speech, and the clinics do not dispute this point. The First Amendment limits on compelled disclosure requirements for commercial speech were explained by the Court in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).[18] There,

18. The clinics' reliance on *Riley v. National Federation for the Blind*, 487 U.S. 781 (1988), is misplaced. The Court there distinguished its case, which did not involve commercial speech, from other cases, and stated that "[p]urely commercial speech is more susceptible to compelled disclosure requirements." *Id.* at 796 n.9.

the Court rejected an attorney's challenge to a state requirement that he include certain information in an advertisement. The Court stressed that the attorney overlooked "material differences between disclosure requirements and outright prohibitions on speech." *Id.* at 650. Disclosure requirements are permissible so long as they are not a state attempt to prescribe what is "orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 651. The Court then held that First Amendment rights "are adequately protected so long as disclosure requirements are reasonably related to the state's interest in preventing deception of consumers." *Id.*

Here, none of the information that § 3205 requires that physicians and counselors provide, including the information offered in the printed materials, has been shown to be false or unverifiable. It is not an attempt to prescribe an orthodoxy in matters of opinion, and the information involved is reasonably related to the state's interest in ensuring that women have relevant information before having an abortion.[19]

19. The disclosure required by the Pennsylvania Act is similar to a long list of regulations by state and federal governments designed to protect the public. For example, the federal government requires warnings on all cigarette packages, advertisements, and billboards. 15 U.S.C. § 1333 (1988). Federal law requires disclosure in the context of securities transactions. 15 U.S.C. § 78(b) (1988). Pennsylvania requires

We thus hold that the informed consent requirements do not violate the First Amendment.

4. *The 24-Hour Waiting Period*

Section 3205(a) of the Act requires a mandatory 24-hour waiting period between the time that the physician and counselor provide the required information to a woman and the time that a physician performs the abortion. The woman's consent to the abortion may be given at any time during that period, including right before the abortion.

As the clinics stress, a 24-hour waiting period may result in delays considerably longer than 24 hours because most clinics do not perform abortions every day of the week. Moreover, such a waiting period may require a woman to make two visits to a clinic rather than one. Where the woman has no clinic immediately available and must travel to obtain an abortion, this means that the overall cost of an abortion to her may increase by a significant percentage. And as the district court pointed out, the burden of an additional trip to the clinic falls most heavily on battered wives who often find it difficult to free themselves of their husband's surveillance.

financial institutions to disclose rates, terms, definitions, and other information in residential mortgage applications. 41 Pa. Cons. Stat. Ann. § 301(e) (Supp. 1991).

The clinics' argument is potentially limitless: there is "no reason why a concern for professional freedom could be confined to the medical profession; nothing in the Constitution indicates a preference for the liberty of doctors over that of lawyers, accountants, bakers, or brickmakers." *Thornburgh*, 476 U.S. at 802-03 (White, J., dissenting). Thus, if this provision violated the First Amendment, the above-cited disclosure requirements would presumably also have to fall.

Despite these adverse consequences from the 24-hour waiting period, however, we conclude that this requirement does not constitute an undue burden. In *Hodgson*, the Supreme Court concluded that a two-parent notification requirement with a judicial bypass was rationally related to a legitimate state interest and, therefore, was constitutional. Justice O'Connor noted that the Court had "explicitly approved judicial bypass as a means of tailoring a parental consent provision so as to avoid unduly burdening the minor's limited right to obtain an abortion." *Hodgson*, 110 S. Ct. at 2950 (O'Connor, J., concurring). The Court reached this conclusion despite the trial court's findings that "scheduling practices in Minnesota courts typically require minors to wait two or three days between their first contact with the court and the hearing on their petitions" and that this delay "may combine with other facts to result in a delay of a week or more." 648 F. Supp. at 853.

Given the Court's conclusion in *Hodgson* that the length of the delays and the increased costs occasioned by the judicial bypass did not impose an undue burden on the right to an abortion or otherwise require strict scrutiny, we decline to reach a different result with respect to the Commonwealth's imposition of a 24-hour delay for considering the information required by the informed consent requirements.[20]

20. In *Akron*, the Supreme Court invalidated an Ohio statute that required a 24-hour delay so that the "woman's decision [would] be informed." 462 U.S. at 450. The Court reached this result applying strict scrutiny, however, and as we have explained, we are not bound by the result in *Akron* if, as we conclude, the Commonwealth's 24-hour waiting period imposes no undue burden. While Justices Stevens and

Accordingly, we now inquire whether the 24-hour waiting period passes rational basis.[21] All parties agree that choosing to have an abortion is an important decision. The state's interest in ensuring that such a decision is *both* informed *and* well-considered is rationally related to the state's legitimate interest in the life and health of the mother as well as its interest in the potential life of the fetus. The waiting period "reasonably relates to the State's interest in ensuring that a woman does not make this serious decision in undue haste." *Akron*, 462 U.S. at 474 (O'Connor, J., dissenting).

O'Connor in *Hodgson* viewed *Akron*'s 24-hour waiting period for an adult as less justified by the state's interest than a 48-hour waiting period for a minor after notification of a parent. 110 S. Ct. at 2944 n.35. nothing said in *Hodgson* suggests to us that the Commonwealth's 24-hour waiting period is an undue burden. As Justice O'Connor stressed in *Hodgson*, the Court has consistently viewed judicial bypass provisions as a means of avoiding an undue burden and, it necessarily follows that the time required to pursue such a bypass cannot constitute one. That time varies depending on the statute involved, but necessarily involves at least several days. The judicial bypass approved in *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 477 n.4, 491 n.16 (1983), could require 17 calendar days; the bypass approved in *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972, 2980-81 (1990), could require 14 days.

21. The Court in *Akron* in striking down a similar 24-hour waiting period occasionally used language similar to that of rational basis review in considering the relationship between a waiting period and maternal health. However, we believe that the Court's level of review in *Akron* for all abortion regulations was strict scrutiny. *See Akron*, 462 U.S. at 428-31 (outlining *Roe* standard); *Hodgson*, 110 S. Ct. at 2952 (Marshall, J., dissenting) (citing *Akron* in stating, "we have subjected state laws limiting that right to the most exacting scrutiny, requiring a State to show that such a law is narrowly drawn to serve a compelling state interest").

In sum, we believe the waiting period is "a small cost to impose to ensure that a woman's decision is well considered in light of its certain and irreparable consequences on fetal life, and the possible effects on her own." *Akron*, 462 U.S. at 474 (O'Connor, J., dissenting). We fully recognize that many women contemplating an abortion will have seriously considered their decision before the required consultations with physician and counselor take place. The waiting period may not for those women serve any purpose. But the wait does not prevent any women from having an abortion, and the possible overinclusiveness of the provision does not render it irrational, especially given the serious and irreversible consequences of a hasty and ill-considered abortion decision.

C. Parental Consent with Judicial Bypass

For women under 18 who desire an abortion, § 3206 of the Act requires the informed consent of at least one parent, but provides a judicial bypass option if a woman does not wish to or cannot obtain a parent's consent.[22]

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22. Section 3206 of the Act provides in part:

(a) GENERAL RULE.—Except in the case of a medical emergency, or except as provided in this section, if a pregnant woman is less than 18 years of age and not emancipated, or if she has been adjudged an incompetent . . ., a physician shall not perform an abortion upon her unless, in the case of a woman who is less than 18 years of age, he first obtains the informed consent both of the pregnant woman and of one of her parents; or, in the case of a woman who is incompetent, he first obtains the informed consent of her guardian.

. . .

(c) PETITION TO COURT FOR CONSENT.—If both of the parents or guardians of the pregnant woman refuse to consent to the performance of an abortion or if she elects not to seek the consent of either of her parents or of her guardian,

An absolute parental consent requirement with no exceptions would cause an undue burden on a

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the court of common pleas of the judicial district in which the applicant resides or in which the abortion is sought shall, upon petition or motion, after an appropriate hearing, authorize a physician to perform the abortion if the court determines that the pregnant woman is mature and capable of giving informed consent to the proposed abortion, and has, in fact, given such consent.

(d) COURT ORDER.—If the court determines that the pregnant woman is not mature and capable of giving informed consent or if the pregnant woman does not claim to be mature and capable of giving informed consent, the court shall determine whether the performance of an abortion upon her would be in her best interests. If the court determines that the performance of an abortion would be in the best interests of the woman, it shall authorize a physician to perform the abortion.

. . .

(f) PROCEEDINGS.—

(1) Court proceedings under this section shall be confidential and shall be given such precedence over other pending matters as will ensure that the court may reach a decision promptly and without delay in order to serve the best interests of the pregnant woman. In no case shall the court of common pleas fail to rule within three business days of the date of application. A court of common pleas which conducts proceedings under this section shall make in writing specific factual findings and legal conclusions supporting its decision and shall, upon the initial filing of the minor's petition for judicial authorization of an abortion, order a sealed record of the petition, pleadings, submissions, transcripts, exhibits, orders, evidence and any other written material to be maintained which shall include its own findings and conclusions.

. . .

(3) The name of the pregnant woman shall not be entered on any docket which is subject to public inspection. All persons shall be excluded from hearings under this section except the applicant and such other persons whose presence is specifically requested by the applicant or her guardian.

minor woman's abortion decision because it would impose an absolute veto and take the decisionmaking power from the woman contemplating an abortion. *Cf. Hodgson*, 110 S. Ct. at 2949-50 (O'Connor, J., concurring); *Akron*, 462 U.S. at 464 (O'Connor, J., dissenting). The Pennsylvania statute, however, provides a judicial bypass option, and the Supreme Court, including Justice O'Connor, has consistently held that any undue burden caused by a parental notification or consent statute is alleviated if it provides a judicial bypass option that comports with the requirements outlined in *Bellotti v. Baird*, 443 U.S. 622, 663-64 (1979) ("*Bellotti II*"). *See Hodgson*, 110 S. Ct. at 2950-51 (O'Connor, J., concurring); *id.* at 2970 (opinion of Kennedy, J.); *Ohio*, 110 S. Ct. at 2978-81; *see also Planned Parenthood v. Miller*, 934 F.2d 1462, 1475-82 (11th Cir. 1991). Thus, so long as an adequate judicial bypass procedure existed, the Court has upheld many different forms of parental consent and parental notification laws.

. . .

(h) REGULATION OF PROCEEDINGS.—

. . . Any court to which an appeal is taken under this section shall give prompt and confidential attention thereto and shall rule thereon within five business days of the filing of the appeal.

. . .

(i) PENALTY.—Any person who performs an abortion upon a woman who is an unemancipated minor or incompetent to whom this section applies either with knowledge that she is a minor or incompetent to whom this section applies, or with reckless disregard or negligence as to whether she is a minor or incompetent to whom this section applies, and who intentionally, knowingly or recklessly fails to conform to any requirement of this section is guilty of "unprofessional conduct" and his license for the practice of medicine and surgery shall be suspended . . . for a period of at least three months.

including two-parent consent and two-parent notification. *See Bellotti II*, 443 U.S. at 643 ("We therefore conclude that if the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained."); *Hodgson*, 110 S. Ct. at 2970 (opinion of Kennedy, J.) ("The simple fact is that our decision in *Bellotti II* stands for the proposition that a two-parent consent law is constitutional if it provides for a sufficient judicial bypass alternative.").[23]

Bellotti II set out the constitutional requirements for a bypass procedure that the Court has followed in a number of subsequent cases:

> A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained.

Bellotti II, 443 U.S. at 622.

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23. The district court held that the requirement of "informed" parental consent would necessitate in-person parental consent. We need not decide whether that is correct, for any burden caused by one-parent, in-person consent is surely no more than that caused by two-parent consent. *cf. Hodgson*, 110 S. Ct. at 2970; and the Supreme Court has held that a judicial bypass option alleviates the undue burden caused by two-parent consent requirements.

The Pennsylvania Act's bypass procedure complies with each of the four requirements set forth in *Bellotti II*. Under § 3206, if a minor woman does not wish to or cannot obtain the consent of a parent, she may file a motion or petition with the court of common pleas in the district where she lives or in which the abortion is sought. A judge of the court of common pleas must hold a hearing, at which the woman has a right to court-appointed counsel. At the hearing, the judge must determine if the woman is mature and able to make her own decision and has in fact consented to the abortion. If so, the judge must allow the abortion. Furthermore, if the judge finds that the woman is not mature and able to make her own decision, the judge must decide if an abortion would nevertheless be in her best interests. 18 Pa. Cons. Stat. Ann. § 3206 (c)-(d) (1983 & Supp. 1991). This statutory language mirrors the *Bellotti II* requirements for the factors that must guide a judge in making this decision.

In accordance with *Bellotti II*, the statute requires that the proceedings be confidential. *Id.* § 3206(f). Initials must be used to identify the woman in all documents. The hearing before the common pleas judge must be closed, and the appeals procedure must also be confidential. The record of the proceedings must be sealed.

Section 3206 also meets the promptness requirement of *Bellotti II*. Section 3206 requires that the court hold the hearing and render a decision within three business days of the application by the woman. The woman has a right to appeal to the Superior Court if the court of common pleas does not grant her permission. The Superior Court decision must be rendered within five business days of the filing of an appeal. *Id.*

§ 3206 (f), (h). This entire procedure should last no longer than eight business days. In *Ohio*, the Supreme Court upheld Ohio's bypass procedure, which required the trial court to make its decision within five business days and required the court of appeals to decide within nine days after the filing of a notice of appeal. 110 S. Ct. at 2980. The Pennsylvania statute requires a quicker decision than did Ohio's, and the Supreme Court held that Ohio's procedure was sufficiently prompt. The Commonwealth's bypass procedure thus meets the *Bellotti II* requirements and alleviates the undue burden that would be caused by a parental consent statute with no judicial bypass. *Cf. Glick v. McKay*, 937 F.2d 434 (9th Cir. 1991) (striking down parental consent statute because bypass provision did not specify time in which judge had to render decision).

We further conclude that requiring parental consent in combination with a judicial bypass procedure passes rational basis review. It is not irrational for the state to require adult guidance for a minor woman, eleven or twelve years old in some cases, *see* 744 F. Supp. at 1343, in deciding whether to obtain an abortion. *See Hodgson*, 110 S. Ct. at 2950-51 (O'Connor, J., concurring); *Ohio*, 110 S. Ct. at 2983-84; *H.L. v. Matheson*, 450 U.S. 398, 411 (1981); *Bellotti II*, 443 U.S. at 634-37, 640-41; *Danforth*, 428 U.S. at 91 (Stewart, J., concurring).

D. *Spousal Notice*

Next, we address the issue in this case that presents the most difficult application of the undue burden standard. Section 3209 of the Act requires that, before a physician may perform an abortion on a married woman, the woman must

sign a statement that she has notified her husband of her intended abortion. The Commonwealth is to provide the forms for these statements, and each form must bear a notice that false statements are punishable by law. Besides the standard medical emergency exception, § 3209 contains four other important exceptions. A woman is not required to notify her husband if: (1) her husband is not the father; (2) her husband, after diligent effort, cannot be located; (3) the pregnancy is a result of spousal sexual assault which has been reported to a law enforcement agency; or (4) the woman has reason to believe that notifying her husband is likely to result in the infliction of bodily injury by her spouse or by another individual.[24] If the woman provides a false

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24. Section 3209 of the Act states:

> (a) SPOUSAL NOTICE REQUIRED.—In order to further the Commonwealth's interest in promoting the integrity of the marital relationship and to protect a spouse's interests in having children within marriage and in protecting the prenatal life of that spouse's child, no physician shall perform an abortion on a married woman, except as provided in subsections (b) and (c), unless he or she has received a signed statement, which need not be notarized, from the woman upon whom the abortion is to be performed, that she has notified her spouse that she is about to undergo an abortion. The statement shall bear a notice that any false statement made therein is punishable by law.
>
> (b) EXCEPTIONS.—The statement certifying that the notice required by subsection (a) has been given need not be furnished where the woman provides the physician a signed statement certifying at least one of the following:
>
> (1) Her spouse is not the father of the child.
>
> (2) Her spouse, after diligent effort, could not be located.

statement on the form, she may be liable for a misdemeanor of the third degree. Any physician who performs an abortion without complying with this section may be subject to civil penalties.

First, we must consider whether § 3209 imposes an undue burden on the woman's abortion decision. At this point, it is important to emphasize that we do not consider the countervailing interest of the husband; we consider *only* the burden imposed on the woman. After we conduct this threshold analysis, as we must, *then* we will address the Commonwealth's interest in furthering the husband's interest.

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(3) The pregnancy is a result of spousal sexual assault as described in section 3128 (relating to spousal sexual assault), which has been reported to a law enforcement agency having the requisite jurisdiction.

(4) The woman has reason to believe that the furnishing of notice to her spouse is likely to result in the infliction of bodily injury upon her by her spouse or by another individual.

Such statements need not be notarized, but shall bear a notice that any false statements made therein are punishable by law.

(c) MEDICAL EMERGENCY.—The requirements of subsection (a) shall not apply in the case of a medical emergency.

. . .

(e) PENALTY; CIVIL ACTION.— Any physician who violates the provisions of this section is guilty of "unprofessional conduct," and his or her license for the practice of medicine and surgery shall be subject to suspension or revocation . . . . In addition, any physician who knowingly violates the provisions of this section shall be civilly liable to the spouse who is the father of the aborted child for any damages caused thereby and for punitive damages in the amount of $5,000, and the court shall award a prevailing plaintiff a reasonable attorney fee as part of costs.

A spousal notice requirement does not cause a drastic or severe time delay, increase in costs, or decrease in the number of abortion providers. Nor does it give a state-sanctioned veto power over the woman's abortion decision to another person. But as Justice O'Connor noted in *Hodgson*, a provision requiring a woman to notify another person before obtaining an abortion can impose an undue burden in two other ways. First, the act of finding the person to whom notice must be given may constitute an undue burden. In *Hodgson*, so many parents in Minnesota were divorced that it would have been a great burden in many cases for the child to track down the other parent. This is not a problem with the Commonwealth's spousal notification requirement, however, since it allows a woman to certify that her husband, after diligent effort, could not be notified. Second, the giving of notice and the consequences thereof may constitute a severe limitation on the woman's abortion decision. The notified person, for example, may effectively prevent the abortion or may severely penalize the woman in other ways if she exercises her right to obtain an abortion. *Cf. Hodgson*, 110 S. Ct. at 2939. Such consequences were found to constitute undue burdens on a woman's right to an abortion in both *Bellotti II* and *Hodgson*.

In *Bellotti v. Baird* ("*Bellotti I*"), 428 U.S. 132, 145 (1976), the Court noted that one proffered interpretation of the Massachusetts statute requiring parental consent would allow minor women to obtain permission for abortion in a bypass proceeding, thus avoiding the "undue burden" caused by forced "consultation." Then, in *Bellotti II*, the Court held that the statute did not meet constitutional standards because, as

construed by the courts of Massachusetts, the bypass procedure was available only after the minor had notified, and unsuccessfully sought consent from, her parents. The Court concluded:

> We think that, construed in this manner, § 12S would impose an undue burden upon the exercise by minors of the right to seek an abortion. As the District Court recognized, "there are parents who would obstruct, and perhaps altogether prevent, the minor's right to go to court." *Baird III*, 450 F. Supp. at 1001. There is no reason to believe that this would be so in the majority of cases where consent is withheld. But many parents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court.

Bellotti II, 443 U.S. at 647.

In *Hodgson*, the Court rejected a two-parent notice requirement that did not provide a judicial bypass option. As we have noted, Justice O'Connor, the fifth vote necessary for the majority, found that a two-parent notification requirement was an "undue burden" on the abortion decision. 110 S. Ct. at 2950.[25] Justice Stevens, writing for

25. Judge Alito disagrees with our interpretation of Justice O'Connor's application of the undue burden standard in *Hodgson*. We agree with Judge Alito that Part I of Justice O'Connor's opinion in *Hodgson* is ambiguous; however, Part II clarifies her reasoning. As we noted above, Justice O'Connor in Part II of her opinion in *Hodgson* explained that the Court often had approved parental consent and notice provisions that contained a bypass option because a bypass option tailors a consent or notice statute "so as to avoid unduly burdening" the abortion right. *Hodgson*, 110 S. Ct. at 2950 (O'Connor, J., concurring). Justice O'Connor thus found constitutional the Minnesota statute that contained the

a majority of the Justices, including Justice O'Connor, described the burden imposed by the notice requirement in the following terms:

> The record reveals that in the thousands of dysfunctional families affected by this statute, the two-parent notice requirement proved positively harmful to the minor and her family. The testimony at trial established that this requirement, ostensibly designed for the benefit of the minor, resulted in major trauma to the child, and often to a parent as well. In some cases, the parents were divorced and the second parent did not have custody or otherwise participate in the child's upbringing. App. 244-245; *id.* at 466; *id.* at 115. In these circumstances, the privacy of the parent and child was violated, even when they suffered no other physical or psychological harm. In other instances, however, the second parent had either deserted or abused the child, *id.* at 462, 464, had died under tragic circumstances, *id.* at 120-121, or was not notified because of the considered judgment that notification would inflict unnecessary stress on a parent who was ill. *Id.* at 204, 465.
>
> * * *
>
> The most common reason for not notifying the second parent was that that parent was a child or spouse-batterer. App. at 204, and notification would have provoked further abuse.

bypass option. If a bypass procedure renders a parental notice provision constitutional because it alleviates the undue burden of the notice requirement, we think it follows that a parental notice requirement without the bypass option constitutes an undue burden.

Hodgson, 110 S. Ct. at 2945 & n.36.

The Supreme Court has thus been attuned to the real-world consequences of forced notification in the context of minor child/parent relationships and has found an undue burden to exist where there is a realistic likelihood either of parents preventing the abortion or of parents causing serious physical or psychological trauma for the pregnant child. In this case, we conclude that the real-world consequences of forced notification in the context of wife/husband relationships impose similar kinds of undue burdens on a woman's right to an abortion.

Most married women will discuss the abortion decision with their husbands. As Justice Stevens noted in *Hodgson*, a notification requirement is unnecessary and serves no state interest in those instances. 110 S. Ct. at 2945. The relevant burdens to be assessed are those imposed by § 3209 on women who would choose not to notify their husbands in the absence of state compulsion to do so.

The district court found that § 3209's notification requirement creates a substantial risk that women who would otherwise have an abortion will be prevented from having one. Abortion is a matter about which individuals have deeply held and strongly felt convictions, often rooted in moral or religious commitment. In those situations where a husband is sufficiently opposed to abortion or sufficiently desirous of having a child that the wife will not voluntarily share the fact of her pregnancy and her intention to abort with him, the clinics' experts testified that coerced notification will predictably result in an effort to prevent the abortion. That testimony showed that the husband's response will frequently take a variety of forms other than persuasive discourse.

Many husbands are capable of violence in circumstances of this kind and will use physical force and the threat thereof to keep the wife from access to the clinic. But physical force is not the only means at the disposal of a husband who seeks to prevent an abortion. In the numerous households where the husband alone holds the economic power, the wife is in as vulnerable a position as the pregnant minor discussed in *Bellotti II*. The husband can simply decline to pay for the abortion and/or threaten to withhold future economic support unless the woman decides to forego the abortion. Finally, the record reveals that the forms of effective psychological coercion available to a husband are potentially unlimited and include the ultimate threat of a dissolution of the marriage.

One form of psychological coercion warrants special note because of the potential toll it may take on the wife and its resulting effectiveness as a deterrent. We have often spoken about the value placed by our society on the right of each individual to privacy concerning personal health information. *See, e.g., United States v. Westinghouse Electric Corp.*, 638 F.2d 571, 577 (3d Cir. 1980); *see also Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). The only thing we can think of more personal and intimate than the fact that one is carrying a child is the fact that one intends to seek an abortion. When the state forces spousal notification on a wife in a seriously troubled marriage, or even a wife in an untroubled marriage with a husband unalterably opposed to abortion, it compels disclosure of very intimate information with no assurance of confidentiality to someone highly motivated to make a public disclosure. As the district court found, the threat of exposure of

the abortion decision to family, friends, and the community at large is likely to be a very substantial deterrent to a woman's pursuing her decision to abort.

Prevention of a planned abortion is not the only foreseeable consequence of coerced notification, however. Even if the woman is not deterred from pursuing an abortion, the same arsenal of physical, economic, and psychological abuse is available to the notified husband to penalize the wife for exercising her constitutionally bestowed right. Nor is the effect of § 3209 limited to those situations in which the wife gives notice pursuant to the statute. Just as the principal power of Damocles' sword is in its hanging rather than its fall, the primary effect of § 3209 may well be on those women who desire an abortion but who choose to carry to term because of the feared consequences of giving notice to their husbands.

The Pennsylvania legislature has not been unmindful of the burdens imposed on pregnant wives by § 3209 and has attempted to ease or avoid a number of them by including exceptions. Section 3209, for example, speaks to the dilemma of a woman who "has reason to believe that the furnishing of notice to her spouse is likely to result in the infliction of bodily injury upon her by her spouse or by another individual." A woman with such a fear may avoid notification by certifying her fear to her physician on a form provided by the Commonwealth. While ameliorative, this exception does not save § 3209 from being unduly burdensome in the constitutional sense. The district court found, with appropriate record support, that battered spouses are psychologically incapacitated from making the assertion required by the statute even when there is ample objective

basis for the required fear. Many other women who have never before been the victims of "bodily injury" at the hands of their husband, may subjectively fear that notice may occasion "the first time," but conclude that they lack the requisite "reason to believe." Moreover, it is not clear to us that the "fear of bodily injury" exception was intended to aid those women whose access to an abortion is blocked by physical constraints or who reasonably fear physical abuse and the attendant suffering, but cannot conscientiously represent that injury to their bodies is likely to occur.

If physical violence were the only burden reasonably predictable from coerced spousal notification we might be inclined in this facial challenge to hold that the fear of bodily injury exception was sufficient to avoid an undue burden, at least until the effects of the Act in practice are known. But as we have previously stressed, physical violence is *not* the only burden reasonably predictable. The record reveals and the district court found that if § 3209 is allowed to go into effect, abortions can and will be prevented by economic and psychological duress and wives can and will be penalized by such duress for electing abortions.

One other of § 3209's exceptions warrants comment in our assessment of the burdens imposed by that section. The record demonstrates and the district court found that many women consent to sexual intercourse with their husbands solely to avoid greater physical or psychological abuse. Section 3209 provides that when a child is conceived in the course of coerced sex, notification need not be given, if, but only if, the wife reports her husband to law enforcement authorities having jurisdiction over the matter. While this limitation

on the exception is understandably imposed to discourage misrepresentations at the time an abortion is sought, its motivation does not ease the impact of the notification requirement on a woman who finds herself pregnant as a result of a sexual assault by her spouse. Given the devastating effect that a report to law enforcement authorities is likely to have on the marital relationship and the economic support provided the wife by the marriage, we believe it would be unrealistic to find that such a woman's right to choose an abortion is not severely burdened by § 3209. *Cf. Hodgson*, 110 S. Ct. at 2950 (O'Connor, J., concurring).

Because of the nature of the marriage relationship and the emotional character of human response to pregnancy and abortion, the number of different situations in which women may reasonably fear dire consequences from notifying their husbands is potentially limitless.[26] Because fear of those consequences is likely to dissuade many from seeking an abortion if such notification is required and because the consequences themselves are an undue burden, we hold that § 3209 constitutes an undue burden on a woman's abortion decision.

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26. The district court's list of situations in which spousal notification is likely to cause dire consequences for the women include, *inter alia*: women who reasonably fear retaliatory psychological abuse; women who reasonably fear retaliatory physical or psychological abuse of their children; women who are separated following a failed marriage relationship and for whom renewal of contact may produce severe emotional distress; women whose husbands have serious health problems and who reasonably fear that notification will be health threatening; and women whose marriages are severely troubled and who reasonably fear that notice will precipitate the demise of the marital relationship. 744 F. Supp. at 1386 n.42.

Accordingly, we must apply strict scrutiny to determine if § 3209 is narrowly tailored to serve a compelling state interest. Section 3209 expressly states that the spousal notice requirement is designed to further three state interests: promoting the integrity of the marital relationship, protecting a spouse's interests in having children within marriage, and protecting a spouse's interest in the prenatal life of that spouse's child.

We turn first to marital integrity. It is not entirely clear what the Commonwealth means when it speaks of the integrity of a marriage. If the interest is in honesty and full disclosure between married individuals, *Hodgson* indicates that this interest does not rise to the level of a legitimate state interest, much less a compelling one. In the course of striking down Minnesota's two-parent notice requirement without a judicial bypass, Justice Stevens there wrote for a majority of the court:

> The State does not rely primarily on the best interests of the minor in defending this statute. Rather, it argues that, in the ideal family, the minor should make her decision only after consultation with both parents who should naturally be concerned with the child's welfare and that the State has an interest in protecting the independent right of the parents "to determine and strive for what they believe to be best for their children." Minn.Br. 26. Neither of these reasons can justify the two-parent notification requirement. The second parent may well have an interest in the minor's abortion decision, making full communication among all members of a family desirable in some cases, but such communication may not be decreed by the State. The State has no more interest in

> requiring all family members to talk with one another than it has in requiring certain of them to live together. . . . [A] state interest in standardizing its children and adults, making the "private realm of family life" conform to some state-designed ideal, is not a legitimate state interest at all.

Hodgson, 110 S. Ct. at 2946.

If the state's alleged interest in the integrity of the marriage refers to the state's interest in keeping married individuals together in wedlock, we agree that this is a legitimate state interest. It is not an interest that the Supreme Court has recognized as a compelling one, however. Moreover, even if we were to assume that it does constitute a compelling state interest, we could not conclude that the Commonwealth has carried its burden of demonstrating that § 3209 is narrowly tailored to promote that interest. As we have noted, the only effect of § 3209 is to require notice in those instances in which the wife would not otherwise share with her husband the fact of the pregnancy and her intention to abort. In such situations, an across-the-board requirement of coerced disclosure is an altogether arbitrary approach to a difficult and complex problem of human relations. Nothing in this record suggests that replacing the wife's judgment regarding disclosure with such an arbitrary rule will save more marriages than it destroys.

The Commonwealth asserts that § 3209 furthers its interests in furthering the husband's interest both in having children within the marriage and in the fetus. To the extent that these interests are distinct, the abstract interest in having children within the marriage is not more substantial than

the interest in the fetus. Therefore, we will now turn to the most difficult issue: the state's interest in furthering the husband's interest in the individual fetus. In *Danforth*, in discussing a spousal consent requirement, the Court recognized the state's *legitimate* interest in the husband's interest in the fetus. Justice Blackmun for the Court stated that the Court was "not unaware" of the "deep and proper concern and interest" that a husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying. *Danforth*, 428 U.S. at 69. Nevertheless, the Court struck down the spousal consent requirement in *Danforth*, finding that the state's interest in supporting the husband's interest in the fetus was insufficient to override the wife's right to an abortion:

> Notwithstanding these factors, we cannot hold that the State has the constitutional authority to give the spouse unilaterally the ability to prohibit the wife from terminating her pregnancy, when the State itself lacks that right. *See Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).
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> As the Court recognized in *Eisenstadt v. Baird*, "the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." 405 U.S., at 453 (emphasis in original).

Danforth, 428 U.S. at 70 & n.11. *Danforth* can be

read to stand for the proposition that the state's interest in protecting a husband's interest in a previable fetus within his marriage is not a compelling one. It must be read at least to hold that that interest must yield to the wife's right to have an abortion. Thus, the state cannot vindicate the husband's interest in a fetus, and § 3209 was enacted with that realization.

Section 3209, despite its preamble, does not protect the husband's interest in the fetus; under *Danforth*, as we have noted, a state statute cannot constitutionally protect that interest. What § 3209 seeks to preserve for the husband is something considerably more modest: the possibility of participating in a decision his wife is constitutionally privileged to make on her own for her own reasons. While promoting the possibility of spousal participation is undoubtedly a legitimate state interest, we conclude in light of *Danforth* that it is not the kind of compelling state interest that can justify the very substantial burdens imposed by § 3209 on the wife's right to choose an abortion.

In sum, we hold that § 3209 is unconstitutional because it imposes an undue burden on a woman's abortion decision and does not serve a compelling state interest.[27]

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27. Our conclusion that § 3209 is unconstitutional does not prevent the Commonwealth from putting into effect the rest of the Act's provisions. The Act contains a broad severability provision. "The provisions of this act are severable. If any word, phrase or provision of this act or its application to any person or circumstance is held invalid, the invalidity shall not affect any other word, phrase or provision or application of this act which can be given effect without the invalid word, phrase, provision or application." Act of November 17, 1989, 1989 Pa. Laws 592, No. 64, § 6. In addition, Pennsylvania has a general severability statute. 1 Pa. Cons. Stat. Ann. § 1925 (Supp. 1991). Severability is a question of state law. *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 818 (1989). Because the remainder of the Act may be given effect without § 3209, we conclude that § 3209 may be severed from the Act in accordance with Pennsylvania law.

E. *Confidential Medical Reports*

An abortion provider must file a report with the Department of Health for every abortion performed at its facility. 18 Pa. Cons. Stat. Ann. § 3214(a) (1983 & Supp. 1991). Each report must include a variety of information about the abortion.[28] Because these reports are not open for public inspection and are subject to various safeguards against disclosure, *id.* § 3214(b), the district court concluded – and the clinics do not challenge the conclusion – that the Commonwealth had adequately assured the confidentiality of these reports.

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28. The relevant text of § 3214 provides:

> (a) GENERAL RULE.– For the purpose of promotion of maternal health and life by adding to the sum of medical and public health knowledge through the compilation of relevant data, and to promote the Commonwealth's interest in protection of the unborn child, a report of each abortion performed shall be made to the department on forms prescribed by it. The report forms shall not identify the individual patient by name and shall include the following information:
>
> (1) Identification of the physician who performed the abortion, the concurring physician as required by section 3211(c)(2) (relating to abortion on unborn child of 24 or more weeks gestational age), the second physician as required by section 3211(c)(5) and the facility where the abortion was performed and of the referring physician, agency or service, if any.
>
> (2) The county and state in which the woman resides.

In *Danforth*, the Court held that recordkeeping and reporting requirements are permissible so long

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(3). The woman's age.

(4) The number of prior pregnancies and prior abortions of the woman.

(5) The gestational age of the unborn child at the time of the abortion.

(6) The type of procedure performed or prescribed and the date of the abortion.

(7) Pre-existing medical conditions of the woman which would complicate pregnancy, if any, and, if known, any medical complication which resulted from the abortion itself.

(8) The basis for the medical judgment of the physician who performed the abortion that the abortion was necessary to prevent either the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman, where an abortion has been performed pursuant to section 3211(b)(1).

(9) The weight of the aborted child for any abortion performed pursuant to section 3211(b)(1).

(10) Basis for any medical judgment that a medical emergency existed which excused the physician from compliance with any provision of this chapter.

(11) The information required to be reported under section 3210(a) (relating to determination of gestational age).

(12) Whether the abortion was performed upon a married woman and, if so, whether notice to her spouse was given. If no notice to her spouse was given, the report shall also indicate the reason for failure to provide notice.

(b) COMPLETION OF REPORT.– The report shall be completed by the hospital or other licensed facility, signed by the physician who performed the abortion and transmitted to the department within 15 days after each reporting month.

as they are not used to accomplish "through the sheer burden of recordkeeping detail, what [the Court has] held to be an otherwise unconstitutional restriction," and so long as the reports are confidential. *Danforth*, 428 U.S. at 81. Furthermore, the reports must be rationally related to a legitimate state interest. *Id.*

The district court concluded that the Commonwealth could not constitutionally require

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. . .

(i) PENALTIES.–

(1) Any person required under this section to file a report, keep any records or supply any information, who willfully fails to file such report, keep such records or supply such information at the time or times required by law or regulation is guilty of "unprofessional conduct" and his license for the practice of medicine and surgery shall be subject to suspension or revocation in accordance with procedures provided under the act of October 5, 1978 (P.L. 1109, No. 261), known as the Osteopathic Medical Practice Act, the act of December 20, 1985 (P.L. 457, No. 112), known as the Medical Practice Act of 1985, or their successor acts.

(2) Any person who willfully delivers or discloses to the department any report, record or information known by him to be false commits a misdemeanor of the first degree.

(3) In addition to the above penalties, any person, organization or facility who willfully violates any of the provisions of this section requiring reporting shall upon conviction thereof:

(i) For the first time, have its license suspended for a period of six months.

(ii) For the second time, have its license suspended for a period of one year.

(iii) For the third time, have its license revoked.

18 Pa. Cons. Stat. Ann. § 3214(a), (i) (1983 & Supp. 1991).

of a doctor or clinic four of the many items of information listed in the statute: (1) the basis for the physician's determination of gestational age; (2) in a third trimester abortion, the basis for the physician's decision that a third trimester abortion was necessary for the life or health of the mother; (3) in a medical emergency case, the basis for the physician's decision that a medical emergency suspended the statute's requirements; and (4) the identity of the referring physician.[29] 744 F. Supp. at 1391-95.

First, we address the three reporting requirements relating to the physician's medical judgments for particular types of abortions. The abortion provider must file one report for every abortion. The report will not cause by the "sheer burden of recordkeeping detail" a drastic increase in delay or cost, or a drastic decrease in availability. The district court's only relevant finding on this point was that compliance with this section had cost $12,000 per year for a clinic that performed 7,000 abortions per year. 744 F. Supp. at 1337, 1372. An added cost of at most a few dollars per abortion that the clinics may pass on to patients is not the kind of "drastic" increase necessary to constitute an undue burden. In addition, the reports are concededly confidential, and the reporting requirement does not constitute an undue burden on that basis. The reports are also rationally related to preservation of maternal health; they will enable the Commonwealth to

29. The Court in *Thornburgh* struck down similar reporting requirements because they were not confidential, 476 U.S. at 765-68; in that case, the report could unduly burden the abortion right by making public both information about the women who obtain abortions and information about the doctors who perform them.

discover how often and under what circumstances women obtain medically necessary abortions. Finally, the reports will confirm that clinics and physicians are complying with the Act's requirements.

The district court concluded that such a report would have a "chilling effect" on the exercise of the physician's judgment. We fail to perceive a chilling effect, however, other than on a physician who is not complying with the other provisions of the Act for medical emergencies, determination of gestational age, and third trimester abortions. Because those provisions themselves are constitutional, it seems unremarkable and not unduly burdensome that the Commonwealth requires this information in a report concerning an abortion.

With respect to the requirement of § 3214(a)(1) that the report concerning an abortion include the name of the performing and referring physicians, the district court concluded that the record was devoid of any evidence that a *performing* physician would be deterred from performing abortions by the requirement that the report include his or her name. 744 F. Supp. at 1391-92. Nevertheless, the district court concluded that some physicians might stop *referring* women for abortions if their names were included in the confidential report. *Id.* at 1392. The testimony at trial established that referring physicians zealously protect their anonymity, and we would face a different and more difficult case if there were a significant risk that such information would be disclosed. But given the district court's conclusions about the safeguards that will ensure confidentiality, we decline to conclude that referring physicians will be deterred in sufffficient number that the availability of an

abortion will be drastically reduced. Accordingly, we conclude that the requirement of disclosure of the identity of the names of the referred and performing physicians need only satisfy rational basis review.

As to rational basis, the district court found that the performing physician's name was properly included because he or she could answer questions that might arise about information contained in the reports. However, the district court felt that no similar reason existed for the referring physician's name. *Id.* This conclusion ignores the fact that the referring physician can perform some of the Act's requirements; the Act allows referring physicians both to obtain the woman's informed consent and to determine gestational age. We thus conclude that this requirement is rationally related to a legitimate state interest.

We hold that the confidential reporting requirements of § 3214(a) are constitutional.

F. *Publicly Available Reports*

Abortion facilities must file with the Department of Health a report supplying the name and address of the facility and the name and address of affiliated organizations, such as parent or subsidiary corporations. 18 Pa. Cons. Stat. Ann. § 3207(b) (Supp. 1991).[30] Every abortion facility

30. Section 3207(b) provides:

Within 30 days after the effective date of this chapter, every facility at which abortions are performed shall file, and update immediately upon any change, a report with the department, containing the following information:

(1) Name and address of the facility.

must also file a report showing the total number of abortions performed, broken down by trimester, at the facility during the preceding quarter year. 18 Pa. Cons. Stat. Ann. § 3214(f) (1991 Supp.).[31]

(2) Name and address of any parent, subsidiary or affiliated organizations, corporations or associations.

(3) Name and address of any parent, subsidiary or affiliated organizations, corporations or associations having contemporaneous commonality of ownership, beneficial interest, directorship or officership with any other facility.

The information contained in those reports which are filed pursuant to this subsection by facilities which receive State appropriated funds during the 12-calendar-month period immediately preceding a request to inspect or copy such reports shall be deemed public information. Reports filed by facilities which do not receive State appropriated funds shall only be available to law enforcement officials, the State Board of Medicine and the State Board of Osteopathic Medicine for use in the performance of their official duties. Any facility failing to comply with the provisions of this subsection shall be assessed by the department a fine of $500 for each day it is in violation hereof.

31. Section 3214(f) provides:

Every facility in which an abortion is performed within this Commonwealth during any quarter year shall file with the department a report showing the total number of abortions performed within the hospital or other facility during that quarter year. This report shall also show the total abortions performed in each trimester of pregnancy. Any report shall be available for public inspection and copying only if the facility receives State-appropriated funds within the 12-calendar-month period immediately preceding the filing of the report. These reports shall be submitted on a form prescribed by the department which will enable a facility to indicate whether or not it is receiving State-appropriated funds. If the facility indicates on the form that it is not receiving State-appropriated funds, the department shall regard its report as confidential unless it receives other evidence which causes it to conclude that the facility receives State-appropriated funds.

If a facility has received public funds during the preceding year, the reports must be made available to the public.

The clinics do not attack these reporting requirements; they challenge only the mandate that reports of clinics receiving public funds be available to the public. More specifically, the argument presented by the clinics—and accepted by the district court—is that public disclosure of these reports will cause protests in front of clinics to proliferate and intensify, and that this will eventually reduce the number of abortion providers and the availability of abortions. Like the district court, we recognize that substantial public protest, directed toward both the clinics and the women entering them, occurs in front of abortion clinics. *See, e.g., Northeast Women's Center v. McMonagle*, ___ F.2d ___ (3d Cir. 1991). In its opinion, the district court detailed much of this activity and then concluded that the clinics had reasonable fears of increased protest from the public disclosure of these reports. The district court also concluded that some clinics might refuse the funds they receive for medically necessary abortions in order to avoid having their reports made available to the public. 744 F. Supp. at 1390-91.

We have considered this issue before in addressing nearly the same reporting requirements. *American College of Obstetricians v. Thornburgh*, 737 F.2d 283, 297-98 (3d Cir. 1984) ("*ACOG*"), *aff'd on other grounds*, 476 U.S. 747 (1986). Unless the clinics show a clear nexus between the disclosure requirement and increased private harassment, any attempt to argue that this requirement constitutes an undue burden fails.

ACOG, 737 F.2d at 297-98. Here, the clinics have not shown that the public disclosure requirement will so enlarge the number or escalate the severity of protests that they will become an absolute obstacle or severe limitation on a woman's abortion right. The clinics are publicly advertised and listed in the phone book, and many, if not all, encounter protests and demonstrations without this requirement. On the record as we review it—at a time before this provision has been implemented—we cannot conclude that the public disclosure requirement will result in an absolute obstacle or severe limitation on a woman's abortion decision. We thus conclude, as we did in the previous incarnation of this challenge, that §§ 3207(b) and 3214(f) do not constitute an undue burden because the clinics have not "demonstrated a nexus between the disclosure of such information and the chilling of constitutional rights." *Id.* at 297.

The next question is whether this provision is rationally related to a legitimate state interest. Records relating to public expenditures and disbursements are generally available to the public under Pennsylvania law. 65 Pa. Cons. Stat. Ann. §§ 66.1, 66.2 (1959 & Supp. 1991). When a state provides money to a private commercial enterprise, there is a legitimate public interest in informing taxpayers who the funds are benefiting and what services the funds are supporting. Thus, this requirement does not lack a rational basis.

The clinics also argue that the public disclosure requirement is an unconstitutional condition on the receipt of public funds. Under the doctrine of unconstitutional conditions, "government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even

if the government may withhold that benefit altogether." Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1415, 1415 (1989). There are two major elements of a successful unconstitutional conditions challenge.

The first is that "the constitutional interest at issue . . . rise to the level of a recognized right—indeed a *preferred* right normally recognized by strict judicial review." *Id.* at 1427. In this case, the constitutional right to abortion is implicated by these requirements; however, as we concluded above, this right is not unduly burdened by these disclosure requirements and thus strict scrutiny is not triggered. Therefore, it is not an unconstitutional conditions problem in the way that it would be if the Commonwealth prohibited a recipient of public funds from performing abortions at all. *Cf. Babbitt v. Planned Parenthood*, 479 U.S. 925 (1986), *aff'g* 718 F.2d 938 (9th Cir. 1983).[32]

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32. The Supreme Court's abortion funding cases exemplify the second major element of an unconstitutional conditions case: the state may fund activities as it pleases, may refuse to fund other activities, and may prevent recipients of government funds from using those funds in ways the government does not permit; however, the government may not restrict a recipient of government funds from constitutionally-protected activities it chooses to perform with its own or private funds. *See Rust v. Sullivan*, 111 S. Ct. 1759 (1991).

The Supreme Court has used these principles in deciding a number of abortion funding cases. In *Maher v. Roe*, 432 U.S. 464 (1977), the Court upheld a state regulation under which Medicaid recipients received payment for medical services related to childbirth, but not for those related to nontherapeutic abortions. Similarly, in *Poelker v. Doe*, 432 U.S. 519 (1977), the Court upheld a city's policy of providing publicly financed hospital services for childbirth without

Having concluded that this requirement does not unduly burden the abortion right, rationally relates to a legitimate state interest, and does not present an unconstitutional condition on the receipt of public funds, we uphold §§ 3207(b) and 3214(f).

IV.

We conclude that the undue burden standard adopted by Justice O'Connor was the narrowest grounds in the majority in *Webster* and *Hodgson* and is at present the law of the land. Applying the undue burden standard, we conclude that § 3209, the spousal notice provision, constitutes an undue burden. Since the state does not have a compelling interest in ensuring spousal notice, we hold § 3209 unconstitutional. However, none of the other provisions at issue here constitutes an undue burden, and each is rationally related to a legitimate state purpose. Thus, we uphold them against the clinics' challenge. We will affirm in part and reverse in part the judgment of the district court.

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providing corresponding services for nontherapeutic abortions. In *Harris v. McRae*, 448 U.S. 297 (1980), the Court upheld the federal government's refusal to fund medically necessary abortions though it funded other medically necessary services. In *Webster*, the Court upheld a state's ban on the use of public employees and facilities for the performance or assistance of nontherapeutic abortions. In *Rust*, the Court upheld the federal government's refusal to fund programs that refer women for abortions.

In the one abortion funding case where the Court has struck down a government restriction on abortion funding, a state had attempted to prohibit any recipient of any state funds from performing abortions, even if that recipient wished to provide abortion services with private funds. *Babbitt*, 479 U.S. at 925. The problem in *Babbitt* was that the government had attempted to prohibit a recipient of government funds from using its own funds to exercise its constitutional right; that is an unconstitutional condition, but not one imposed by the legislation before us.

ALITO, *Circuit Judge*, concurring in part and dissenting in part.

I concur in the court's judgment except insofar as it holds that 18 Pa. Cons. Stat. Ann. § 3209 (Supp. 1991) (spousal notice) is unconstitutional. I also join all of the court's opinion except for the portions concerning Section 3209 and those interpreting Justice O'Connor's opinion in *Hodgson v. Minnesota*, 110 S.Ct. 2926, 2949-51 (1990), to mean that the two-parent notification requirement without judicial bypass imposed an "undue burden" and was thus required to satisfy strict scrutiny.

I.

As the court suggests, the crux of this case concerns the identification of the constitutional standard that the lower courts must now apply in cases involving laws regulating abortion. For the reasons carefully explained in the court's opinion, I agree that *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), and *Hodgson* changed the law that we are bound to apply and that the test set out in Justice O'Connor's opinions now represents the governing legal standard.

My disagreement with the majority regarding a single provision of the Pennsylvania Abortion Control Act, 18 Pa. Cons. Stat. Ann. § 3201 *et seq.* (1983 & Supp. 1991), results from disagreement about the portion of Justice O'Connor's two-part test that must be applied to this provision. Under that test, as the majority explains, a law that imposes an "undue burden" must serve a "compelling" state interest. By contrast, a law that does not impose an "undue burden" must simply be "rationally" or "reasonably" related to a "legitimate" state interest.

The majority holds that Section 3209 constitutes an undue burden. The majority therefore applies the first prong of the two-part test and strikes down Section 3209 on the ground that it does not serve a "compelling" interest. I do not believe that Section 3209 has been shown to impose an undue burden as that term is used in the relevant Supreme Court opinions; I therefore apply the second prong of the two-part test; and I conclude that Section 3209 is constitutional because it is "rationally related" to a "legitimate" state interest.

Although the majority and I apply different prongs of this two-part test, I see no indication that we disagree concerning the conclusion produced when either prong is applied to Section 3209. If the majority is correct that Section 3209 must satisfy heightened scrutiny, I agree that its constitutionality is doubtful. Similarly, I do not interpret the majority opinion to mean that Section 3209 cannot satisfy the rational relationship test. Indeed, the majority acknowledges that Section 3209 serves a "legitimate" interest. See majority typescript at 74, 77. Thus, my major disagreement with the majority concerns the question whether Section 3209 imposes an "undue burden," and I will therefore turn to that question.

II.

A. Justice O'Connor has explained the meaning of the term "undue burden" in several abortion opinions. In *Akron v. Akron Center for Reproductive Health*, 462 U.S. at 464 (O'Connor, J., dissenting), she wrote that "an 'undue burden' has been found for the most part in situations involving absolute obstacles or severe limitations on the abortion decision." She noted that laws held unconstitutional in prior cases involved statutes

that "criminalized *all* abortions except those necessary to save the life of the mother," inhibited "'the vast majority of abortions after the first 12 weeks,'" or gave the parents of a pregnant minor an absolute veto power over the abortion decision. *Id.* (emphasis in original; citations omitted). She suggested that an "undue burden" would not be created by "a state regulation [that] may 'inhibit' abortions to some degree." *Id.* She also suggested that there is no undue burden unless a measure has the effect of "*substantially* limiting access." *Id.* at 463, quoting *Carey v. Population Services International*, 431 U.S. 678, 688 (1977) (emphasis added in Justice O'Connor's opinion).

Justice O'Connor reiterated the same analysis in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986). She wrote (*Id.* at 828 (O'Connor, J., dissenting), quoting *Akron*, 462 U.S. at 464 (O'Connor, J., dissenting)):

> An undue burden would generally be found "in situations involving absolute obstacles or severe limitations on the abortion decision," not wherever a state regulation "may 'inhibit' abortions to some degree."

She also criticized the majority for taking an approach under which "the mere possibility that *some women* will be less likely to choose to have an abortion by virtue of the presence of a particular state regulation suffices to invalidate it." *Id.* at 829 (emphasis added).

Justice O'Connor's application of the undue burden test in several cases further illustrates the meaning of this test. In *Hodgson*, 110 S.Ct. at 2950-51, Justice O'Connor found that no undue burden was imposed by a law requiring notice to both parents or judicial authorization before a

minor could obtain an abortion. Justice O'Connor reached this conclusion despite statistics adduced by Justice Marshall to show that mandatory parental notice may inhibit a significant percentage of minors from obtaining abortions (*Id.* at 2953-54 (Marshall, J., dissenting) and despite the district court's finding, noted in Justice Marshall's dissent, that the judicial bypass option "so daunted" some minors that they felt compelled to carry to term (*Id.* at 2959, *quoting* 648 F.Supp. at 763).

Justice O'Connor has also suggested on more than one occasion that no undue burden was created by the statute upheld in *H. L. v. Matheson*, 450 U.S. 398 (1981), which required parental notice prior to any abortion on an unemancipated minor. Instead, she has stated that this statute merely inhibited abortions to "some degree." *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting); *Akron*, 462 U.S. at 464 (O'Connor, J., dissenting). In dissent in *Matheson*, Justice Marshall argued that the statute would result in substantial interference with abortions sought by minors. He wrote (450 U.S. at 398) (Marshall, J., dissenting) that "the minor may confront physical or emotional abuse, withdrawal of financial support or actual obstruction of the abortion decision." These harms are almost identical to those that the majority in this case attributes to Section 3209. See majority typescript at 66-68. *See also Planned Parenthood Association v. Ashcroft*, 462 U.S. 476, 505 (1983) (O'Connor concurring and dissenting) (statute requiring parental consent or judicial authorization "imposes no undue burden").

Finally, Justice O'Connor has concluded that regulations that simply increase the cost of

abortions, including regulations that may double the cost, do not create an "undue burden." *See Akron*, 462 U.S. at 434-35 (maj. op.); 466-67 (O'Connor, J., dissenting). Justice O'Connor reached this conclusion even though it seems clear that such increased costs may well deter some women.

Taken together, Justice O'Connor's opinions reveal that an undue burden does not exist unless a law (a) prohibits abortion or gives another person the authority to veto an abortion or (b) has the practical effect of imposing "severe limitations," rather than simply inhibiting abortions "'to some degree'" or inhibiting "some women." *Thornburgh*, 476 U.S. at 828, 829 (O'Connor, J., dissenting), *quoting Akron*, 462 U.S. at 464 (O'Connor, J., dissenting). Furthermore, Justice O'Connor's opinions disclose that the practical effect of a law will not amount to an undue burden unless the effect is greater than the burden imposed on minors seeking abortions in *Hodgson* or *Matheson* or the burden created by the regulations in *Akron* that appreciably increased costs. Since the laws at issue in those cases had inhibiting effects that almost certainly were substantial enough to dissuade some women from obtaining abortions, it appears clear that an undue burden may not be established simply by showing that a law will have a heavy impact on a few women but that instead a broader inhibiting effect must be shown.

In this case, the plaintiffs, who made a facial attack[1] on Section 3209, did not prove that this

1. Because the plaintiffs made a facial attack on Section 3209, they could not rely on a "worst-case analysis" (*Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972, 2981 (1990)) or on proof showing only that the provision would impose an undue burden "under some conceivable set of

provision would impose an undue burden. Section 3209 does not create an "absolute obstacle" or give a husband "veto power." Rather, this provision merely requires a married woman desiring an abortion to certify that she has notified her husband or to claim one of the statutory exceptions.

The plaintiffs also failed to carry their burden[2] of proving that Section 3209 if enforced would have the kind of broad practical impact needed to establish an "undue burden" under the opinions discussed above. Clearly the plaintiffs did not substantiate the impact of Section 3209 with the degree of analytical rigor that should be demanded before striking down a state statute. Cf. *Akron*, 462 U.S. at 463 (O'Connor, J., dissenting) (citation omitted) (courts should exercise "'deliberate restraint'" before finding an undue burden "'in view of the respect that properly should be accorded legislative judgments'"); *id.* at 465.

circumstances" (*United States v. Salerno*, 481 U.S. 739, 745 (1987)). Thus, proof that the provision would adversely affect an unknown number of women with a particular combination of characteristics could not suffice.

2. In *Thornburgh*, Justice O'Connor made clear that a party challenging the constitutionality of a statute must bear the burden of proving that the law imposes an undue burden. After arguing strenuously that the case should be sent back to the district court for "additional factual development" (476 U.S. at 827 (O'Connor, J., dissenting), Justice O'Connor repeatedly stated that the appellees, who were challenging the statute, had the burden of proving that individual statutory provisions would impose an undue burden. She discussed whether "appellees could succeed in making the threshold showing of undue burden" (*id.* at 831), whether "appellees [could] establish that the abortion decision [would be] unduly burdened" (*id.*), and whether the appellees "could succeed in establishing an undue burden" (*id.* at 832).

At the outset, it is apparent that two factors imposed a low ceiling on any showing that the plaintiffs could have made. First, as the district court found, the "vast majority" of married women voluntarily inform their husbands before seeking an abortion. *Planned Parenthood v. Casey*, 744 F.Supp. 1232, 1360 (E.D. Pa. 1990). Indeed, in the trial testimony on which the district court relied, the plaintiffs' witness stated that in her experience 95% of married women notify their husbands. App. at 701. Second, the overwhelming majority of abortions are sought by unmarried women.[3] Thus, it is immediately apparent that Section 3209 cannot affect more than about 5% of married women seeking abortions or an even smaller percentage of all women desiring abortions.

The plaintiffs failed to show even roughly how many of the women in this small group would actually be adversely affected by Section 3209. As previously noted, Section 3209 contains four significant exceptions. These exceptions apply if a woman certifies that she has not notified her husband because she believes[4] that (1) he is not the father of the child, (2) he cannot be found after diligent effort, (3) the pregnancy is the result of a

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3. Since 1973, abortions on unmarried women have consistently exceeded 70% of the national total and at times have surpassed 80%. *United States Department of Commerce, Statistical Abstract of the United States 1990* at 71.

4. The form prepared by the Pennsylvania Department of Health for use in implementing Section 3209 requires a woman to certify that she has not notified her husband "for the following reason(s). . . ." (744 F.Supp. at 1359). Moreover, a false statement is punishable (as a third degree misdemeanor) only if the woman did not "believe [the statement] to be true" (18 Pa. Cons. Stat. Ann. § 4904(b) (1983)).

spousal sexual assault that has been reported to the authorities, or (4) she has reason to believe that notification is likely to result in the infliction of bodily injury upon her. If Section 3209 were allowed to take effect, it seems safe to assume that *some* percentage of the married women seeking abortions without notifying their husbands would qualify for and invoke these exceptions. The record, however, is devoid of evidence showing how many women could or could not invoke an exception.

Of the potentially affected women who could not invoke an exception, it seems safe to assume that *some* percentage, despite an initial inclination not to tell their husbands, would notify their husbands without suffering substantial ill effects. Again, however, the record lacks evidence showing how many women would or would not fall into this category. Thus, the plaintiffs did not even roughly substantiate how many women might be inhibited from obtaining an abortion or otherwise harmed by Section 3209.[5] At best, the record shows that

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5. In considering whether Section 3209 would impose an undue burden, I do *not* take into account a fact that seems glaringly apparent, i.e., that Section 3209 would be difficult to enforce and easy to evade. Section 3209 does not require a woman to provide any proof of notification other than her own unnotarized statement. Thus, if a woman claimed that she had orally notified her husband in private (the mode and place of notification to be expected in most cases), it would be exceedingly difficult in most cases for the Commonwealth to prove beyond a reasonable doubt that she had not done so.

Proving that a woman violated the law due to a false statement concerning one of the exceptions would also be hard. As noted (*see* footnote 4, *supra*), the Commonwealth would have to prove that the woman did not "believe [the

Section 3209 would inhibit abortions "'to some degree'" or that "some women [would] be less likely to choose to have an abortion by virtue of the presence" of Section 3209. *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting), quoting *Akron*, 462 U.S. at 464 (O'Connor, J., dissenting).[6] And

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statement] to be true" (18 Pa. Cons. Stat. Ann. § 4904(b) (1983)). Consequently, if a woman certified that she did not notify her husband because he was not the father, the Commonwealth would have to prove that she subjectively believed that the husband was the father. Or, if a woman certified that she did not notify her husband because she had reason to believe that this would lead to the infliction of bodily injury upon her, the Commonwealth would have to prove that the woman subjectively believed that she would not be harmed. It seems likely, therefore, that Section 3209, if allowed to take effect, would be widely evaded and infrequently enforced and would consequently be less likely to produce either the good or bad effects that the opposing parties claim.

6. The plaintiffs' proof may be separated into five categories. First, they offered testimony that a spousal notification requirement would sometimes delay an abortion or necessitate an extra trip to the abortion provider (*see* 744 F.Supp. at 1360). But as the majority properly concludes in rejecting identical objections to the 24-hour waiting period required by Section 3205(a) (see majority typescript at 52-55), these potential effects do not amount to an undue burden. *See Akron*, 462 U.S. at 472-74 (O'Connor, J., dissenting).

Second, the plaintiffs offered testimony that the exceptions in Section 3209 would not cover a case in which a woman did not want to notify her husband for fear that he would retaliate in some way other than the infliction of bodily injury upon her, such as by subjecting her to psychological abuse or abusing their children (*see* 744 F.Supp. at 1360-62). The plaintiffs, however, do not appear to have offered any evidence showing how many (or indeed that *any* actual women) would be affected by this asserted imperfection in the statute.

even with respect to these women, the plaintiffs did not show that the impact of Section 3209 would be any greater or any different from the impact of the notice requirement upheld in *Matheson*. Consequently, the plaintiffs failed to prove that Section 3209 would impose an undue burden.

Third, the plaintiffs introduced general evidence about the problem of spouse abuse (*see* 744 F.Supp. at 1361). They offered widely varying statistics concerning the dimensions of the problem, as well as evidence that battering occurs in all socioeconomic groups and is sometimes fatal. This proof, while documenting the existence of a broad national problem, provides no basis for any estimate of what is relevant here – the impact of Section 3209.

Fourth, the plaintiffs offered evidence that "mere notification of pregnancy is frequently a flashpoint for battering" (*see* 744 F.Supp. at 1361). This proof indicates *when* violence is likely to occur in an abusive marriage but provides no basis for determining how many women would be adversely affected by Section 3209.

Finally, the plaintiffs offered the opinion of one of their witnesses that most battered women would be psychologically incapable of taking advantage of Section 3209's fourth exception, i.e., the exception for cases in which the woman has reason to fear that notification will lead to the infliction of bodily harm upon her (*see* 744 F.Supp. at 1363). However, the plaintiffs failed to show how many of the women potentially affected by Section 3209 (married women seeking abortions without notifying their husbands) are victims of battering. Thus, the opinion offered by their expert, even if taken at face value, merely describes the likely behavior of most of the women in a group of unknown size. Clearly, then, this evidence does not show how many women would be inhibited or otherwise harmed by Section 3209. I cannot believe that a state statute may be held facially unconstitutional simply because one expert testifies that in her opinion the provision would harm a completely unknown number of women.

Needless to say, the plight of any women, no matter how few, who may suffer physical abuse or other harm as a result of this provision is a matter of grave concern. It is apparent that the Pennsylvania legislature considered this problem and attempted to prevent Section 3209 from causing adverse effects by adopting the four exceptions noted above. Whether the legislature's approach represents sound public policy is not a question for us to decide. Our task here is simply to decide whether Section 3209 meets constitutional standards. The first step in this analysis is to determine whether Section 3209 has been shown to create an undue burden under Supreme Court precedent, and for the reasons just explained it seems clear that an undue burden has not been established.

B. This conclusion is not undermined (and may indeed be supported) by the portion of Justice O'Connor's opinion in *Hodgson* regarding the constitutionality of the two-parent notice requirement without judicial bypass. The majority in this case interprets Justice O'Connor's opinion to mean that this requirement imposed an undue burden and did not serve a "compelling" interest. Majority typescript 26, 28. I interpret Justice O'Connor's opinion differently. I do not read her opinion to mean that the two-parent notice requirement without judicial bypass constituted an undue burden. Rather, I interpret her opinion to mean that this requirement was unconstitutional because it was not reasonably related to a legitimate state interest. Thus, I do not believe that her opinion (or the Court's holding) supports the majority's conclusion in the present case that the spousal notification requirement in Section 3209 imposes an undue burden.

In *Hodgson*, Justice Stevens wrote the lead opinion discussing the unconstitutionality of the two-parent notification requirement without judicial bypass, and Justice O'Connor joined most of Justice Stevens' opinion (*see* 110 S. Ct. at 2949 (O'Connor, J., concurring). Thus, in interpreting Justice O'Connor's position, it is helpful to begin with the relevant portions of Justice Stevens' opinion.

Two portions of Justice Stevens' opinion, Parts III and VII, are most important for present purposes. In Part III, Justice Stevens discussed the applicable constitutional standard. Nowhere in this portion of his opinion (or indeed in any portion of his opinion) did Justice Stevens make reference to "strict," "exacting," or "heightened" scrutiny or any of the terminology associated with that level of review. Instead, he concluded that the statute failed to satisfy even the least demanding standard of review. He wrote (110 S. Ct. at 2937): "Under any analysis, the . . . statute cannot be sustained if the obstacles it imposes are not reasonably related to legitimate state interests."

In Part VII of his opinion, Justice Stevens explained (*id.* at 2945) why the two-parent notice requirement did not "reasonably further any legitimate state interest." Thus it seems clear that Justice Stevens' opinion concluded that the two-parent notice requirement without judicial bypass was unconstitutional because it failed some variant of the rational relationship test.

In my view, Justice O'Connor's opinion in *Hodgson* did not subject this requirement to a more exacting level of scrutiny. Although Justice O'Connor did not join Part III of Justice Stevens' opinion (in which he discussed the general constitutional standard that he applied), Justice

O'Connor wrote as follows (110 S. Ct. at 2949-50 (emphasis added)):

> It has been my understanding in this area that "[i]f the particular regulation does not 'unduly burde[n]' the fundamental right, . . . then our evaluation of that regulation is limited to our determination that the regulation rationally relates to a legitimate state purpose." . . . . *It is with that understanding that I agree with Justice Stevens' statement "that the statute cannot be sustained if the obstacles it imposes are not reasonably related to legitimate state interests."*

I interpret this to mean that Justice O'Connor agreed with Justice Stevens that the challenged statute should be judged under the rational relationship test. I do not think that she would have expressed general agreement with Justice Stevens' statement of the governing legal standard if she believed that the statute imposed an undue burden and was thus required to satisfy an entirely different legal standard. I also do not think that she would have concluded that the statute created an undue burden without explaining the basis for that conclusion. Moreover, Justice O'Connor joined Part VII of Justice Stevens' opinion, in which, as previously noted, Justice Stevens concluded that the two-parent notice requirement without judicial bypass was not "reasonably" related to any "legitimate interest." I do not think that Justice O'Connor would have joined this portion of Justice Stevens' opinion if her position regarding the constitutionality of the provision was based on a fundamentally different analysis. Thus, I conclude that Justice O'Connor found the two-parent notice statute unconstitutional under the rational relationship

test. This must mean either (a) that she did not believe that this requirement constituted an undue burden or (b) that she did not find it necessary to reach that question because she believed that the requirement could not even pass the rational relationship test. In either event, her position in no way undermines my conclusion that Section 3209 has not been shown to create an undue burden.[7]

III.

Since Section 3209 has not been proven to impose an undue burden, it must serve a "legitimate" (but not necessarily a "compelling") state interest. The majority acknowledges that this provision serves a "legitimate" interest, namely, the state's interest in furthering the husband's interest in the fetus. *See* majority typescript at 74, 77. I agree with this conclusion, and I do not think that this point requires extended discussion.

The Supreme Court has held that a man has a fundamental interest in preserving his ability to father a child. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). The Court's opinions also seem to establish that a husband who is willing to

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7. In the portion of her opinion concluding that the two-parent notification requirement with judicial bypass was constitutional, Justice O'Connor wrote (110 S.Ct. at 2950 (emphasis added)): "In a series of cases, this Court has explicitly approved judicial bypass as a means of tailoring a parental *consent* provision so as to avoid unduly burdening the minor's limited right to obtain an abortion." I interpret this statement to mean that a judicial bypass option prevents a consent requirement (which would otherwise amount to an absolute veto) from creating an undue burden. This statement is therefore fully consistent with my view that Justice O'Connor did not find that an undue burden was created by the two-parent *notice* requirement without judicial bypass.

participate in raising a child has a fundamental interest in the child's welfare. *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1969); *Stanley v. Illinois*, 405 U.S. 645 (1972). It follows that a husband has a "legitimate" interest in the welfare of a fetus he has conceived with his wife.

To be sure, the Supreme Court held in *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 67-72 (1976), that a potential father may not be given the legal authority to veto an abortion, and thus the Court apparently held that the potential father's interest was not "compelling." But the Court did not question the *legitimacy* of this interest. On the contrary, the Court wrote (*id.* at 69 (emphasis added)): "We are not unaware of the *deep and proper* concern and *interest* that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying." *See also id.* at 93 (White, J., dissenting) ("A father's interest in having a child — perhaps his only child — may be unmatched by any other interest in his life"). Since a "deep and proper . . . interest" appears indistinguishable from a "legitimate" interest, it seems clear that a husband has a "legitimate" interest in the fate of the fetus.

This interest may be legitimately furthered by state legislation. "[S]tatutory regulation of domestic relations [is] an area that has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). *See also Moore v. East Cleveland*, 431 U.S. 494, 499 (1977); *Scheinberg v. Smith*, 659 F.2d 476, 483-94 (5th Cir. 1981). Accordingly, Pennsylvania has a legitimate interest in furthering the husband's

interest in the fate of the fetus, as the majority in this case acknowledges.

IV.

The remaining question is whether Section 3209 is "rationally" or "reasonably" related to this interest. Under the rational relationship test, which developed in equal protection cases, "legislation carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality." *Hodel v. Indiana*, 452 U.S. 314, 331-32 (1981). This test does not permit the invalidation of legislation simply because it is "deemed unwise or unartfully drawn." *U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166, 175 (1981). Legislation does not violate this test simply because it produces some adverse effects. *Id.*; *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61-78 (1911). As the Court wrote in *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970):

> "The problems of government are practical ones and may justify, if they do not require, rough accommodations — illogical, it may be, and unscientific." *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 68-70. . . .
>
> . . . [The rational-basis standard] is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy.

See also Dallas v. Stanglin, 490 U.S. 19, 25-27 (1989); *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439-40 (1985). Rather, "those challenging the legislative judgment must convince the Court that the legislative facts on which the classification

is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. 93, 111 (1979). *See also Hancock Industries v. Schaeffer*, 811 F.2d 225, 238 (3d Cir. 1987).

Even assuming that the rational relationship test is more demanding in the present context than in most equal protection cases, that test is satisfied here. The Pennsylvania legislature could have rationally believed that some married women are initially inclined to obtain an abortion without their husbands' knowledge because of perceived problems – such as economic constraints, future plans, or the husbands' previously expressed opposition – that may be obviated by discussion prior to the abortion. In addition, the legislature could have reasonably concluded that Section 3209 would lead to such discussion and thereby properly further a husband's interests in the fetus in a sufficient percentage of the affected cases to justify enactment of this measure. Although the plaintiffs and supporting amici argue that Section 3209 will do little if any good and will produce appreciable adverse effects, the Pennsylvania legislature presumably decided that the law on balance would be beneficial. We have no authority to overrule that legislative judgment even if we deem it "unwise" or worse. *U.S. Railroad Retirement Board v. Fritz*, 449 U.S. at 175. "We should not forget that 'legislatures are ultimate guardians of the liberty and welfare of the people in quite as great a degree as the courts.'" *Akron v. Akron Center For Reproductive Health*, 462 U.S. at 465 (O'Connor, J., dissenting), *quoting Missouri, K. & T. R. Co. v. May*, 194 U.S. 267, 270 (1904). Clearly, the plaintiffs have not shown that "the legislative facts on which [the statute] is

apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. at 11. Thus, Section 3209 is rationally related to a legitimate state interest and may not be invalidated under the Supreme Court's abortion precedents.[8]

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8. The plaintiffs argue that the district court's decision may be affirmed on alternative constitutional grounds not adopted by that court, *i.e.*, that Section 3209 violates the rights to marital and informational privacy and equal protection. Because the majority has relied solely on the abortion right in affirming the district court, I do not address these alternative grounds.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, REPRODUCTIVE HEALTH AND ACTION COUNSELLING CENTER, WOMEN'S HEALTH SERVICES, INC., WOMEN'S SUBURBAN CLINIC, ALLENTOWN WOMEN'S CENTER, and THOMAS ALLEN, M.D., on behalf of himself and all others similarly situated,	:	CIVIL ACTION NO. 88-3228
Plaintiffs,	:	
v.	:	
ROBERT P. CASEY, N. MARK RICHARDS, ERNEST PREATE, personally and in their official capacities, and MICHAEL D. MARINO, personally and in his official capacity together with all others similarly situated,	:	
Defendants.	:	

OPINION

HUYETT, J. August 24, 1990

INTRODUCTION

This court is required to address again the difficult and controversial issue of the permissible degree of governmental regulation of a woman's abortion decision. In this action for declaratory and injunctive relief, plaintiffs challenge the 1988 and 1989 amendments to Pennsylvania's Abortion Control Act of 1982 ("the Act"), Act of March 25, 1988, 1988 Pa. Laws 262, No. 31, §§ 3-10 ("Act 31") and Act of November 17, 1989, 1989 Pa. Laws 592, No. 64, §§ 1-9 ("Act 64"), amending 18 Pa. Cons. Stat. Ann. §§ 3201-20 (Purdon 1983 and 1990 Supp.).[1] Plaintiffs assert that Act 31 and Act 64 violate the United States Constitution

1. Hereinafter, all citations to 18 Pa. Con. Stat. Ann. §§ 3201-20 refer to the amended Act, unless otherwise specified.

and 42 U.S.C. § 1983 (1981). I have subject matter jurisdiction over this controversy pursuant to 28 U.S.C. § 1331 (1966 and 1990 Supp.), 28 U.S.C. § 1343(a)(3),(4) (1976 and 1990 Supp.), and the fourteenth amendment to the United States Constitution.

Just three days prior to the scheduled effective date of Act 31, following a hearing, I granted plaintiffs' motion for a temporary restraining order and enjoined defendants from: (1) enforcing the provisions of section 3206[2] and

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2. Section 3206 of Act 31 required minor women seeking abortions in Pennsylvania to obtain informed parental consent therefor, or, in the alternative, to apply to the Court of Common Pleas of Pennsylvania for judicial authorization for an abortion. I concluded as follows:

> the evidence presented in numerous affidavits attached to the motion (continued...)

publicly disclosing or otherwise making available for public inspection and copying any report filed pursuant to

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2. (...continued)

> in affidavits presented at the hearing held on [April 21, 1988] establishes that the courts of common pleas of many counties in Pennsylvania have taken no steps to ensure that the provisions of Section 3206 are properly implemented. Specifically, as of this time there are no procedures in place in the courts of common pleas to ensure expedition of the proceedings or to ensure confidentiality. There is also substantial evidence in the record that no steps have been taken to ensure that individuals are available to provide legal representation for minors or to act as guardians ad litem. More importantly, it appears that key personnel in many of the courts of common pleas are unaware of the requirements of the statute. The Commonwealth failed to present any evidence which suggests that this situation will change before April 24, 1988.

See Temporary Restraining Order at ¶ 3 (April 21, 1988).

sections 3207(b) or 3214(f).[3] An evidentiary hearing and oral argument on plaintiffs' motion for a preliminary injunction was held on May 9, 1988. With the consent of the parties, I ordered that the earlier temporary restraining order would remain in effect until such time as I ruled on the motion for a preliminary injunction following the hearing. See Order (May 9, 1988). Two weeks later, on May 23, 1988, I preliminarily enjoined various portions of the Act.[4] Planned Parenthood

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3. Sections 3207(b) and 3214(f) of Act 31 required the public disclosure of certain reports, if the facility filing the report received state appropriated funds within the preceding twelve month period.

4. The various portions of the Act enjoined by my May 23, 1988 decision will be discussed below in the context of the sections of the Act at issue in this case.

of Southeastern Pennsylvania v. Casey, 686 F. Supp. 1089 (E.D. Pa. 1988). ("Casey I"). Defendants did not appeal this decision.

Thereafter, I stayed all proceedings pending issuance of the decision of the United States Supreme Court in Webster v. Reproductive Health Services.[5] At about the time of the Supreme Court's decision in Webster, the Pennsylvania legislature began debating various amendments to the Act. Several months later, on November 17, 1989, Act 64 was adopted to become effective in sixty days. With the consent of the defendants and leave of the court, plaintiffs filed an amended complaint to extend the scope of their challenge against the Act to include the 1989

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5. _____ U.S. _____, 109 S.Ct. 3040, 106 L.Ed. 2d 410 (1989).

amendments. After a conference held in chambers, I extended, over the objection of defendants, the preliminary injunction order to encompass the 1989 amendments to the Act. See Planned Parenthood of Southeastern Pennsylvania v. Casey, 736 F.Supp. 633 (E.D. Pa. 1990) ("Casey II").

The trial of this action on the merits was held during the week of July 30, 1990. The parties have entered into a comprehensive stipulation of uncontested facts and a supplemental stipulation of uncontested facts for the purposes of trial.[6] Based upon the stipulation of uncontested facts and the supplemental stipulation of uncontested

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6. These documents have been admitted into evidence and marked as Court's Exhibit 1 and the Court's Exhibit 1-A for ease of reference. All subsequent references to either document shall be by exhibit number and the relevant paragraph number.

facts, the evidence presented at trial, and the evidence presented at the hearing on plaintiffs' motion for a preliminary injunction which the parties have agreed would be admissible at the trial on the merits,[7] I make the following findings of fact and

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7. Specifically, I refer to the testimony and verifications of Sue Roselle, Sylvia Stengle, and Cathy Dratman, M.D. I note that defendants object to the admissibility of the verifications of these witnesses. However, these witnesses testified at the preliminary injunction hearing and were subject to cross-examination at that time. Therefore, defendants had ample opportunity to examine these witnesses concerning the contents of the verifications, as well as to object to the contents of the verifications. Further, Ms. Stengle and Ms. Roselle were included on defendants' witness list, see Defendants' Pretrial Brief at 4, and defendants could have called them to challenge their earlier testimony and verifications. Finally, Ms. Roselle testified at trial for plaintiffs and was subject to extensive cross-examination at that time. For these reasons, I overruled defendants' objection at the time of trial. See Pretrial Conference Transcript at 28-30.

conclusions of law. However, because in many ways the Pennsylvania legislature has come full circle by re-enacting many provisions of the Act which were deemed unconstitutional at various stages during the 1982 action involving the 1982 Act, I shall first summarize the lengthy history of abortion legislation in Pennsylvania.

I.

HISTORY OF ABORTION REGULATION IN PENNSYLVANIA[8]

In its landmark decision in Roe v. Wade, 410 U.S. 113, 93 S.Ct.

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8. For a more detailed discussion of this historical material, see Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 751-54, 106 S.Ct. 2169, 2173-75, 90 L. Ed. 2d 779 (1986) ("Thornburgh") and American College of Obstetricians and Gynecologists, Pennsylvania Section v. Thornburgh, 737 F.2d 283, 287-90 (3d Cir. 1984) ("American College II").

705, 35 L.Ed. 2d 147 (1973), the Supreme Court invalidated statutes, like Pennsylvania's,[9] containing general prohibitions against abortions, because such statutes unconstitutionally violated a woman's fundamental right to privacy. See also Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed. 2d 201 (1973). In the year following Roe v. Wade, over the Governor's veto, the state legislature enacted Pennsylvania's first comprehensive "Abortion Control Act." See Abortion Control Act of 1974, 1974 Pa. Laws 639, No. 209 (amended 1978, repealed 1982). After

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9. Prior to Roe v. Wade, the relevant law in Pennsylvania provided that any person who "unlawfully" caused a woman's miscarriage committed a felony punishable by fine or imprisonment. See Penal Code of 1939, 1939 Pa. Laws 872, 958, No. 375, § 718, saved from repeal, Crimes Code of 1972, 1972 Pa. Laws 1482, 1611, No. 334, § 5 (repealed 1974). See American College II, 737 F.2d at 287 n.1.

extensive and substantial litigation, various provisions of the 1974 Act, including sections relating to spousal and parental consent to abortion procedures, to the proscription of advertising for abortion procedures, to the choice of post-viability abortion procedures, and to the criminal standard governing the performance of abortions at viability, were struck down. See Planned Parenthood Ass'n v. Fitzpatrick, 401 F. Supp. 554 (E.D. Pa. 1975) (three judge panel), aff'd mem. in part sub nom., Franklin v. Fitzpatrick, and vacated and remanded mem. in part sub nom., Beal v. Franklin, 428 U.S. 901, 96 S.Ct. 3202, 49 L.Ed. 2d 1205 (1976), modified on remand, Civil Action No. 74-2440 (E.D. Pa. Sept. 16, 1977) (unreported), aff'd sub nom., Colautti v. Franklin, 439 U.S. 379, 99 S.Ct. 675,

58 L.Ed. 2d 596 (1979).[10] See also Doe v. Zimmerman 405 F. Supp. 534 (M.D. Pa. 1975) (three judge panel).

In 1978, the legislature attempted to restrict a woman's access to abortions by limiting medical assistance funding for the procedure. See Act of September 26, 1978, 1978 Pa. Laws 773, No. 148, §§ 1-2. A successful challenge was mounted against this effort. Roe v. Casey, 464 F. Supp. 487 (E.D. Pa. 1978), aff'd, 623 F.2d 829 (3d Cir. 1980).

Thereafter, a bill based on a model developed by Americans United For Life, a non-profit organization, was introduced by the House as an amendment to a Senate bill regulating "tough guy"

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10. For a summary of the history of the cases involving the Abortion Control Act of 1974, see Colautti v. Franklin, 439 U.S. at 384-86, 99 S.Ct. at 679-80.

competitions. See Note, Toward Constitutional Abortion Control Legislation: The Pennsylvania Approach. 87 Dick. L. Rev. 373, 382 n.84 (1983). Despite being rejected by the relevant legislative committee, the bill was passed overwhelmingly. The Senate, after brief discussion, concurred with the House amendment. While acknowledging his personal opposition to abortion, Dick Thornburgh, then Governor of Pennsylvania, vetoed the bill and explained his action as follows:

> I am concerned that [some] provisions, and to some extent, the overall tone and tenor of the bill, would have the effect of imposing an undue, and, in some cases, unconstitutional burden upon even informed, mature adults intent upon obtaining an abortion under circumstances in which the U.S. Supreme Court has determined they are entitled to do so. . . .

> Likewise, I am concerned that some of the detailed, complex and burdensome requirements of the bill, accompanied as they are by severe criminal penalties, could well foster an atmosphere in which many physicians would be deterred from providing the kind of abortion-related medical services to which the U.S. Supreme Court has held their patients are constitutionally entitled. This could well disrupt the traditional doctor-patient relationship and impinge upon the right of physicians to practice. Of even greater concern is the potential for more experienced and conscientious physicians to refrain from involvement in even medically necessary abortions, and to abandon the field to marginal practitioners. It could even lead to a resurgence of "back alley" abortions, which no thoughtful person would wish to happen. . . .
>
> I am also concerned that in its entirety the bill in its current form goes further than is necessary in protecting the state interests in this area . . . . In so doing, it threatens to create additional regulation and bureaucracy and to unduly involve government in the private lives of its citizens.

See Veto Message to the Senate at 7 (December 23, 1981) [Plaintiffs' Exhibit

60]. After revision and introduction on the floor of the House as an amendment to a bill relating to paramilitary training, the Abortion Control Act of 1982 was passed by both the House and Senate. Signed by Governor Thornburgh on June 11, 1982, the Act was to take effect within 180 days, on December 8, 1982, from its enactment.

The Abortion Control Act of 1982 imposed detailed regulations on abortions which required that: (1) a pregnant woman wait a mandatory 24 hours prior to undergoing an abortion procedure after giving her consent to the procedure; (2) a physician personally provide certain specified information to a woman seeking an abortion as a part of the informed consent process; (3) unemancipated minors obtain parental or judicial

consent for an abortion procedure; and (4) all second trimester abortions be performed in a hospital. The 1982 Act also strictly limited post-viability abortions; dictated the use of specific procedures and, in some cases, the presence of a second physician to save the aborted fetus; imposed detailed reporting regulations; required fetal pathology reports; restricted the availability of public funds for the performance of abortions; and regulated private insurance coverage for the performance of abortions. Further, the 1982 Act subjected physicians and clinics violating the Act to criminal prosecution, as well as civil tort liability and revocation or suspension of licensure.

Before the Act took effect, the American College of Obstetricians and

Gynecologists ("ACOG"), Pennsylvania Section, various abortion clinics and physicians, among others, filed suit in this court alleging that the 1982 Act was unconstitutional in its entirety and immediately filed a motion for a preliminary injunction. See American College of Obstetricians and Gynecologists, Pennsylvania Section, et al. v. Thornburgh, et al., Civil Action No. 82-4336. Based upon what the Third Circuit later described as "an unusually complete factual and legal presentation from which to address the important constitutional issues at stake," see American College II, 737 F.2d at 290, I concluded that the 1982 Act as a whole was constitutional with the exception of the 24-hour waiting period contained in section 3205. American College of Obstetricians and Gynecologists,

Pennsylvania Section v. Thornburgh, 552 F. Supp. 791 (E.D. Pa. 1982) ("American College I").

Plaintiffs immediately filed a notice of appeal, and the Commonwealth filed a cross-appeal challenging my ruling on the 24-hour waiting period provision. The Third Circuit, on December 9, 1982, granted the plaintiffs' motion for stay of enforcement of the entire Act pending appeal. After expedited briefing and argument, the Third Circuit withheld opinion pending three decisions of the Supreme Court which were under submission.[11] After consideration of

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11. City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed. 2d 687 (1983) ("Akron"); Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476, 103 S.Ct. 2517, 76 L.Ed. 2d 733 (1983) ("Ashcroft"); Simopoulos v. Virginia, 462 U.S. 506, 103 S.Ct. 2532, 76 L.Ed. 2d 755 (1983).

supplemental briefs and reargument, the Third Circuit ruled that various sections of the 1982 Act were unconstitutional, including the detailed reporting provisions imposed upon physicians, the requirement of discriminatory insurance, the compulsory "informed consent" information which must be given to a pregnant woman seeking an abortion, and the sections attempting to control the method of abortion and mandate the attendance of a second physician under certain circumstances. American College II, 737 F.2d at 283. Further, in light of the decisions in Akron and Ashcroft, the Commonwealth conceded, and the Third Circuit agreed, that the 24-hour waiting period, the physician-only disclosure requirements, and the proscription against second trimester abortions unless performed in a hospital were

unconstitutional. Id. at 293. The Supreme Court subsequently affirmed by a five to four vote. Thornburgh, 476 U.S. at 747, 106 S.Ct. at 2169.[12]

Thereafter, Pennsylvania's legislature adopted the 1988 and 1989 amendments to the Act. These amendments include many provisions similar, if not identical, to the provisions of the 1982

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12. Subsequent to the Third Circuit's decision, I enjoined, upon motion of the plaintiffs, the enforcement of the public disclosure provisions of the 1982 Act. American College of Obstetricians and Gynecologists, Pennsylvania Section v. Thornburgh, 613 F. Supp. 656 (E.D. Pa. 1985) ("American College III"). The Supreme Court declined to reach this issue. Thornburgh, 476 U.S. at 758 n.9, 106 S.Ct. at 2177 n.9. Further, after the Supreme Court's decision in Thornburgh, I continued the preliminary injunction as it applied to the rules promulgated by the Pennsylvania Supreme Court governing the judicial by-pass procedure for minors seeking an abortion. See American College of Obstetricians and Gynecologists, Pennsylvania Section v. Thornburgh, 656 F. Supp. 879 (E.D. Pa. 1987) ("American College IV").

version of the Act struck down by this court, the Third Circuit, and the United States Supreme Court, as well as other provisions to which plaintiffs object. These include a mandatory 24-hour waiting period for all women seeking to have an abortion; a parental informed consent/judicial by-pass procedure for minor women seeking to terminate their pregnancy; spousal notification provisions; physician-only disclosure requirements; and various reporting and disclosure requirements.[13]

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13. Prior to the enactment of the 1988 amendments, Governor Casey vetoed an earlier version of the 1988 amendments, but identified a need for the "strongest possible measure [of] controlling abortion consistent with the Constitution and [his] oath to it." See Veto Message to the House at 2 (December 17, 1987) [Plaintiffs' Exhibit 62]. In so doing, Governor Casey, "opposed to abortion on every moral ground," recognized the invalidity of physician-only counseling requirements (continued...)

II.

FINDINGS OF FACT

A. The Parties and Witnesses.

1. Plaintiff Thomas Allen testified as an expert at trial in the field of obstetrics and gynecology. He is qualified to testify as an expert in this field, and I found his testimony to be credible in all respects. Dr. Allen is a physician licensed to practice

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13. (...continued)
and further stated:

> Other rulings by the [Supreme] Court have declared that a state may not compel disclosure of information protected by an individual's right of privacy to any third-party; that a state lacks a legally justifiable interest in simply knowing the identity of a woman seeking an abortion; and that a state cannot intervene in a marital relationship to dictate the relationships between husband and wife. In striking down spousal consent requirements, the Court has held that a state cannot delegate to any third-party -- even a husband -- the power that the state cannot exercise itself.

Id. at 5 (emphasis supplied).

medicine in Pennsylvania and is an Associate Clinical Professor in the Department of Obstetrics and Gynecology at the University of Pittsburgh. He graduated from the University of Pittsburgh School of Medicine in 1943. He is an emeritus staff member of Magee Women's Hospital, and is Medical Director of Women's Health Services, Inc. He has been a Diplomate of the American College of Obstetrics and Gynecology since 1954, has been a Fellow of the American College of Obstetrics and Gynecology since 1955, and a Fellow of the Pittsburgh Obstetrical and Gynecological Society since 1974. From 1972 to the present, Dr. Allen has been active in planning, establishing and administering Women's Health Services, Pittsburgh's first free standing

abortion clinic. From 1970 to 1979, he was active in establishing and contributing services to the Pittsburgh Free Clinic. Dr. Allen has a private obstetrical and gynecological practice with one other specialist. [Court's Exhibit 1 at ¶ 1; Plaintiffs' Exhibit 81; Trial Testimony of Dr. Allen, Vol. I at 35-39].

2. Plaintiff Planned Parenthood of Southeastern Pennsylvania ("PPSP") is a non-profit corporation providing comprehensive family planning, medical and counseling services (including birth control education), pregnancy testing and counseling, gynecological care, first trimester abortions, and vasectomies at medical clinics in Philadelphia, Montgomery and Delaware Counties. The Center City Philadelphia

clinic offers these services Monday through Friday. Abortions are performed on Wednesdays, Thursdays, Fridays and Saturdays at PPSP's Center City Philadelphia Clinic. [Court's Exhibit 1 at ¶2].

3. Plaintiff Reproductive Health and Counseling Center ("RHCC") is a for-profit corporation in Chester, Pennsylvania, which operates a clinic that performs first and early second trimester abortions. [Court's Exhibit 1 at ¶ 12].

4. Plaintiff Women's Health Services, Inc. ("WHS") in Pittsburgh, Pennsylvania, is a non-profit health center providing fertility control education, pregnancy counseling, general counseling for individuals and couples, PMS counseling and treatment, contraceptive and gynecological care,

public education, and first and early second trimester abortions. [Court's Exhibit 1 at ¶ 25].

5. Plaintiff Women's Suburban Clinic ("WSC") is a non-profit corporation in Paoli, Pennsylvania, which operates a health care facility providing abortions, ongoing gyneco-logical services, mini-laparoscopies, pregnancy testing, community education, and other counseling services. [Court's Exhibit 1 at ¶ 42].

6. Plaintiff Allentown Women's Center ("AWC") is a for-profit corporation in Allentown, Pennsylvania, which operates a clinic providing pregnancy testing and counseling, contraceptive and gynecological care, and first trimester abortions. [Court's Exhibit 1 at ¶55].

7. Defendant Robert P. Casey is the

Governor of the Commonwealth of Pennsylvania. [Plaintiffs' Amended Complaint and Defendants' Answer to Amended Complaint at ¶13].

8. Defendant N. Mark Richards, M.D., is the Secretary of Health of the Commonwealth of Pennsylvania. [Plaintiffs' Amended Complaint and Defendants' Answer to Amended Complaint at ¶14].

9. Defendant Ernest Preate, Jr., is the Attorney General of the Commonwealth of Pennsylvania. [Plaintiffs' Amended Complaint and Defendants' Answer to Amended Complaint at ¶15].

10. Defendant Michael D. Marino is the District Attorney for Montgomery County, Pennsylvania.[14] [Plaintiff's

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14 By stipulation filed on July 24, 1990, the parties have voluntarily dismissed defendant Marino from this action pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure.

Amended Complaint and Defendants' Answer to Amended Complaint at ¶ 16].

11. Sue Roselle testified at the hearing on plaintiffs' motion for a preliminary injunction and at trial. I found her testimony on both occasions to be credible in all respects. Ms. Roselle is the Executive Director of WHS. As Executive Director, she is responsible for the ongoing operation of the clinic and for staff selection, and she reports to the Board of Directors of WHS. She holds a master's degree in social work from the University of Illinois at Urbana, and a M.S.B.A. in management from Robert Morris College. She is Treasurer of the Pennsylvania Chapter of the National Association of Social Workers, a member of the Academy of Certified Social Workers, President

of Pennsylvanians for a Right to a Private Life, and serves on the Health Services Committee of the American Red Cross, Pittsburgh-Allegheny Chapter. She has over ten years' experience in health care administration, including medical services and home health care. She is a former director for emergency medical service systems for the 12 counties of southwestern Pennsylvania. [See Casey I, 686 F.Supp. at 1093 (¶ 11)].

12. Sylvia Stengle testified at the hearing on plaintiffs' motion for a preliminary injunction. I found her testimony to be credible in all respects. Ms. Stengle is the founder and Director of AWC. She is responsible for the ongoing operation of the clinic and hiring. She holds a bachelor's degree from the University of Wisconsin, and has taken graduate courses in

sociology and psychology. Prior to founding AWC in 1978, she was the Education Director for Planned Parenthood of Northampton County, Pennsylvania. She has been personally involved in counseling since 1973, and now supervises the AWC counseling staff. She serves on the Board of Directors of the national Abortion Rights Action League. [See Casey I, 686 F. Supp. at 1093-94 (¶ 12)].

13. Dr. Cathy Dratman testified at the hearing on plaintiffs' motion for a preliminary injunction. I found her testimony to be credible in all respects. Dr. Dratman is licensed to practice medicine in Pennsylvania and New Jersey. She is a graduate of Hahnemann Medical College, and completed her internship and residence at Pennsylvania Hospital in Philadelphia.

She is board certified by the American Board of Obstetrics and Gynecology. She has been Medical Director of PPSP since 1986, and has a private obstetrical and gynecological practice in New Jersey. She does not presently perform abortions, but in the past has performed and referred patients for first and second trimester abortions up to 20 weeks gestation. As Medical Director of PPSP, she maintains close contact with, and generally oversees, all abortion procedures performed at the clinic. [Casey I, 868 F. Supp. at 1094 (¶ 13)].

14. Dr. Steven J. Davidson testified at trial as an expect in the field of emergency medicine. He is qualified to testify as an expert in emergency medicine, and I found his testimony credible in all respects. Dr. Davidson is a physician licensed to

practice medicine in Pennsylvania and California. He is a Division Head of Pre-Hospital Care and Professor of Emergency Medicine at the Medical College of Pennsylvania where he teaches, both clinically and didactically, medical students, interns, residents and house staff. He received his bachelor's degree in chemistry with honors from Temple University in 1971 and graduated from Temple University Medical School in 1975. Dr. Davidson's internship and residency, in emergency medicine, took place in the Medical College of Pennsylvania. Subsequently, he was awarded a master's degree in business administration from the Wharton School of the University of Pennsylvania in 1989.

Dr. Davidson's hospital appointments include attending physician at the

hospital at the Medical College of Pennsylvania, associate in the Department of Emergency Medicine at the Mercy Catholic Medical Center, and he serves on the intensive care unit, attending staff and affiliate staff, at Jefferson Hospital. He presently sees patients in emergency rooms approximately 600 hours annually.[15] He has been a Fellow of the American College of Emergency Physicians since 1982, and has been a Diplomate of the American Board of Emergency Medicine since 1980. Finally, he is the author or co-author of numerous publications and has given numerous presentations on topics in the field of emergency

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15 A full-time clinical practice in emergency medicine is generally considered to encompass approximately 2,000 hours of practice a year. [Trial Testimony of Dr. Davidson, Vol. I at 12].

medicine. [Trial Testimony of Dr. Davidson, Vol. I at 10-14; Plaintiffs' Exhibit 77].

Dr. Michael Alan Grodin testified at trial as an expert in the field of medical ethics. He is qualified to testify as an expert in medical ethics, and I found his testimony credible in all respects. Dr. Grodin is a physician licensed to practice medicine in Massachusetts and New York. He received his bachelor's degree from Massachusetts Institute of Technology in 1973 and graduated from Albert Einstein College of Medicine in 1976. Dr. Grodin was an intern and junior resident in pediatrics at Harbor General Hospital in Torrance, California (UCLA), and completed his residency in pediatrics at Massachusetts General Hospital and Boston City Hospital (Harvard University). While at Boston City Hospital, he was Chief

Resident in Pediatrics. Subsequently, he completed a clinical fellowship in pediatric cardiology at Children's Hospital Medical Center in Boston.

Dr. Grodin is a pediatrician and a professor with over eleven years of experience in the field of medical ethics. He has taught courses and lectured within the Boston University Schools of Liberal Arts, Medicine, Law, Public Health, Social Work, and Theology over the past eleven years. He is presently Associate Director of the Law, Medicine and Ethics Program and Director of Medical Ethics at Boston University Schools of Medicine and Public Health, where he is also Associate Professor of Health Law, Pediatrics, and Socio-Medical Sciences and Community Medicine. In addition, he is Adjunct Associate Professor of Philosophy in the

college of Liberal Arts at Boston University.

Dr. Grodin is a Medical Ethicist and Human Studies Chairman for the Department of Health and Hospitals of the City of Boston, and serves on the Institutional Review Board and Ethics Advisory Group-Institutional Ethics Committee of Boston City Hospital. He is a staff pediatrician at Associated Pediatricians of Boston, an associate visiting pediatrician at Boston City Hospital, and a senior associate in pediatrics at Beth Israel Hospital in Boston. In addition, he serves on the boards of directors of the American Society of Law and Medicine, and Public Responsibility in Medicine and Research. He is a member of the National Committee on Bioethics of ACOG. Finally, he served as medical ethics reviewer for The New England

Journal of Medicine and Oxford University Press, authored or co-authored numerous publications in the areas of moral dilemmas in medicine and problematic decision-making in clinical medicine, and has delivered numerous presentations on various topics in the field of medical ethics. [Trial Testimony of Dr. Grodin at 91-96; Plaintiffs' Exhibit 78].

16. Dr. Ronald J. Bolognese testified at trial as an expert in the fields of obstetrics, gynecology and perinatal medicine. He is qualified to testify as an expert in these areas, and I found his testimony credible in all respects. Dr. Bolognese is a physician licensed to practice medicine in Pennsylvania and New Jersey. He received his bachelor's degree from Princeton University in 1959 and graduated from the University of

Pennsylvania School of Medicine in 1967. Dr. Bolognese completed his internship at Bryn Mawr Hospital and his residency in obstetrics and gynecology at Pennsylvania Hospital in Philadelphia.

Dr. Bolognese was the Chief of Obstetrics and Gynecology at Williams Air Force Base Hospital in Arizona from 1967 to 1969. He has specialty certifications from ACOG and the Maternal-Fetal Medicine Board, a division of ACOG.[16] He is the Director of the Section on Perinatology of the Department of Obstetrics and Gynecology at Pennsylvania Hospital. Since 1985, he has been the Chairman

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16. In 1974, ACOG established the subspecialty of perinatology, which is maternal fetal medicine or high risk obstetrics, for physicians with additional training and expertise in this area. Dr. Bolognese was one of the original fourteen physicians certified in this subspecialty. [Trial Testimony of Dr. Bolognese, Vol. I at 139-140].

of the Department of Obstetrics and Gynecology at Pennsylvania Hospital. He has been a Professor of Obstetrics and Gynecology at the University of Pennsylvania School of Medicine since 1982, after serving as a clinical assistant professor and associate professor of obstetrics and gynecology. Finally, he is the author or co-author of numerous publications and has delivered several presentations on topics in his fields of expertise. [Trial Testimony of Dr. Bolognese, Vol. I at 137-141; Plaintiffs' Exhibit 79].

17. Dr. Lenore E. A. Walker testified at trial as an expert in the field of family violence. She is qualified to testify as an expert in the area of family violence and the effects of battering on women, children and other members of their families and I found her testimony credible in all

respects. Dr. Walker is licensed to practice psychology in Colorado and New Jersey. She received her bachelor's degree in psychology from Hunter College of the City University of New York in 1962, her master's degree in clinical school psychology from City College of the City University of New York in 1967, and her doctorate degree from Rutgers University's School of Psychology in 1972.

Dr. Walker has more than twenty years of experience as a licensed clinical, forensic, and school psychologist. She is currently the president of Walker and Associates in Denver and the founder and Executive Director of the Domestic Violence Institute, a non-profit organization which conducts research in the area of family violence. Dr. Walker is a Fellow of and has served on the council of

Representatives of the American Psychological Association and as chair of its Women's Caucus. In 1987, she was the recipient of the Board of Professional Affairs Distinquished Professional Contributions to Psychology in the Public Interest Award, one of the American Psychological Associations highest honors. Dr. Walker is also an adjunct professor of psychology at the University of Denver. During her career she has been Chairperson of the Department of Psychology and Associate Professor of Psychology at Colorado's Women's College, an Assistant Professor of Psychiatry at Rutgers University's Medical School, and an Assistant Professor at Rutgers University's Graduate School of Applied and Professional Psychology.

Dr. Walker was one of the first scientists in the country to conduct

clinical research on intra-family violence and is one of the foremost experts on the psychology of battered women and families. From 1978 to 1981, she acted as the principal investigator for a National Institute for Mental Health funded study on the "battered women syndrome." She is the author or co-author of numerous publications, including The Battered Woman, her first book published in 1979 for which she received a Distinguished Media Award from the Association for Women in Psychology. She serves as an assistant editor for a number of major "referree" journals[17] in her field, has delivered several presentations on topics in her

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17. "Referee" journals are publications in which all articles are subjected to peer review to determine worthiness for publication prior to publication. [Trial Testimony of Dr. Walker, Vol. II at 8."

field, and consulted with governmental agencies and testified, in criminal and civil cases in thirty states and federal courts, as an expert on domestic violence and the battered women syndrome. [Trial Testimony of Dr. Walker, Vol. II at 3-9; Plaintiffs' Exhjibit 80].

18. Jean A. Dillon[18] testified at trial, and I found her testimony credible in all respects. She is a counselor for Women's Resource Center of Monroe County, Inc., a non-profit

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18. In an oral motion in limine, defendants objected to the testimony of Ms. Dillon on several grounds and sought to exclude her from testifying at trial. At the pretrial conference, I orally denied defendants' motion in limine. See Pretrial Conference Transcript at 5-16. Subsequently, I issued an order memorializing my denial of defendants' motion and explaining my reasons therefor. See Order (July 31, 1990). I incorporate herein by reference my ruling at the pretrial conference and in my July 31, 1990 order herein by reference.

organization that provides counseling services to battered women, victims of sexual abuse, and children in domestic violence situations. Women's Resource Center of Monroe County is a member organization of the Pennsylvania Coalition Against Domestic Violence which provides similar services to battered women and children. Ms. Dillon provides protection from abuse accompaniment for battered women and children to courthouses, shelters women in need of a safe house, and spends many hours working on a crisis intervention hotline annually. Also, she is a former victim of spousal abuse. [Trial Testimony of Ms. Dillon, Vol. III at 143-165].

19. Dr. Vincent M. Rue testified at trial as an expert in the areas of problem pregnancy decision-making,

marital family relationships, and psychological effects following an abortion. Dr. Rue received a bachelor's degree in sociology from St. John's University, a master's degree in clinical social work from St. Louis University, and doctorate degree in family relations from the University of North Carolina, School of Home Economics at Greensboro. He is co-founder and co-director of the Institute for Abortion Recovery and Research in New Hampshire, and Executive Director of Sir Thomas Moore Clinic in California. In addition, from 1975 to 1980, he was an Associate Professor of Family Relations at the School of Fine and Applied Arts of California State University at Los Angeles, and was an Adjunct Associate

Professor at the School of Professional Psychology at United States International University in San Diego.

Dr. Rue is a licensed marriage and family counselor in California, and a trained psychotherapist. He is not a psychologist and has never conducted a controlled research study. While Dr. Rue has produced various published works in his field, he has never had any of his work published in a referee journal. Because he is not a physician, Dr. Rue has never provided informed consent for an abortion or any other medical procedure. In addition, he has not conducted any research on the informed consent procedures utilized in abortion clinics in Pennsylvania. [Trial Testimony of Dr. Rue, Vol. II at 143-155; Defendants' Exhibit 62].

Dr. Rue submitted a study he co-authored with others, The

Psychological Aftermath of Abortion, to Surgeon General C. Everett Koop and the House of Representatives Committee on Government Operations as part of a federal investigation of the medical and psychological effects of abortion which purports to establish the existence of a psychological disorder denominated "post abortion syndrome." After submission for peer review by scientists with the Center for Disease Control, the National Center for Health Statistics and other scientific institutions, his study was found to have "no value" and to be "based upon a priori briefs rather than an objective review of the evidence." See The Federal Role in Determining the Medical and Psychological Impact of Abortion on Women, Committee on Government Operations, H.R. 101-392, 101st Cong. 1st Sess. (Dec. 11, 1989) at 12 [Plaintiffs' Exhibit 67 at 12].

The Board of Directors of the American Psychological Association, after review of all of the scientific literature, has determined that there are no scientific studies which support the existence of a "post abortion syndrome" as suggested by Dr. Rue. [Trial Testimony of Dr. Rue, Vol. II at 51].

Because Dr. Rue lacks the academic qualifications and scientific credentials possessed by plaintiffs' witnesses, I conclude that his testimony, which is based primarily, if not solely, upon his limited clinical experience, is not credible. His testimony is devoid of the analytical force and scientific rigor which typified the testimony of plaintiffs' expert psychologist, Dr. Walker. Moreover, his admitted personal opposition to abortion, even in cases of rape and incest, suggests a possible

personal bias. Finally, his testimony concerning informed consent is suspect in light of his lack of direct involvement in obtaining informed consent for any medical treatment or procedure.

20. Dr. Watson Allen Bowes, Jr., testified at trial as an expert in the fields of high risk obstetrics and maternal fetal medicine. He is qualified to testify as an expert in these fields, and I found his testimony credible in certain respects but subject to certain limitations caused by his admitted philosophical opposition to abortion.[19] In addition, because Dr.

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19. Dr. Bowes testified that he would not perform an abortion under any circumstances except when the life of the mother is threatened. Further, he has been a member of the American Association of Pro-Life Obstetricians, an organization of obstetricians and gynecologists opposed to the performance (continued ...)

Bowes is not a certified specialist in emergency medicine, like Dr. Davidson, his testimony on issues pertaining to this area is not entitled to the same weight as the testimony of Dr. Davidson.

Dr. Bowes is a physician licensed to practice medicine in North Carolina and Colorado. He received his bachelor's degree from Washington and Lee University in 1955 and graduated from the University of Colorado School of Medicine in 1959. Dr. Bowes completed his internship at Mary Hitchcock Memorial Hospital, his residency (general practice) at the University of Colorado, and his residency (obstetrics and gynecology) at the University of Colorado School of Medicine. In addition,

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19. (... continued)
of abortions except where necessary to save the life of the mother. [Trial Testimony of Dr. Bowes, Vol. III at 30-31].

he was a Fellow in Obstetrics and Gynecology, Reproductive Physiology Laboratory at the University of Colorado School of Medicine.

Dr. Bowes is certified by ACOG, as well as ACOG's Division of Maternal-Fetal Medicine. He is presently a Professor in the Department of Obstetrics and Gynecology at the University of North Carolina School of Medicine at Chapel Hill. Previously, he taught obstetrics and gynecology at the University of Colorado as an assistant professor, associate professor and full professor. Finally, he is the author of various publications in his field. [Trial Testimony of Dr. Bowes, Vol. III at 25-32; Defendants' Exhibit 61].

21. Patricia Potrzebowski, Ph.D., testified at trial, and I found her

testimony credible in all respects. She is the Director of the Division of Health Statistics and Research, State Health Data Center, Department of Health. She has a bachelor's degree in biology from Schimer College, Mount Carroll, Illinois. In 1974, she obtained a doctorate degree in human genetics from the Graduate School of Public Health from the University of Pittsburgh. She has been the Director of the Division of Health Statistics since late 1976 or early 1977. [Trial Testimony of Dr. Potrzebowski, Vol. III at 88-90; see also Casey I, 686 F. Supp. at 1094 (¶ 14)].

B. Procedures and Practices of Plaintiffs.

(1) Planned Parenthood of Southeastern Pennsylvania

22. PPSP performs approximately 2,800 first trimester abortions a year.

The abortion procedure presently costs full-payment patients $240, if the woman is 12 weeks or less from her last menstrual period. All fees cover only the direct costs of the procedure, including personal counseling, medical testing and examination, the abortion procedure, medical supervision during the post-surgical recovery, and a post-abortion examination. [Court's Exhibit 1 at ¶ 3].

23. PPSP charges $180 for abortions for women who are on medical assistance but whose abortions are not reimbursable by the state. [Court's Exhibit 1 at ¶ 4].

24. PPSP accepts state medical assistance reimbursement in lieu of direct payment for abortions for victims of rape and incest, and for women with life-threatening conditions. In 1987,

approximately 53 of the abortions performed at PPSP were reimbursed by the Commonwealth. [Court's Exhibit 1 at¶ 5].

25. When a woman believing she is pregnant presents herself at a PPSP clinic, she is given a pregnancy test and examined by a nurse practitioner or physician. Women who believe they have just recently become pregnant are offered early detection by means of a blood test or special urine test. Once it is determined that she is pregnant, the woman is encouraged to participate in an individual options counseling session with a PPSP counselor. [Court's Exhibit 1 at ¶ 7].

26. Options counselors are volunteers or staff counselors who have completed a special training program under the supervision of PPSP counselors and other senior staff members. This

training program consists of 43 hours of group sessions that focus on factual information regarding adoption, abortion, contraception and referral resources. The course also gives participants the opportunity to evaluate, explore and share their attitudes and feelings. The course is certified by Temple University, and participants receive four CEU credits for completion of the training. [Court's Exhibit 1 at ¶ 8].

27. Abortion counselors are members of PPSP's counseling staff or college student interns working under the supervision of a staff counselor. These counselors have college backgrounds and experience in a health or social services related field. All abortion counselors have had on-site training in pregnancy counseling and abortion care

and are required to participate in ongoing in-service training. [Court's Exhibit 1 at ¶ 9].

28. Each PPSP client participates in an individual abortion counseling session on the day her procedure is scheduled. In this session, the counselor and the woman discuss the woman's medical history, personal situation and feelings about abortion. The counselor explains the abortion procedure and its risks. Post-abortion care and contraceptive plans are also explored. If the client has been accompanied to the clinic by a person she wishes to involve in the counseling, that person will be included in part of this session. In some cases the abortion counselor will serve as the support person and accompany the woman through the procedure. [Court's Exhibit 1 at ¶ 10].

29. To assure that minors are informed of all options and are making a free and informed choice, PPSP counseling sessions for minors are more extensive. In the course of the counseling session, minors are given detailed information on the procedure and its risks. Minor women are also counseled on future contraceptive care. When a minor does elect to involve a parent or other supportive adult such as an aunt, guardian or older sibling, the counselor will first meet privately with the minor. Then, at the counselor's discretion and with the minor's consent, the parent or adult will be brought in for joint counseling. [Court's Exhibit 1 at ¶ 11].

30. Many of PPSP's abortion patients come from referrals from other clinics where they previously have

received options counseling. [Court's Exhibit 1-A at ¶ 115].

31. During options counseling at PPSP, the counselors discuss with the woman the option of keeping her baby or giving it up for adoption. [Court's Exhibit 1-A at ¶ 116].

32. It is typical for a woman to receive counseling about her options once she has her pregnancy diagnosed at one of PPSP's centers, and to receive counseling again at the surgical center in Center City. [Court's Exhibit 1-A at ¶ 123].

33. In 1987, PPSP performed 359 abortions for women under the age of 18. [Court's Exhibit 1 at ¶ 6].

34. PPSP encourages minors to bring a parent with them. [Court's Exhibit 1-A at ¶ 114].

35. Approximately 65% of the minors

bring a parent with them to the counseling session in PPSP's experience. [Court's Exhibit 1-A at ¶ 117].

36. PPSP refers women with medical problems that make them high-risk patients to hospitals. [Court's Exhibit 1-A at ¶ 113].

37. PPSP advises minors (and others) that if anything unusual or any sort of complications occur to let PPSP know and come back for treatment or to go to an emergency room for treatment. [Court's Exhibit 1-A at ¶ 124].

38. PPSP collects information for its internal use concerning medical complications following an abortion. [Court's Exhibit 1-A at ¶ 122].

(2) Reproductive Health and Counselling Center

39. RHCC performs approximately 2,900 first and early second trimester

abortions annually. [Court's Exhibit 1 at ¶ 12].

40. RHCC employs a staff of approximately four physicians, one nurse practitioner, and two full-time and two part-time counselors. Abortions are performed on Tuesday, Wednesday and Friday afternoons. Additional counseling sessions are available by appointment. [Court's Exhibit 1 at ¶ 13].

41. At RHCC, one physician works at a time during those hours of operation when abortions are performed. [Court's Exhibit 1-A at ¶ 141].

42. First trimester abortions (up to 12 weeks from the last menstrual period) with local anesthesia cost RHCC clients $220. For abortions from 12 to 16 weeks from the last menstrual period the cost is $375, plus an additional $70

for a required ultrasound. [Court's Exhibit 1 at ¶ 14].

43. If RHCC's clients are eligible for medical assistance reimbursement, RHCC seeks reimbursement from the Commonwealth. In 1987, RHCC was reimbursed for no more than 20 suchabortions. The reimbursement rate was $59.50 to the clinic and $81.50 to the physician. [Court's Exhibit 1 at ¶ 15].

44. Where a client receives medical assistance from the state but is not eligible for medical assistance for an abortion, RHCC provides a $50 cost reduction for first trimester abortions with local anesthesia. [Court's Exhibit 1 at ¶ I6].

45. While RHCC's clients come primarily from Delaware, Philadelphia, Chester and Bucks Counties,

approximately 3-4% of its clients come from areas in excess of three hours travelling time. [Court's Exhibit 1 at ¶ 17].

46. A woman's first contact with RHCC is usually by telephone. Women who call RHCC may or may not have had a pregnancy test prior to calling. Telephone counselors refer the women to RHCC or to the agency closest to her home or place of work for the test. [Court's Exhibit 1 at ¶ 19].

47. If a woman has a positive pregnancy test and wants to terminate the pregnancy, RHCC will schedule an abortion appointment, usually within one week's time. If the woman indicates uncertainty about her decision, the telephone counselor will recommend her making an appointment to talk further with an options counselor about her

decision. [Court's Exhibit 1 at ¶ 20].

48. At an options counseling session, an RHCC counselor talks with the woman about her feelings about her pregnancy. The purpose of the session is to let the woman know about each of the three options available to her: carrying to term and keeping the child, carrying to term and giving the child up for adoption, and abortion. Where appropriate, the woman is urged to talk about these options with supporting family members and friends. The role of the counselor in these sessions is to support the decision of the woman and to provide information that would be necessary as she acts on her decision. [Court's Exhibit 1 at ¶ 22].

49. Pre-abortion counseling at RHCC, which each woman must participate in on the day of her abortion and which

is different from options counseling, involves a discussion of the woman's decision, a review of her medical history and a description of the risks and complications of the abortion procedure. The informed consent part of the session is done with groups of four women. The counselor describes the medical procedure, reviews the risks and complications, and answers questions or addresses concerns. RHCC also provides counseling to the person or persons who accompany women for abortions. [Court's Exhibit 1 at ¶ 23].

50. Pre-abortion and options counselors are trained and supervised by RHCC's head counselor who has nine years counseling experience. [Court's Exhibit 1 at ¶ 24].

51. Telephone counselors' salaries at RHCC are between $6 and $6.30 an

hour. For options counselors, salaries begin at $6.30 an hour. [Court's Exhibit 1-A at ¶ 134].

52. RHCC counselors are not required to have a bachelor's degree. [Court's Exhibit 1-A at ¶ 135].

53. If a woman receives options counseling and pre-abortion counseling at RHCC, such counseling occurs on different days, with options counseling being available on Tuesdays and Thursdays. [Court's Exhibit 1-A at ¶ 136].

54. In 1987, RHCC performed abortions on 349 minors. Approximately 60% of these minors were accompanied by a parent. That percentage has decreased to approximately 5o%. All minors who choose not to be accompanied by a parent are required to bring a responsible adult with them to RHCC who will stay in

the building as long as the minor is there and will accompany the minor home. [Court's Exhibit 1 at ¶ 18; Court's Exhibit 1-A at 145].

55. RHCC strongly urges options counseling for all minors who have not involved their parents in the decision. [Court's Exhibit 1 at ¶ 21].

56. In general, RHCC supports and encourages parental involvement in the abortion decision where possible. [Court's Exhibit 1-A at ¶ 137].

57. If a parent accompanies a minor to RHCC for the abortion procedure, the minor reviews the risks and informed consent provision in the group session while the waiting room counselor goes over that information, including possible complications, with the parent. [Court's Exhibit 1-A at ¶ 138].

58. RHCC keeps statistics on

complications. [Court's Exhibit 1-A at ¶ 139].

59. The Medical History Form used by RHCC was being used prior to the 1988 amendments to the Act. [Court's Exhibit 1-A at ¶ 142].

60. RHCC submits quarterly reports of complications to the National Abortion Federation. [Court's Exhibit 1-A at ¶ 143].

61. Doctors at RHCC sign the individual reporting forms (Report of Induced Termination of Pregnancy) submitted to the Pennsylvania Department of Health ("PaDOH") immediately following the abortion procedure. [Court's Exhibit 1-A at ¶ 144].

62. No physician at RHCC has ceased performing abortions because their identity is listed on PaDOH pregnancy

termination forms. [Court's Exhibit 1-A at ¶ 140].

(3) Women's Health Services and Dr. Allen

63. WHS has a staff of approximately 75 people (including 8 physicians, 14 nurses and 33 counselors) and offers ongoing programs which are inclusive of approximately 2,700 client contacts a month. [Court's Exhibit 1 at ¶ 25].

64. Free pregnancy testing and counseling are available at WHS daily, Monday through Saturday. Abortions are performed Tuesdays, Fridays and Saturdays. Gynecology clinics are held on Wednesdays, Thursdays, and any other day a patient's condition dictates. Once their pregnancy is diagnosed, clients usually schedule their abortions by telephone. [Court's Exhibit 1 at ¶ 26].

65. WHS provides approximately 12,900 free pregnancy tests and 7,000 first trimester and early second trimester abortions each year. The abortion procedure at WHS costs as follows: $330 if twelve weeks or less from the last menstrual period; and $430 if thirteen to fourteen weeks from the last menstrual period; and $650 if fifteen to sixteen weeks from the last menstrual period. The fee includes the abortion procedure, laboratory testing, personal counseling, contraceptive care, pathological examination and medical supervision during the post-surgical recovery period. [Court Exhibit 1 at ¶ 27].

66. WHS does not perform abortions after 17 weeks gestation. [Court's Exhibit 1-A at ¶ 85].

67. If clients are eligible for

medical assistance, WHS takes the necessary information and seeks reimbursement from the Commonwealth. Medical assistance is available only where the abortion is necessary because of the life-threatening condition, or because the patient was a victim of rape or incest. In 1989, WHS was reimbursed for 46 such abortions. [Court's Exhibit 1 at ¶ 28].

68. Where a client receives medical assistance from the state, but is not eligible for medical assistance for an abortion, WHS nevertheless will discount the cost of the abortion. Last year, WHS accommodated 1,170 clients who were unable to pay the full amount. WHS has never turned away any client seeking an abortion merely because of inability to pay. [Court's Exhibit 1 at ¶ 29].

69. WHS's clients come primarily

from Allegheny County. In 1989, however, 909 of their abortion patients came from areas in excess of two hours travelling time (100 miles) from the clinic. [Court's Exhibit 1 at ¶ 30].

70. When a patient presents herself at the WHS clinic, she receives a pregnancy test and blood tests. [Court's Exhibit 1 at ¶ 32].

71. As to WHS, free pregnancy tests and counseling are available Monday through Saturday, but 95% of counseling services are provided on the same day of the abortion. [Court's Exhibit 1-A at ¶ 110].

72. Both Magee and WHS take a patient's history prior to performing the abortion. [Court's Exhibit 1-A at ¶ 90].

73. In Dr. Allen's private practice, a patient completes a history

form, which is a sort of health questionnaire, which is then amplified by a nurse's questions and further amplified by the physician when he sees her. [Court's Exhibit 1-A at ¶ 91].

74. At WHS, the patient completes the history form, which is gone over by a counselor, and then the physician reviews it prior to performing the abortion. [Court's Exhibit 1-A at ¶ 92].

75. All women are required to have an individual interview with a counselor on the day of their abortion. During this interview, a woman is counseled with respect to her options and her decision to have an abortion. Information regarding the risks and benefits of the abortion procedure and the patient's medical history is provided to her. In that connection, the counselor seeks to ensure that the

woman is not unduly ambivalent about her decision and that she is not being coerced. In addition, the counselor discusses future contraceptive use with the patient. [Court's Exhibit 1 at ¶ 33].

76. If the client appears ambivalent about her decision, the counselor will refer her to one of the staff therapists and the abortion will be rescheduled to give the patient more time to consider her options. On rare occasions, the clinic will refuse to perform the abortion, if convinced of the patient's continued ambivalence. [Court's Exhibit 1 at ¶ 34].

77. Options counseling is provided on the day of the procedure by WHS professional counselors who are selected on the basis of personal qualifications and maturity. [Court's Exhibit 1 at ¶ 36].

78. Extensive and intensive problem pregnancy counseling is available at WHS at no charge to clients either before or after a decision with respect to an abortion has been made, regardless of what that decision may be. Personal counseling is also available after the abortion procedure and clients are encouraged to take advantage of that service. [Court's Exhibit 1 at ¶ 37].

79. At WHS, the average counseling takes 20 minutes. [Court's Exhibit 1-A at ¶ 102].

80. In 1989, 703 of WHS's abortion patients were under the age of 18. WHS presently encourages minors to bring a parent or other adult with them. Because WHS believes that parental involvement should be encouraged, clinic counselors are instructed to offer to speak with the minor's parents, if the

minor would prefer that to making direct contact herself. When minors refuse to inform their parents under any circumstances, their wishes are currently respected. [Court's Exhibit 1 at ¶ 31].

81. Fifty percent of the minors who go to WHS are accompanied by a parent. When a parent accompanies a minor seeking an abortion, WHS first counsels the minor with respect to her options and her decision to have an abortion, and also provides her with information on future contraceptive use. The parent is then asked to join the minor, at which time the abortion procedure and possible complications are described. The counselor also answers any questions they might have. An informed consent form is then read out loud to the parent and minor while they follow along with

their own copies. Each then signs the form in the medical record. [Court's Exhibit 1 at ¶ 35; Court's Exhibit 1-A at ¶¶ 97, 101].

82. No abortion can be performed on a minor at Magee without a parent's written consent. [Court's Exhibit 1-A at ¶ 94].

83. Approximately 30% of Dr. Allen's patients seeking abortions are minors. [Court's Exhibit 1-A at ¶ 95].

84. If a parent comes with a minor for an abortion procedure at Magee, Dr. Allen will speak to the parent too. If a parent comes with a minor for an abortion procedure at WHS, a counselor speaks to the parent. [Court's Exhibit 1-A at ¶ 96].

85. At present, WHS's director of personal counseling holds a Ph.D. [Court's Exhibit 1 at ¶ 38].

86. Personal counselors at WHS are professional therapists who have at least five years of clinically supervised experience at the master's degree level or above. [Court's Exhibit 1 at ¶ 39].

87. Both paraprofessional and professional counselors at WHS are required to begin their employment with a week of classroom preparation, consisting of approximately 35 hours of medical and counseling orientation to the abortion clinic. This instruction is provided by the associate medical director, director of counseling, and director of clinical services. [Court's Exhibit 1 at ¶ 40].

88. The medical information to be presented by counselors at WHS is developed under the supervision of a physician, the WHS associate medical

director. The counseling protocols are developed and presented under the supervision of the director of counseling who holds a Ph.D. from the University of Pittsburgh. WHS also has an ongoing training module comprised of monthly in-services and quarterly individual supervision. [Court's Exhibit 1 at ¶ 41]

89. Dr. Allen always does some counseling with his patient prior to the procedure and goes over the informed consent form with them. [Court's Exhibit 1-A at ¶ 89].

90. Dr. Allen signs PaDOH reporting forms for Magee but WHS uses his signature stamp for such forms. [Court's Exhibit 1-A at ¶ 93].

91. WHS has a hot-line for women to call if they have any unusual symptoms or problems after an abortion to make

sure there is immediate treatment. [Court's Exhibit 1-A at ¶ 103].

92. WHS provides information to the National Abortion Federation and the Alan Guttmacher Institute, including information concerning complications and the frequency that WHS's patients report to them or WHS observes them. [Court's Exhibit 1-A at ¶ 105].

93. If a medical emergency resulting from an abortion performed at WHS occurs, an ambulance is called to take the person to the hospital. [Court's Exhibit 1-A at ¶ 111].

(4) Women's Suburban Clinic

94. WSC performs approximately 3,350 first trimester abortions a year. Abortions are performed Tuesdays, Wednesdays and Thursdays. [Court's Exhibit 1 at ¶ 43].

95. The fee for an abortion at WSC

is $275. At present, WSC accepts state medical assistance reimbursement for abortions for cases of rape, incest and life endangerment. Approximately 40 such claims are reimbursed by the Commonwealth annually. [Court's Exhibit 1 at ¶ 45].

96. Appointments for counseling and abortions are made through WSC telephone counselors. A positive pregnancy test is required before an abortion is scheduled. [Court's Exhibit 1 at ¶ 46].

97. The telephone counselors at WSC make appointments and receive clients but they do not counsel about pregnancy options. [Court's Exhibit 1-A at ¶ 125].

98. Depending on the patient interest and availability, appointments are made at WSC in one of the following ways:

a. If a woman requests counseling

and the abortion on the same day, the first available appointment is given. There is often a one to two week wait in obtaining an appointment. Approximately 70% of the abortion appointments are scheduled this way.

b. If a woman wants to see a counselor prior to the day of her abortion, a pre-abortion session is scheduled. Approximately 30% of the abortion appointments are scheduled this way. [Court's Exhibit 1 at ¶ 47].

99. A woman who calls WSC and expresses concern and confusion over an unwanted pregnancy is offered an opportunity to see a counselor to discuss her options. Resource information is available for options

including keeping the child, foster care and adoption. Information concerning maternity homes is also available for those women who wish to carry their pregnancy to term. [Court's Exhibit 1 at ¶ 49].

100. All counseling at WSC is provided on an individual basis by a trained counselor. All but one member of WSC's counseling staff have master's degrees. The other has a bachelor's degree with several years experience in counseling and family planning. All have backgrounds in various fields of human services. [Court's Exhibit 1 at ¶ 50].

101. It is WSC's policy that in order to counsel effectively, without becoming overstressed by the emotional demands of the job, counselors are not permitted to provide counseling for more

than 20 hours a week. [Court's Exhibit 1 at ¶ 51].

102. WSC encourages that partners and/or parents be seen by the counselor during or after the counseling session. However, all clients are first seen alone by a WSC counselor. [Court's Exhibit 1 at ¶ 52].

103. Counseling at WSC is provided in an objective, non-judgmental manner. The client's decision is reviewed and explored. The counselor also reviews the client's medical history, describes the abortion procedure, reviews birth control methods and goes over the informed consent form. Disclosure of medical risks and benefits is made as well. Also, post-abortion information, including what to do in the event of an emergency, is reviewed. [Court's Exhibit 1 at ¶ 53].

104. For women who express ambivalence over their abortion decision, the WSC counselor will further explore the issues. If the counselor feels that the woman is not sure of her decision, it is suggested that she take some time to reevaluate her choice. Additional counseling is available to assist the woman to come to a decision with which she feels comfortable. [Court's Exhibit 1 at ¶ 54].

105. Counselors at WSC start at $8.50 per hour and are all part-time employees. [Court's Exhibit 1-A at ¶ 126].

106. Of the approximately 3,350 abortions WSC performed in 1987, 410 (12.25%) were performed on minors. [Court's Exhibit 1 at ¶ 44].

107. WSC encourages minors to attend with a parent. [Court's Exhibit

1-A at ¶ 127].

108. All minors who have not informed a parent about their decision to have an abortion are asked to come to WSC for pre-counseling before the abortion appointment. This is done to give adolescents the opportunity to explore with a counselor their reasons for not involving their parents and affords them the time and opportunity to reevaluate that decision prior to the abortion. [Court's Exhibit 1 at ¶ 48].

109. If a parent comes in with a minor to WSC, the minor is first seen alone by the counselor and then the parent joins the counseling session. [Court's Exhibit 1-A at ¶ 130].

110. WSC does not perform abortions due to medical emergencies defined by the Act or otherwise. [Court's Exhibit 1-A at ¶ 128].

111. If an emergency occurs when performing an abortion at WSC, a crash cart is used to stabilize the woman and then, in all probability, the woman would be transferred to a hospital based upon the physician's or medical director's decision. [Court's Exhibit 1-A at ¶ 129].

112. WSC maintains or collects internal data regarding complications that occur during the performance of abortions. [Court's Exhibit 1-A at ¶ 133].

(5) Allentown Women's Center

113. AWC provides approximately 5,300 pregnancy tests and 4,000 first trimester abortions each year. [Court's Exhibit 1 at ¶ 56].

114. Abortions are performed at AWC three to five days a week, depending on

patient need. [Court's Exhibit 1 at ¶ 57].

115. The abortion procedure at AWC costs $280, with additional charges for services such as RhoGam shots for women more than twelve weeks pregnant, and general anesthesia. The fee includes personal counseling both before and after the abortion, the abortion procedure, laboratory testing, and medical supervision during the post-surgical period. [Court's Exhibit 1 at ¶ 58].

116. For patients who receive medical assistance from the Commonwealth, AWC's fee for abortion is $225. [Court's Exhibit 1 at ¶ 59].

117. In the case of those medical assistance patients who require an abortion because of a life-threatening disease or because they were victims of

rape or incest, AWC has received reimbursement from the state, so that no fee was charged directly to the patient. In 1987, AWC received less than $4,000 in medical assistance funds. [Court's Exhibit 1 at ¶ 60].

118. AWC's patients come primarily from an 18-county area in northern Pennsylvania encompassing the counties of Lehigh, Northampton, Carbon, Schuylkill, Luzerne, Lackawanna, Lebanon, Berks, Bucks, Pike, Chester, Lancaster, Susquehanna, Wayne, Monroe, Montgomery, Columbia and Wyoming. Many of these counties have no clinics or hospitals at which abortions are performed, AWC being the closest facility to which women can come. [Court's Exhibit 1 at ¶ 61].

119. In most cases, appointments for counseling and abortions at AWC are

made through AWC's telephone counselors. A positive pregnancy test is required before an abortion will be scheduled. When a woman calls requesting an abortion, the telephone counselor collects personal data, menstrual history and medical history. If the caller is a minor, the telephone interview is more extended to assure that the minor fully understands what she must do and what the procedure will involve. [Court's Exhibit 1 at ¶ 64].

120. When a telephone counselor makes an appointment, pre-abortion instructions are given to the woman. These instructions include what the woman must do and what she must bring with her on the day of the appointment. [Court's Exhibit 1 at ¶ 65].

121. Any woman who calls AWC and expresses concern and confusion over an

unwanted pregnancy is offered an opportunity to see a counselor to discuss her options. Resource information is available for options, including keeping the child, foster care and adoption. Information concerning prenatal care, welfare and support services is also available for those women who wish to carry their pregnancy to term. [Court's Exhibit 1 at ¶ 66].

122. A nurse practitioner or physician's assistant is available to examine all women and, where necessary, provide a pregnancy test and blood work-up. In addition, all women are required to have an individual interview with a counselor on the day their abortion is scheduled. In this interview, the abortion procedure and other alternatives are explained to the woman. [Court's Exhibit 1 at ¶ 67].

123. If the patient appears ambivalent about her decision to have an abortion, the AWC counselor will review options and suggest that the patient take more time to consider her decision before terminating the pregnancy. On occasion, the clinic has refused to permit an abortion if, after consultation, the counselor and the clinic supervisor are convinced of the woman's extreme ambivalence, coercion, or that she is otherwise overly distraught. Sometimes, but infrequently, they will refer these women to outside counselors. [Court's Exhibit 1 at ¶ 68].

124. In 1987, 563 of AWC's abortion patients were 17 or under. Of these, 3 were age 13; 32 were age 14; 64 were age 15; 178 were age 16; and 286 were age 17. [Court's Exhibit 1 at ¶ 62].

125. AWC encourages its minor patients to involve their parents in the abortion decision and to bring a parent or other supporting adult with them at the time of counseling and the procedure. Clinic counselors are routinely available to speak with a minor's parents. When a minor refuses to inform her parents under any circumstances, AWC respects those wishes. [Court's Exhibit 1 at ¶ 63].

126. When a parent does accompany a minor to the AWC clinic, a counselor will first meet privately with the minor. After assuring that the minor has reached her decision to have an abortion freely and without coercion, the counselor will give the minor the option to continue the counseling session jointly with her parent, or to be counselled separately. In either

case, the counselor will describe the procedure and possible complications as well as answer any questions she or her parent may have. The minor is then asked to sign an informed consent form. [Court's Exhibit 1 at ¶ 69].

127. When a minor chooses not to have a parent involved, AWC counselors explore and encourage the involvement of a supporting adult. Counseling of a minor who has not informed her parents is more extensive and includes a discussion of why she has chosen not to involve her parents. [Court's Exhibit 1 at ¶ 70].

128. The options counseling provided on the day of the procedure at AWC is conducted by paraprofessional staff counselors who are selected on the basis of personal qualifications. Most of the counseling staff have bachelor's

degrees. Two are presently working on master's degrees. All have backgrounds in various fields of human service. [Court's Exhibit 1 at ¶ 71].

129. All of AWC's counselors are required to begin their employment with at least a week of orientation. Instruction is provided by the Director, a nurse practitioner, the Patient Services Coordinator and other counseling staff. During the first several months of work, the new staff has frequent meetings either on an individual basis or as a group with administrative staff to reinforce correct integration of medical information and continued development of interviewing skills. [Court's Exhibit 1 at ¶ 72].

130. All medical information is developed and presented under the supervision of a physician who is

AWC's medical director. The counseling protocols are developed under the supervision of the Patient Services Coordinator. [Court's Exhibit 1 at ¶ 73].

131. There is no minimum education requirement for AWC's counselors. [Court's Exhibit 1-A at ¶ 146].

132. AWC does not accept state appropriated funds. [Court's Exhibit 1-A at ¶ 148].

133. AWC provides information to the National Abortion Federation regarding AWC's complication rate. [Court's Exhibit 1-A at ¶ 149].

134. AWC, prior to 1988, advertised in the newspapers although it does not presently advertise there. AWC does advertise in telephone directories. [Court's Exhibit 1-A at ¶ 150].

C. Other Relevant Statistical Evidence.

135. The following table represents the number of abortions performed in Pennsylvania and reported to PaDOH over the past ten years:

YEAR	NUMBER OF ABORTIONS PERFORMED
1989[20]	51,341
1988	50,786
1987	51,360
1986	51,666
1985	53,465
1984	59,258
1983	59,288
1982	60,772
1981	62,701
1980	65,777

[Court's Exhibit 1 at ¶ 76; Trial Testimony of Dr. Potrzebowski, Vol. III at 118; see also Casey I, 686 F. Supp. at 1101 (¶ 95)].

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20. The 1989 statistics provided by Dr. Potrzebowski are only provisional figures.

136. Of the 50,786 abortions performed in Pennsylvania in 1988, 47,548 (93.6%) were performed within the first three months of pregnancy. [Court's Exhibit 1 at ¶ 77]. Conversely, 3,238 (6.4%) were performed after the first three months of pregnancy.

137. Plaintiffs are unaware of any free standing abortion clinics in Pennsylvania that perform pregnancy termination procedures after the 18th week of gestation. [Court's Exhibit 1-A at ¶ 109].

138. Patients under the age of 18 accounted for 11.6%, or 5,888 of the abortions reported in Pennsylvania in 1988. [Court's Exhibit 1 at ¶ 78].

139. Of the 50,786 abortions performed in Pennsylvania and reported to PaDOH, 47,802 were performed on Pennsylvania residents. Residents of other states and territories accounted for 2,975 abortions, and residents of other countries accounted for 9. Of the 1988 abortion patients residing in Pennsylvania, 15,269 (30%) resided in Philadelphia: 7,337 (14%) resided in Allegheny County; 2,863 (6%) resided in Montgomery County; 2,270 (4%) resided in Delaware County; and 2,141 (4%) resided in Bucks County. [Court's Exhibit 1 at ¶ 79].

140. The following table represents the numbers of induced terminations of pregnancies performed on minors, as reported to PaDOH, in Pennsylvania in 1988 by age of woman:

AGE (YEARS)	NUMBER
11 or less	1
12	20
13	113
14	377
15	855
16	1,702
17	2,820

[Court's Exhibit 1 at ¶ 80].

141. During 1989, minor women received abortions at plaintiff-clinics as follows:

CLINIC	AGE GROUP	NUMBER
RHCC	14 years and under -	27
	15-17 years -	267
AWC	13 years old -	4
	14 years old -	22
	15 years old -	71
	16 years old -	160
	17 years old -	257
WSC	12 years old -	1
	13 years old -	6
	14 years old -	15
	15 years old -	27
	16 years old -	66
	17 years old -	119
PPSP	12 years old-	2
	13 years old-	14
	14 years old -	27
	15 years old -	80
	16 years old -	122
	17 years old -	189

WHS

12 years old -	2
13 years old -	11
14 years old -	33
15 years old -	117
16 years old -	226
17 years old -	314

Court's Exhibit 1-A at ¶ 82].

142. Of all abortions performed in Pennsylvania in 1988 and reported to PaDOH, 50,256 involved a dilation, evacuation, and curettage procedure. Intrauterine prostaglandin instillation was the procedure for 41. One abortion procedure was performed by a hysterotomy procedure, and none was performed by a hysterectomy. [Court's Exhibit 1 at ¶ 81].

143. According to the provisional statistical compilations of PaDOH, 391 pregnancy complications were reported in 1989. Of the 391 complications reported in 1989, 5 were caused by malignancy, 7 by endocervical polyps, 3 by rubella, 2

by hydatid moles, and 374 by other causes for which no further statistical breakdown presently exists. [Trial Testimony of Dr. Potrzebowski, Vol. III at 120].

144. The risk of death from an abortion is dependent upon numerous factors, which factors include length of gestation, the type of procedure used to perform the abortion, the medical condition of the patient, and the skill of the physician performing the abortion. [Court's Exhibit 1-A at ¶ 83].

145. From the standpoint of risks of complications and mortality, eight weeks gestation is the safest time, statistically, for the performance of an abortion. [Trial Testimony of Dr. Allen, Vol. I at 46, 71-72]. Beyond eight weeks gestation, the risk of complications (by approximately 30%) and

mortality increase (by approximately 50%) with each additional week of gestation. [Trial Testimony of Dr. Allen, Vol. I at 45; Trial Testimony of Dr. Bowes, Vol. III at 54-56].

146. An abortion is twice as safe as a tonsillectomy and 100 times safer than an appendectomy. [Trial Testimony of Dr. Allen, Vol. I at 47]. The following table represents the risk of mortality from an abortion procedure, according to data complied by the Center for Disease Control:

GESTATIONAL AGE (in weeks)	NUMBER OF DEATHS (per 100,000)
8 or less	.5
9 to 10	.8
11 to 12	1.1
13 to 15	1.5
16 to 20	7.8
over 20	3.6

[Trial Testimony of Dr. Bowes, Vol. III at 55-56].

D. The Act.

147. On March 25, 1988, Act No. 31, amending the Pennsylvania Abortion Control Act of 1982, 18 Pa. C.S.A. §§ 3201-20, was enacted. Act 31 was scheduled to take effect thirty (30) days after enactment, on April 24, 1988. [Court's Exhibit 1 at ¶ 74].

148. On November 17, 1989, Act No. 64, further amending the Pennsylvania Abortion Control Act of 1982 was enacted. Act 64 was scheduled to take effect sixty (60) days after enactment, on January 16, 1990. [Court's Exhibit 1 at ¶ 75].

(1) Definition of Medical Emergency (Section 3203)

149. Section 3203 of the Act defines the term "medical emergency" as "[t]hat condition which, on the basis of

the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function." 18 Pa. Con. Stat. Ann. §3203. The Act does not further define the terms "serious risk," "substantial and irreversible impairment," or "major bodily function."

150. This definition applies to the following provisions of the Act containing medical emergency exceptions: section 3205 (informed consent); section 3206 (parental consent or judicial by-pass); section 3209 (spousal notification); section 3210 (determination of gestational age); and

3211 (performance of abortions after 24 weeks gestation). Penalties for violation of these provisions include suspension or revocation of the physician's license or criminal conviction for a third degree felony or third degree misdemeanor.

151. The 1989 amendments to the Act did not change the definition of medical emergency despite my ruling on plaintiffs' motion for a preliminary injunction which invalidated this definition and enjoined all those sections of the Act which contained the term. See Casey I, 686 F. Supp. at 1136-37. Prior to the 1988 amendments, "medical emergency" was defined as "[t]hat condition which, on the basis of the physician's best clinical judgment, so complicates a pregnancy as to necessitate the immediate abortion of

same to avert the death of the mother or for which a 24-hour delay will create grave peril of immediate and irreversible loss of major bodily function." See 1982 Pa. Laws 476, 478, § 1.

152. According to the generally accepted definition of a medical emergency in emergency medicine, an emergency is any medical condition that requires intervention, both diagnostic and treatment, quickly. [Trial Testimony of Dr. Davidson, Vol. I at 14-15]. In emergency medicine, it is essential that doctors be flexible in their response to their patients. Every patient is different and each emergency condition presents the physician with a dynamic situation in which judgments must be made quickly and, if necessary, quickly altered or adjusted. [Trial

Testimony of Dr. Davidson, Vol. I at 14, 21-22].

153. Pennsylvania's Emergency Medical Services Act defines a medical emergency as "a combination of circumstances resulting in a need for immediate medical intervention." See 35 Pa. Con. Stat. Ann. § 6923 (Purdon 1990 Supp.).

154. The definition of medical emergency in the Act departs from the normal medical definition of an emergency and is inconsistent with that contained in Pennsylvania's Emergency Medical Services Act. [Trial Testimony of Dr. Davidson, Vol. I at 15-17; Trial Testimony of Dr. Bolognese, Vol. I at 142; Preliminary Injunction Hearing Testimony of Dr. Dratman at 61]. Defendants' expert, Dr. Bowes, agrees that the definition of medical emergency

in the Act differs from other definitions commonly used in the medical profession. [Trial Testimony of Dr. Bowes, Vol. III at 81-82].

155. No other law infringes so heavily on a physician's discretion to decide when he or she is faced with a medical emergency as the provisions of the Act. [Trial Testimony of Dr. Davidson, Vol. I at 15-16; Trial Testimony of Dr. Bowes, Vol. III at 81-82].

156. Under typical emergency conditions, the definition of "medical emergency" of the Act would cause the physician confusion regarding the proper treatment of the patient and hinder his or her ability to make a rapid response to the detriment of the health of their patient, or it would cause physicians to unknowingly violate the Act by acting in accordance with their medical training

and professional judgment rather than conforming to the requirements of the Act. [Trial Testimony of Dr. Bolognese, Vol. I at 143-44].

157. The Act's narrow definition of medical emergency may require a physician to act in ways that do not protect or restore the health of his or her patient in instances where a delay in the abortion procedure will pose a risk to the patient's health, but an immediate abortion may not be necessary to avert her death or to prevent a serious risk of the substantial and irreversible loss of a major bodily function. [Trial Testimony of Dr. Davidson, Vol I at 20-21].

158. The restrictive definition of medical emergency in the Act could exacerbate existing emergency situations. Or the definition could create emergencies because physicians

fearful of civil or criminal sanctions under the Act may delay treatment of an emergency or hesitate to act in the best interests of his or her patient. [Trial Testimony of Dr. Davidson, Vol. I at 34-35; Trial Testimony of Dr. Bolognese, Vol. I at 143-44].

159. The definition of medical emergency in the Act permits the physician to exercise his or her "good faith clinical judgment" in determining whether a medical emergency exists. However, this does not alter the fact that a "serious risk of substantial and irreversible impairment of major bodily function" must exist for a situation to constitute a medical emergency under the Act. Nor does it alter the fact that the definition of medical emergency in the Act is inconsistent with the generally accepted definition of medical emergency in the medical profession.

Further, the risk of loss of license or criminal liability hinders the physician's ability to rely upon his or her good faith clinical judgment.[21] [Trial Testimony of Davidson, Vol. I at 34-35; Trial Testimony of Dr. Bolognese, Vol I. at 143-44; Preliminary Injunction Hearing Testimony of Dr. Dratman at 63].

160. Under no other circumstances would a physician be required to delay treatment when presented with a patient with a risk, as opposed to a "serious risk," of an impairment, as opposed to a "substantial and irreversible

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21. While defendants' expert witness Dr. Bowes testified that he did not think such consequences would affect a physician's judgment since practicing medicine is already wrought with stress, he admitted that the potential criminal liability established by the Act could cause physicians to become more cautious in their practice of medicine and add stress to an already stressful profession. [Trial Testimony of Dr. Bowes, Vol. III at 76, 83].

impairment," of any bodily function, as opposed to a "major bodily function." Such a requirement is contrary to generally accepted standards of emergency medical care, and interferes with a physician's ability to act in accordance with his best medical judgment.

161. A patient's entitlement to immediate medical care, under the Act, would depend upon the individual physician's assessment of the severity of the condition and whether that physician considered the impairment to be: (1) substantial and irreversible and (2) to a major bodily function. Different interpretations of the Act could result in different patients, with similar or identical symptoms, in need of emergency medical care receiving different treatment. This difference of

opinion is amply illustrated by the testimony of Dr. Bowes and Dr. Bolognese. Dr. Bowes, an obstetrician and gynecologist, did not include the uterus or other female reproductive organs within his definition of major bodily function. Dr. Bolognese, also an obstetrician and gynecologist, on the other hand, testified that he would include such organs within this definition. [Trial Testimony of Dr. Bolognese, Vol. I at 142; Trial Testimony of Dr. Bowes, Vol. III at 34-35].

162. Plaintiffs have presented three examples of how the definition of medical emergency contained in the Act may depart from standard medical practice in emergency situations.

163. Frequently pregnant women present themselves to hospital emergency rooms complaining of vaginal bleeding,

lower abdominal pain, and progressive cervical dilation, which are the symptoms of an inevitable abortion. In a 40,000 visit a year emergency room, women arrive experiencing inevitable abortions once a week. Dr. Davidson personally treats women suffering from inevitable abortions two or three times a year. Further, this occurrence is sufficiently common to permit medical trainees at the Hospital of the Medical College of Pennsylvania to see an inevitable abortion in the emergency room anywhere between five and fifty times over the course of a three-year program. [Trial Testimony of Dr. Davidson, Vol. I at 22, 26-27].

164. It is common practice for an emergency room physician, when treating a woman with an inevitable abortion, to

use an instrument to remove products of conception, including parts of the placenta or fetal parts, to alleviate the bleeding. This would constitute a partial abortion. [Trial Testimony of Dr. Davidson, Vol. I at 23, 26-27].

165. The appropriate and safest treatment for a patient experiencing an inevitable abortion is to empty the uterus immediately by dilating the cervix and evacuating the uterus. Failure to terminate the pregnancy immediately via dilation and curettage, or some other method, could expose the patient to increased risks to her health, including shock and the need for a blood transfusion, as well as continued pain and discomfort. However, with proper treatment, an inevitable abortion is generally not life

threatening or likely to cause any permanent physical impairment. [Trial Testimony of Dr. Davidson, Vol. I at 23-25].

166. An inevitable abortion is a condition for which immediate medical treatment is required in the exercise of good medical judgment but does not fall within the Act's definition of medical emergency. There is no medical reason to delay the performance of an abortion, when a woman is suffering from an inevitable abortion. Therefore, compliance with the Act would require a departure from standard of care presently existing in medical practice, and could jeopardize the health of pregnant women. [Trial Testimony of Dr. Davidson, Vol. I at 26-28, 34-35].

167. A premature ruptured membrane is another common medical condition which could be suffered by a pregnant

woman both before and after the fetus reaches the stage of viability. Between six and ten percent of the births in the United States are premature. Of those premature births, twenty-five to thirty percent of them are preceded by a premature ruptured membrane. Ruptured membranes commonly occur in women of poorer personal health or women with poorer obstetrical care, as well as with drug users or women with poor personal hygiene. [Trial Testimony of Dr. Bolognese, Vol I. at 148].

168. When an infection occurs after a rupture, the accepted course of treatment is to terminate the pregnancy immediately. Failure to terminate the pregnancy could expose the patient to increased risks to her health, including spread of the infection throughout her body, overwhelming septic infection, shock and disseminated intravascular

coagulopathy. [Trial Testimony of Dr. Bolognese, Vol. I at 151-52].

169. For pregnancy of 24 gestational weeks or less, the likelihood of a successful outcome of the pregnancy ranges from extremely poor to impossible because of the absence of amniotic fluid which permits the development of the lungs. Under these circumstances, immediate termination of the pregnancy is usually recommended. [Trial Testimony of Dr. Bolognese, Vol. I at 149-50].

170. The standard method to terminate the pregnancy when infection occurs is a vaginal delivery which is induced by the administration of Pitocin. However, delay could cause the uterus to become infected. An infection in the uterus may hinder the physician's ability to induce labor through the use

of Pitocin. In these cases, a vaginal delivery must be utilized, which places the woman at greater risk. In some cases, the physician may have to remove the uterus. [Trial Testimony of Dr.Bolognese, Vol. I at 152-53].

171. Among the patients treated in an obstetrical practice, particularly high risk obstetrics, are pregnant women, including minors, who are experiencing complications known as preeclampsia (toxemia of pregnancy). Preeclampsia is a combination of symptoms related to an immunological disorder which tends to occur more frequently in first time pregnancies and younger patients. The recommended course of treatment is the induction of labor for a vaginal delivery. Delay could worsen maternal health and cause a loss of oxygen to the fetus. Eclampsia,

a seizure disorder caused by edema or excess fluid, and HELLP Syndrome, an adult respiratory distress syndrome caused by fluid retention in the lungs, are possible further developments of preeclampsia. While a patient with preeclampsia is at risk, there is no immediate "serious risk of substantial and irreversible impairment of [a] major bodily function." However, once the symptoms manifest themselves, there is no medical reason for delay. [Trial Testimony of Dr. Bolognese, Vol. I at 154-56; Preliminary Injunction Hearing Testimony of Dr. Dratman at 59-61].

172. An example of how the definition of medical emergency in the Act may depart from medical practices is illustrated by the following hypothetical. A 16 year-old woman is 18 weeks pregnant. She is swollen; her

blood pressure is elevated; her urine contains a considerable amount of protein; her reflexes are very brisk. She is diagnosed as having a clinical syndrome known as preeclampsia. The only treatment for this condition is to terminate the pregnancy. Under normal obstetrical practice, her condition would be considered to pose a medical emergency. However, while eclampsia could cause seizures which could, in turn, lead to a concussion or other serious medical conditions, there is no clear risk of "substantial and irreversible impairment of major bodily function." [Preliminary Injunction Hearing Testimony of Dr. Dratman at 59-61]. Therefore, this case would not fall within the definition of medical emergency contained in the Act.

173. If required to adhere to the

definition of medical emergency contained in the Act, as opposed to the less restrictive definition used by physicians in other circumstances, a physician could delay in his or her treatment, namely the performance of an abortion, of a patient with a ruptured membrane or preeclampsia. Under these circumstances, preeclampsia and a ruptured membrane would not fall within the definition of medical emergency contained in section 3203, but would be considered an emergency warranting immediate treatment by the physician. Therefore, compliance with the Act would require a departure from standard of care presently existing in medical practice, and could ultimately jeopardize the health of the pregnant woman. [Trial Testimony of Dr. Davidson, Vol. I at 26-28, 34-35].

174. While Dr. Bowes testified that he was unaware of any condition where a patient would require an immediate abortion that would not fall within the Act's definition of medical emergency, his testimony on the subject actually supports the opinions of Dr. Davidson and Dr. Bolognese. For example, he testified that a medical emergency within the meaning of the Act would exist when a woman is experiencing an inevitable abortion but only when "serious" hemorrhaging is occurring in the patient. In respect to preeclampsia, he stated that a medical emergency within the meaning of the Act would exist "in the cases in which [preeclampsia] becomes severe" and "the patient's blood pressure is very high and other complications are occurring." When discussing a ruptured membrane, he

stated that this condition only becomes a medical emergency within the meaning of the Act when the patient develops a fever and the infection reaches the fetus. [Trial Testimony of Dr. Bowes, Vol. III at 37-42]. The credible testimony of Dr. Davidson, Dr. Bolognese and Dr. Dratman establishes that, viewing the term with the ordinary meaning given to it in the profession, the Act would not consider any of the three aforementioned conditions an emergency until much later in the progression of the seriousness of the condition.

(2) Informed Consent and Twenty-Four Hour Waiting Period (Section 3205)

175. Section 3205(a) of the Act, as amended, reads, in pertinent part, as follows:

Except in cases of a medical emergency, consent to an abortion is voluntary and informed if and only if:

(1) At least 24 hours prior to the abortion, the physician who is to perform the abortion or the referring physician has orally informed the woman of:

(i) The nature of the proposed procedure or treatment and of those risks and alternatives to the procedure or treatment that a reasonable patient would consider material to the decision of whether or not to undergo the abortion.

(ii) The probable gestational age of the unborn child at the time the abortion is to be performed.

(iii) The medical risks associated with carrying her child to term.

(2) At least 24 hours prior to the abortion, the physician who is to perform the abortion or the referring physician, or a qualified physician assistant, health care practitioner, technician, social worker to whom the responsibility has been delegated by either physician, has informed the pregnant woman that:

(i) The department[22] publishes printed materials which describe the unborn child and list agencies which offer alternatives to abortion and that she has a right to review the printed materials and that a copy will be provided to her free of charge if she chooses to review it.

(ii) Medical Assistance benefits may be available for prenatal care, childbirth and neonatal care, and that more detailed information on the availability of such assistance is contained in the printed materials published by the department.

(iii) The father of the unborn child is liable to assist in the support of her child, even in instances where he has offered to pay for the abortion. In the case of rape, this information may be omitted.

(3) A copy of the printed materials has been provided to the pregnant woman if she chooses to view these materials.

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22. The "department" is defined by the Act as "[t]he Department of Health of the Commonwealth of Pennsylvania." See 18 Pa. Cons. Stat. Ann. § 3203.

(4) The pregnant woman certifies in writing, prior to the abortion, that the information required to be provided under paragraphs (1), (2) and (3) has been provided.

18 Pa. Con. Stat. Ann. § 3205(a).

176. The 1989 amendments substantially alter the earlier 1988 amendments to subsections (a) and (c) of section 3205. See 1988 Pa. Laws 262, 263-65, § 4. In Act 64, the legislature essentially reenacted most aspects of the 1982 version of the Act found unconstitutional in prior litigation. For example, the 1982 version of section 3205 required a 24-hour waiting period, required a doctor only to advise the woman of (1) the nature and risks of the proposed procedure, (2) the gestational age of the unborn child, and (3) the medical risks associated with carrying the child to term, and required someone to advise the woman of the availability

of (1) medical assistance benefits, (2) a list of agencies which offer alternatives to abortion, (3) printed materials describing the fetus at various different stages, and (4) paternal liability to assist in the support of her child. See 1982 Pa. Laws 476, 479-81, § 1.

177. Section 3208(a) of the Act, as amended, requires PaDOH to prepare, publish and update on an annual basis easily comprehensible printed materials which would comply with the informed consent requirements of section 3205(a). The printed information must be prepared in English, Spanish and Vietnamese. See 18 Pa. Con. Stat. Ann. §3208(a). All materials must be printed in typeface large enough to be clearly legible, 18 Pa. Con. Stat. Ann. § 3208(b), and available at no cost from

PaDOH to any person, facility or hospital. 18 Pa. Con. Stat. Ann. § 3208(c).

178. The 1989 version of section 3208 is virtually identical to the version of this section as it existed in 1988. However, Act 64 eliminated the requirement that the materials concerning the availability of social service agencies contain the following statement:

> There are many public and private agencies willing and able to help you to carry your child to term, and to assist you and your child after your child is born, whether you choose to keep your child or to place her or him for adoption. The Commonwealth of Pennsylvania strongly urges you to contact them before making a final decision about abortion.

See 1988 Pa. Laws 262, 268-69, § 4. The earlier version of section 3208 is similar to the existing version to the extent that it requires the preparation

of "[g]eographically indexed materials designed to inform the woman" of agencies available that provide alternatives to abortion and "[m]aterials designed to inform the woman of the probable anatomical and physiological characteristics of the child at two-week gestational increments." See 1982 Pa. Laws 476, 483-84, § 1.

179. If all provisions of section 3205 were to go into effect, defendants intend to require the use of a notice form prepared by PaDOH by all abortion providers during the informed consent process. The notice reads as follows:

COMMONWEALTH OF PENNSYLVANIA

DEPARTMENT OF HEALTH

NOTICES REQUIRED BY ABORTION CONTROL ACT

JULY, 1990

1. It is generally unlawful for any individual to coerce a woman to undergo [an] abortion.

2. Any physician who performs an abortion upon a woman without according her a private medical consultation may be liable to her for damages in a civil action at law.

3. The father of a child is liable to assist in the support of that child, even in instances where the father has offered to pay for an abortion. The availability of support payments will depend, in part, on the father's income. You may wish to consult a lawyer regarding the availability of support payments.

4. The law permits adoptive parents to pay costs of prenatal care, childbirth and neonatal care.

[Trial Testimony of Dr. Patrozebowski, Vol. III at 112-13, 136-37; Defendants' Exhibit 51].

180. If all provisions of section 3205 were to go into effect, defendants intend to require the use of a form which reads as follows:

COMMONWEALTH OF PENNSYLVANIA

DEPARTMENT OF HEALTH

MEDICAL ASSISTANCE BENEFITS FOR

PRENATAL CARE, CHILDBIRTH AND

NEONATAL CARE

JULY, 1990

You may or may not qualify for medical assistance benefits, depending on your income. For persons who qualify, the Medical Assistance Program will pay for doctor, clinic, hospital, and other related medical expenses so you can receive prenatal care, delivery services, and care for your newborn baby. You can apply for Medical Assistance benefits at your local County Assistance Office.

Under the Healthy New Beginnings Program you may be eligible for Medical Assistance because you are pregnant. A pregnant woman is allowed to have more income to qualify for this benefit and may receive prenatal care from certain providers while the formal application for assistance is being processed.

Your County Assistance Office can tell you which providers participate in the Medical

> Assistance Program and can answer your questions about other available benefits. County Assistance Offices are listed [on the following pages] for your information. The attached pamphlets on Medical Assistance and Healthy Beginnings also may be of assistance to you.

[Trial Testimony of Dr. Potrzebowski, Vol. III at 112, 136-37; Defendants' Exhibit 50].

181. In anticipation of the possibility that section 3205 will be permitted to go into effect, a "Directory of Social Service Organizations" to be provided to women seeking an abortion was prepared by PaDOH. For each county in Pennsylvania, the Directory provides a list of agencies that "provide a variety of services which may assist a woman through pregnancy, upon childbirth, and while the child is dependent." Examples of services provided by these agencies are "counseling, pregnancy testing,

medical care, legal and financial assistance, transportation, childbirth instruction, housing, job placement, continuing education and adoption information." [Trial Testimony of Dr. Potrzebowski, Vol. III at 111; Defendants' Exhibit 49 at 1].

182. The PaDOH-created-list of social service organizations does not include, particularly for Monroe County and Allegheny County, some agencies that provide services to pregnant women. The list also includes crisis pregnancy centers and other organizations which provide women with misinformation and inflammatory literature which increases pre-abortion anxiety. [Trial Testimony of Ms. Roselle, Vol. II at 87-89, 91-92, 112; Trial Testimony of Ms. Dillon, Vol. III at 159-60].

183. Nothing in the Act prohibits abortion providers that would be

required to supply this list to abortion patients from recommending a patient avoid a particular agency on the list. Nor does anything in the Act prohibit abortion providers from recommending a particular agency, whether on the list or not, to a patient in light of that patient's individual needs.

184. Nothing in the record suggests that the Directory could not be supplemented by PaDOH to include those agencies omitted from the list.

185. The informed consent requirements of the Act represent a substantial departure from the ordinary medical requirements of informed consent. [Trial Testimony of Dr. Bowes, Vol. III at 71].

186. "Informed consent" as used in section 3205 has a medically and legally distinct meaning which is different than

simple "consent." [Trial Testimony of Dr. Grodin, Vol. I at 96-97].

187. As a general rule, informed consent requires communications between the doctor or counselor and patient to assure that the patient has made a treatment choice based upon knowledge of his or her condition, the benefits and risks of a particular treatment and its alternatives. In order to be informed, consent must be made voluntarily and competently. [Trial Testimony of Dr. Grodin, Vol. I at 96-97; Trial Testimony of Dr. Allen, Vol. I at 40-41].

188. Although the informed consent dialogue may be brief (the length of the dialogue will depend in a great part upon the complexity of the procedure contemplated), personal contact between the patient and the person rendering the informed consent is essential. The

physician's or counselor's observation of the person's demeanor and reactions to medical information provided is essential to permit the physician or counselor to determine whether the patient is competent to give informed consent and whether the patient fully understood the information imparted during the dialogue. Further, personal contact is necessary to determine whether the patient is under duress from extrinsic sources while providing informed consent. [Trial Testimony of Dr. Allen, Vol. I at 41; Trial Testimony of Dr. Grodin, Vol. I at 99-105]. Even defendants' expert witness testified that telephone informed consent could only be justified, if subsequent face-to-face contact occurs. [Trial Testimony of Dr. Bowes, Vol. III at 69].

189. A patient's informed consent

cannot be obtained through the use of a tape recorded message or printed materials. [Trial Testimony of Dr. Allen, Vol. I at 42; Trial Testimony of Dr. Grodin, Vol. I at 104].

a. **The Twenty-Four Hour Waiting Period.**

190. ACOG has taken an official position in opposition to a mandatory 24-hour waiting period. [Trial Testimony of Dr. Allen, Vol. I at 47].

191. A very small percentage of women are ambivalent concerning whether to have an abortion when they come to a clinic. Arrangements for special counseling sessions are made for women demonstrating any ambivalence about her decision. [Trial Testimony of Dr. Allen, Vol. at 44-45; Trial Testimony of Ms. Roselle, Vol. II at 77].

192. If a patient is ambivalent about having an abortion and decides to

postpone the procedure to have additional counseling, that will cause a delay in the performance of the abortion. [Court's Exhibit 1-A at ¶ 98].

193. If it were to go into effect, the 24-hour waiting period of the Act will force every women seeking an abortion in Pennsylvania to make a minimum of two visits to an abortion provider. [Trial Testimony of Ms. Roselle, Vol. II at 80-81].

194. Two trips to the abortion provider would subject many women to the harassment and hostility of anti-abortion protestors demonstrating outside a clinic, such as WHS, on two separate occasions. [Trial Testimony of Dr. Allen, Vol. I at 43].

195. Because most of plaintiff-clinics and plaintiff-physicians do not perform abortions on a daily basis, the

mandatory 24-hour waiting period will result in delays far in excess of 24 hours. For the majority of women in Pennsylvania, delays will range from 48 hours to two weeks. [Trial Testimony of Ms. Roselle, Vol. II at 81-82, 106].

196. In 1988, 58% of the women obtaining abortions in Pennsylvania resided in only five of the Commonwealth's counties. Women who live in any of the other 62 counties must travel for at least one hour, and sometimes longer than three hours, to obtain an abortion from the nearest provider. [Trial Testimony of Ms. Roselle, Vol. II at 80; Verification of Ms. Roselle at ¶ 9; Verification of Ms. Stengle at ¶ 10].

197. The mandatory 24-hour waiting period would force women to double their travel time or stay overnight at a

location near the abortion facility. This will necessarily add either the costs of transportation or overnight lodging or both to the overall cost of her abortion. Additionally, many women may lose additional wages or other compensation as a result of the mandatory 24-hour delay, if forced to miss work on two separate occasions. Two trips to the abortion provider may cause the women to incur additional expenses for food and child care.

198. The costs incident to obtaining an abortion, excluding the actual cost of the procedure itself, will be greater if the 24-hour waiting period were to go into effect.

199. The mandatory 24-hour waiting period will be particularly burdensome to those women who have the least financial resources, such as the poor

and the young, those women that travel long distances, such as women living in rural areas, and those women that have difficulty explaining their whereabouts, such as battered women, school age women, and working women without sick leave.

200. In some cases, the delays caused by the 24-hour waiting period will push patients into the second trimester of their pregnancy substantially increasing the cost of the procedure itself and making the procedure more dangerous medically.

201. A delay of 24 hours will have a negative impact on both the physical and psychological health of some patients, as well as increase the risk of complications. [Trial Testimony of Dr. Allen, Vol. I at 88; Trial Testimony of Dr. Walker, Vol. II at 42-43].

202. While an abortion is still substantially safer than carrying a pregnancy to term, after the eighth week of the pregnancy, delay in the performance of the abortion increases the risk of death to the woman. [Trial Testimony of Dr. Allen, Vol. I at 45; Trial Testimony of Dr. Bowes, Vol. III at 54-56]. A substantial increase in the risk of death from an abortion procedure occurs when the pregnancy moves from the earlier stages of the second trimester to the middle portion of the second trimester (16 to 20 weeks of gestation). [Trial Testimony of Dr. Bowes, Vol. III at 56].

203. A mandatory 24-hour waiting period between the receipt of informed consent information and the performance of the abortion serves no legitimate medical interest. If a physician has

concluded that any other type of obstetrical or gynecological procedure is medically necessary and has obtained the informed consent of the patient, there is simply no medical reason to delay performance of the procedure any longer. [Trial Testimony of Dr. Allen, Vol. I at 43; Trial Testimony of Dr. Grodin, Vol. I at 118-19; Trial Testimony of Dr. Bolognese, Vol. I at 145-46].

b. **Physician-Only Disclosure Requirements.**

204. Prior to performing an abortion, trained counselors at plaintiff-clinics or plaintiff-physicians provide a patient with options counseling and obtain her informed consent to the procedure. [Trial Testimony of Dr. Allen, Vol. I at 44, 51; Trial Testimony of Ms. Roselle, Vol. II at 77-80, 113-15; Preliminary

Injunction Hearing Testimony of Ms. Stengle at 26-27; see also Findings of Fact at ¶¶ 26-27, 50, 86-88, 100-01, 128-30].

205. ACOG and the American Public Health Association have taken an official position in favor of the use of trained, qualified counselors to provide informed consent information concerning abortions. [Trial Testimony of Dr. Allen, Vol. I at 52].

206. In the last twenty years, the field of medicine has broadened and increased in complexity causing an increase in medical specialization. Accordingly, the importance of mid-level professionals to the provision of excellent, low-cost and personalized health care has grown correspondingly. [Trial Testimony of Dr. Allen, Vol. I at 52].

207. In the field of obstetrics and gynecology, a significant portion of patient care is routine, non-emergent and can be provided as effectively by trained counselors as by licensed physicians. [Trial Testimony of Dr. Allen, Vol. I at 52-53]. This is particularly true with respect to the performance of abortions.

208. Trained counselors, such as those employed or utilized on a volunteer basis by plaintiff-clinics and plaintiff-physicians, are fully capable, by virtue of their training and experience, to provide information to patients, to discuss the alternatives to abortion with the patient, and to secure the patient's informed consent to the abortion procedure. [Trial Testimony of Dr. Allen, Vol. I at 5I; Trial Testimony of Ms. Roselle, Vol. II at 78-79;

Preliminary Injunction Hearing Testimony of Ms. Stengle at 27].

209. None of the plaintiffs have physicians who perform abortions without the physician talking to the patient before the abortion procedure. [Court's Exhibit 1-A at ¶ 88].

210. Requiring physicians to give information personally will leave the physician less time to provide the medical services which he or she, as a licensed physician, can provide. [Trial Testimony of Dr. Allen, Vol. I at 51].

211. In many instances, trained counselors, who are women, are more understanding than physicians and have more time to spend with patients. Further, it is more economical for the plaintiff-clinics to utilize trained counselors to provide options counseling and informed consent information to

patients seeking an abortion. If the physician-only disclosure requirements become law, the added costs incurred by abortion providers will be imposed upon the women seeking abortions. [Trial Testimony of Dr. Allen, Vol. II at 51].

212. The requirement of section 3205 that physicians personally provide information necessary for informed consent will require extensive changes in the operating schedules of plaintiff-clinics and plaintiff-physicians. Physicians' schedules will need to be expanded to include additional medical consultation and counseling sessions which would be required by the Act[23] or additional physicians will have to be hired to provide these additional services. It will be difficult to find

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23. This would be further complicated if the 24-hour waiting period were also to go into effect.

available physicians to provide these additional services, because of the doctors' already busy schedules. [Trial Testimony of Dr. Allen, Vol. I at 50-51]. WHS has found it more difficult to maintain an adequate supply of physicians since the amendments to the Act. [Trial Testimony of Dr. Allen, Vol. I at 87].

213. The state's interest in ensuring that a woman's consent to an abortion procedure is informed and unpressured is in no way furthered by mandating the identity of the person that must obtain the informed consent. The state's interest is satisfied when a woman gives her informed consent to the procedure and receives any necessary counseling from a trained, qualified person, such as the counselors utilized by plaintiff-clinics.

c. Content-Based Informed Consent.

214. Content based informed consent is the supply of specific information to all patients regardless of the specific circumstances and needs of each individual patient. Content-based informed consent is contrary to the standard medical practice that informed consent be specifically tailored to the needs of the specific patient. [Trial Testimony of Dr. Grodin, Vol. I at 101-02, 107].

215. Medical practice requires that the informed consent dialogue between physician or counselor and patient be specifically tailored to the needs of the patient -- rather than a "reasonable patient." [Trial Testimony of Dr. Grodin, Vol. I at 107].

216. The role of the physician or counselor during the informed consent

dialogue is <u>not</u> to attempt to sway the patient's decision in one way or another. [Trial Testimony of Dr. Allen; Trial Testimony of Dr. Grodin; Trial Testimony of Dr. Bolognese; Trial Testimony of Dr. Rue; Trial Testimony of Dr. Bowes]. Options counseling is separate and distinct from informed consent. [Trial Testimony of Dr. Grodin, Vol. I at 102].

217. Section 3205(d) may actively discourage the free flow of information during the informed consent dialogue by relieving any physician "who complies with the provisions" of section 3205 from civil liability for failure to obtain informed consent. This may provide some physicians with an incentive to limit their informed consent dialogue to the four corners of section 3205 in an effort to avoid civil

liability. [Trial Testimony of Dr. Allen, Vol. I at 59-60; Trial Testimony of Dr. Grodin, Vol. I at 117-118].

218. For many women, the medical information required by section 3205 is over inclusive. For example, the Act requires a disclosure of medical risks of carrying a pregnancy to term. If a woman has decided that abortion is in her best interests, no legitimate purpose is served by informing her of maternal mortality statistics or that many women require caesarian sections at the time of delivery. [Trial Testimony of Dr. Allen, Vol. I at 55; Trial Testimony of Dr. Grodin, Vol. I at 105-06, 108-09]. Similarly, a physician would not advise a woman who has decided to carry her pregnancy to term of the risks associated with an abortion procedure. [Trial Testimony of

Dr. Allen, Vol. I at 54].

219. Prior to the scheduling of an appointment with an abortion provider, most women have already decided that an abortion is in their best interest. [Trial Testimony of Ms. Roselle, Vol. II at 109; Trial Testimony of Dr. Allen, Vol. I at 43-44]. For many women, the decision to have an abortion is a decision which they reach only after a good deal of careful thought, consultation with a family member or other trusted individual, or a medical provider. [Trial Testimony of Ms. Roselle].

220. In some cases, merely offering a woman the opportunity to read materials and examine pictures designed to inform her of the probable anatomical and physiological characteristics of the fetus at two week gestational increments

and of the possibility of the unborn child's survival, as well as a state created list of agencies that will assist her in carrying her pregnancy to term, will create undesirable and unnecessary anxiety, anguish and fear. [Trial Testimony of Dr. Grodin, Vol. I at 109-10; Trial Testimony of Ms. Roselle, Vol. II at 91-92, 112].

221. The mandated information required by sections 3205 and 3208 will create the impression in women that the Commonwealth disapproves of the woman's decision. The information and material required by these sections is an attempt by the Commonwealth to alter a woman's decision after she has determined that an abortion is in her best interest.

222. Once the decision to terminate the pregnancy is made by a woman, requiring physicians or counselors to

provide the information required by section 3205 and to offer exposure of the literature required by section 3208 will undermine the physician's or counselor's ability to counsel a patient according to her individual needs and will force the physician or counselor to act in a manner inconsistent with their professional judgment and training. [Trial Testimony of Dr. Grodin, Vol. I at 109-10; Trial Testimony of Ms. Roselle, Vol. II at 84].

223. Informing women of the availability of medical assistance benefits or paternal support for the child has no legitimate medical justification. Such information may mislead or confuse the patient, and, in the vast majority of the cases, is plainly inappropriate given the circumstances of the individual

patient. [Trial Testimony of Dr. Allen, Vol. I at 56; Trial Testimony of Dr. Grodin, Vol. I at 110-11; Trial Testimony of Ms. Roselle, Vol. II at 83-85, 90].

224. The circumstances under which medical assistance benefits or child support payments may, in reality, be available to a patient are well beyond the ordinary expertise of physicians or counselors. Advising a patient of the general availability of such benefits or payments may cause a woman to rely upon those statements and elect against an abortion only to later discover that the benefits or payments were unavailable or insufficient. [Trial Testimony of Dr. Allen, Vol. I at 56; Trial Testimony of Dr. Grodin, Vol. I at 110-11; Trial Testimony of Ms. Roselle, Vol. II

at 90; Trial Testimony of Ms. Dillon, Vol. III at 154-55].

225. The requirements that a woman be advised that medical assistance benefits or child support payments may be available, as well as some of the other information required to be offered by section 3205, are poorly veiled attempts by the Commonwealth to disguise elements of discouragement of the abortion decision.

226. The requirement that a specific body of information be given in all cases, regardless of the individual needs of the patient, intrudes upon the discretion of the physician and the woman's decision-making process. [Trial testimony of Dr. Grodin, Vol. I at 99-102].

227. Section 3205's imposition of criminal penalties[24] upon doctors or counselors is a significant departure from existing informed consent law. In no other instance does an informed consent regulation provide for criminal penalties. [Trial Testimony of Dr. Allen, Vol. I at 61].

228. Fear of criminal sanctions by counselors or doctors will cause abortion providers to apply section 3205 with extreme caution. Some doctors may discontinue performing abortion procedures. [Trial testimony of Dr. Davidson, Vol. I at 34-35; Trial Testimony of Dr. Bolognese, Vol. I at 143-44].

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[24] See 18 Pa. Con. Stat. Ann. §3205(c).

(3) Parental Consent (Section 3206)

229. Section 3206 of the Act, as amended by Act 31, provides, in pertinent part, as follows:

> Except in a medical emergency, or except as provided in this section, if a pregnant woman is less than 18 years of age and not emancipated, or if she has been adjudged an incompetent . . ., a physician shall not perform an abortion upon her unless, in the case of a woman who is less than 18 years of age, he first obtains the informed consent both of the pregnant woman and of one of her parents; or, in the case of a woman who is incompetent, he first obtains the informed consent of her guardian.

See 18 Pa. Con. Stat. Ann. § 3206(a) (emphasis added).

230. This section of the Act was not altered by the 1989 amendments to the Act. However, this section is distinct from the version that existed in 1982 inasmuch as the earlier version only required the "consent" of the pregnant woman and one of her parents--as opposed to the "informed consent" of

both individuals. See 1982 Pa. Laws 476, 481-83, § 1.

231. Inasmuch as this section of the Act requires the "informed consent" of the parent and the pregnant woman, my earlier findings pertaining to informed consent apply with equal force to this section. Therefore, they shall be incorporated by reference herein.

232. The Act does not separately define "informed" parental consent. The Act does not explicitly state that the parent must visit the clinic personally in order to give his or her informed parental consent.

233. ACOG has taken a position against forced parental notification by minors. [Trial Testimony of Dr. Allen, Vol. I at 65].

234. Clinics in Pennsylvania that offer abortion counseling services and

abortion services encourage parental involvement in the minor's decision to have an abortion whenever possible. [Verification of Ms. Roselle at ¶¶ 10, 20; Preliminary Injunction Hearing Testimony of Ms. Stengle at 28; Verification of Ms. Stengle at ¶¶ 12, 19; see also Findings of Fact at ¶¶ 29, 54-57, 80-81, 102, 106-09, 124-27].

235. There can be delays in performing an abortion on a minor who chooses to wait for her parent to be able to come to the clinic, which delay can exceed two weeks. [Court's Exhibit 1-A at ¶ 100].

236. Most minors come to a clinic in the company of an adult, even if not a parent. [Trial Testimony of Dr. Allen, Vol. I at 64].

237. Approximately 54% of AWC's minor patients have parental consent for

abortions. In all cases, AWC requires that some adult is available to care for the minor patient. [Preliminary Injunction Hearing Testimony of Ms. Stengle at 28-29].

238. Under Act 31, and in accordance with standard medical principles of informed consent, the plaintiff-clinics intend to require in-person consultation with the parent to assure the parent's consent is informed. Plaintiff-clinics consider it necessary to require in-person parental informed consent to avoid the heightened risk of criminal and civil liabilities. [Preliminary Injunction Hearing Testimony of Ms. Roselle at 11; Preliminary Injunction Hearing Testimony of Ms. Stengle at 30-31; Verification of Ms. Roselle at ¶ 21; Verification of Ms. Stengle at ¶ 25].

239. The plaintiff-clinics are unwilling to secure parental informed consent over the telephone, or by any means other than an in-person visit to the clinic. [Trial Testimony of Ms. Roselle, Vol. II at 81; Preliminary Injunction Hearing Testimony of Ms. Roselle at 10; Preliminary Injunction Hearing Testimony of Ms. Stengle; Verification of Ms. Roselle at ¶ 21].

240. An in-person visit by a parent for informed consent counseling may cause delays of several days or possibly weeks, even in cases where the parent is prepared to consent. [Verification of Ms. Stengle at ¶¶ 24, 26, 28; Verification of Ms. Roselle at ¶ 24].

241. Delays in obtaining parental consent could be both dangerous and prohibitive since a substantial number of minors decide to have an abortion

much later in their pregnancy. [Trial Testimony of Dr. Allen, Vol. I at 63; Preliminary Injunction Hearing Testimony of Ms. Roselle at 14; Verification of Ms. Roselle at ¶ 24; Verification of Ms. Stengle at ¶ 28].

242. Adolescents as a group are generally more reluctant to initiate contact with an unfamiliar group or organization. For this reason, a pregnant minor may delay the initial step of contacting the clinic until further into their pregnancies. [Verification of Ms. Roselle at ¶ 27; Verification of Ms. Stengle at ¶ 33].

243. Adolescents as a group tend to deny their pregnancies out of guilt and postpone making any decisions as to what course of action is in their best interests. [Trial Testimony of Dr. Allen, Vol. I at 63; Verification of Ms.

Stengle at ¶ 33].

244. Many adolescents are unaware of their pregnancy for weeks or months because of ignorance about their menstrual cycles, pregnancy and their own irregular menstrual cycles. [Trial Testimony of Dr. Allen at 63].

245. Further delays can arise from a minor's fear and hesitation in divulging to her parents: first, she has been sexually active; second, that she is pregnant, and third, that she wishes to have an abortion. Because of the disruption and trauma associated with these disclosures, a minor will delay telling her parents that she is pregnant for days or even weeks. [Preliminary Injunction Hearing Testimony of Ms. Roselle at 14; Preliminary Injunction Hearing Testimony of Ms. Stengle at 29; Verification of Ms. Stengle at ¶ 30].

246. The clinics often find themselves having to expedite a minor's testing, counseling and procedure because the minor has delayed going to the clinic until she is near or into the second trimester of her pregnancy. [Trial Testimony of Dr. Allen, Vol. I at 63; Trial Testimony of Ms. Roselle; Preliminary Injunction Hearing Testimony of Ms. Roselle at 15].

247. The additional costs, burdens and delays incurred by minors and her parents, if the parent is required to make an in-person visit to the facility, could be extremely costly and burdensome.

248. More second trimester abortions are performed on minors in the United States than any other age group. [Verification of Ms. Stengle at ¶ 33]. Late abortions, particularly second trimester abortions, pose a greater risk

to the woman's health. [Trial Testimony of Dr. Allen, Vol. I at 46-47; Trial Testimony of Dr. Bowes, Vol. III at 55-58; Preliminary Injunction Hearing Testimony of Ms. Stengle at 37; Verification of Ms. Stengle at ¶ 34]. Because teenagers have never experienced a prior dilation of the cervix, later abortions can be an especially dangerous procedure for them. [Preliminary Injunction Hearing Testimony of Ms. Stengle at 37].

249. Many minors have great difficulty tolerating scheduling difficulties and delay. They tend to postpone the abortion decision because of fear and anxiety. Thus, once the decision has been made, they are likely to react negatively to scheduling delay and obstacles in obtaining an abortion. Some may lie about their age to attempt

to avoid the requirements of section 3206; others may decide to carry their pregnancy to term; and some may resort to self-abortion. [Preliminary Injunction Hearing Testimony of Ms. Stengle at 37-38].

250. In some cases, where parents are prepared to consent, he or she will be unable to come to the clinic for several days for the necessary counseling because of work schedules, family obligations, travel distance, or other commitments. [Verification of Ms. Stengle at ¶ 26; Verification of Ms. Roselle at ¶ 21]. Still in other cases, a parent may refuse to accompany their daughter to the facility even though he or she has agreed to consent to the daughter's abortion. [Trial Testimony of Ms. Roselle, Vol. II at 92-93].

251. Implementation of parental

informed consent requirements of the Act will create scheduling and administrative difficulties for plaintiff-clinics and alter their current practices and procedures drastically. Counseling sessions will have to be scheduled at times and on days not presently within their staffing capabilities to accommodate the schedules of parents of minor patients. [Verification of Ms. Roselle at ¶¶ 22-23; Verification of Ms. Stengle at ¶¶ 27].

252. If the parental consent provision of the Act goes into effect, PPSP will counsel parents who attend with their minor child at the same time they counsel the minor. [Court's Exhibit 1-A at ¶ 118].

253. If the parental consent provision of the Act goes into effect,

parents may receive counseling sessions at any of PPSP's clinics. [Court's Exhibit 1-A at ¶ 119].

254. The requirement of parental informed consent for minor women seeking abortions adds significant expense and delay to the expense and delay already existing in the Act. Taken together, the provisions of the Act, as applied to minors, will create layers of obstacles which could unduly burden a minor woman's ability to get an abortion. [Trial Testimony of Ms. Roselle, Vol. II at 81-82].

255. The additional financial cost of travel, lost wages and child care expenses incurred by minors and their parents because of the parental informed consent requirements of the Act would unduly burden a minor woman's ability to get an abortion. In some cases, the

provisions may act in such a way as to deprive her of her right to have an abortion. [Preliminary Injunction Hearing Testimony of Ms. Roselle at 14-15; Preliminary Injunction Hearing Testimony of Ms. Stengle at 35; Verification of Ms. Roselle at ¶ 25].

256. In order to avoid the risk of criminal or civil penalties, the plaintiff-clinics and plaintiff-physicians will be extremely conservative as to their requirements for proof of age and parenthood. [Preliminary Injunction Hearing Testimony of Ms. Stengle at 31; Preliminary Injunction Hearing Testimony of Ms. Roselle at 10; Verification of Ms. Stengle at ¶ 31; Verification of Ms. Roselle at ¶ 26].

257. On many occasions, members of the public enter plaintiff-clinics

posing as clients or pregnant women seeking information about abortion in order to scrutinize the procedures and controls in effect at the clinic. [Preliminary Injunction Hearing Testimony of Ms. Roselle; Preliminary Injunction Hearing Testimony of Ms. Stengle].

258. Plaintiff-clinics reasonably fear that members of anti-abortion groups will send minors to the clinic posing as patients to test the clinic's compliance with section 3206. [Preliminary Injunction Hearing Testimony of Ms. Roselle].

259. All of the clinics anticipate increased expenses resulting from the parental consent provisions of section 3206. [Preliminary Injunction Hearing Testimony of Ms. Roselle at 14; Verification of Ms. Stengle at ¶ 32].

260. Pennsylvania law governing consent for medical or health services on minors provides as follows:

> Any minor who is eighteen years of age or older, or has graduated from high school, or has married or has been pregnant, may give effective consent to medical, dental and health services for himself or herself, and the consent of no other person shall be necessary.

35 Pa. Con. Stat. Ann. § 10101 (Purdon 1977). Further, a minor parent may give effective consent to medical, dental or health services for his or her child. See 35 Pa. Con. Stat. Ann. § 10102.

261. Pennsylvania law governing consent for medical or health service on pregnant minors provides as follows:

> Any minor may give effective consent for medical and health services to determine the presence of or to treat pregnancy, and venereal disease . . . .

35 Pa. Con. Stat. Ann. § 10103.

262. Finally, 35 Pa. Con. Stat. Ann. § 10104 states:

> Medical, dental and health services may be rendered to minors of any age without the consent of a parent or legal guardian when, in the physician's judgment, an attempt to secure consent would result in delay of treatment which would increase the risk of the minor's life or health.

263. Section 3206(b), regarding "Unavailability of parent or guardian," provides:

> If both parents have died or are otherwise unavailable to the physician within a reasonable time and in a reasonable manner, consent of the pregnant woman's guardian or guardians shall be sufficient. If the pregnant woman's parents are divorced, consent of the parent having custody shall be sufficient. If neither any parent nor a

> legal guardian is available to the physician within a reasonable time and in a reasonable manner, consent of any adult person standing in loco parentis shall be sufficient.

18 Pa. Con. Stat. Ann. § 3206(b).

264. In part because of the failure to define the terms "reasonable time," "reasonable manner," and "person standing in loco parentis," the plaintiff-clinics will likely take a conservative approach in applying section 3206(b).

265. Many of the plaintiff-clinic's patients are minors who live with non-parents, such as aunts, grandmothers or siblings. Often the arrangement is an informal one rather than a legal guardianship, with natural parents living in another city or perhaps having abandoned the minor. The plaintiff-clinics intend to be wary of

permitting the adult "caretaker" to consent to the minor's abortion for fear of criminal or civil sanctions if officials believe that the parents could have been available in a reasonable time and manner. [Preliminary Injunction Hearing Testimony of Ms. Stengle at 32-33].

266. The provisions of section 3206 relating to the judicial by-pass procedure are self-executing on their face. There was been no testimony at the trial concerning whether the various Courts of Common Pleas in Pennsylvania were adequately prepared to implement the judicial by-pass procedures and protect the confidentiality of minors availing themselves of these procedures.

(4) Spousal Notification (Section 3209)

267. Pertinent portions of section 3209 read as follows:

(a) **Spousal notice required.**--In order to further the Commonwealth's interest in promoting the integrity of the marital relationship and to protect a spouse's interests in having children within marriage and in protecting the prenatal life of that spouse's child, no physician shall perform an abortion on a married woman, except as provided in subsections (b) and (c), unless he or she has received a signed statement, which need not be notarized, from the woman upon whom the abortion is to be performed, that she has notified her spouse that she is about to undergo an abortion. The statement shall bear a notice that any false statement made therein is punishable by law.

(b) **Exceptions.**-- The statement certifying that the notice required by subsection (a) has been given need not be furnished where the woman provides the physician a signed statement certifying at least one of the following:

(1) Her spouse is not the father of the child.

(2) Her spouse, after diligent effort, could not be located.

(3) The pregnancy is a result of spousal sexual assault as described in section 3128 (relating to spousal sexual assault), which has been

reported to a law enforcement agency having the requisite jurisdiction.

(4). The woman has reason to belief that the furnishing of notice to her spouse is likely to result in the infliction of bodily injury upon her spouse or by another individual.

Such statement need not be notarized, but shall bear a notice that any false statements made therein are punishable by law.

(c) **Medical Emergency.**--The requirements of subsection (a) shall not apply in the case of a medical emergency.

18 Pa. Con. Stat. Ann. § 3206(a) - (c). The husband notification provisions of this section are new to the Act.

268. "Spousal sexual assault" is defined as follows:

(a) sexual assault.-- A person commits a felony of the second degree when that person engages in sexual intercourse with that person's spouse:

(1) by forcible compulsion;

(2) by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution; or

(3) who is unconscious.

(b) Involuntary spousal deviate sexual intercourse.-- A person commits a felony of the second degree when that person engages in deviate sexual intercourse with that person's spouse:

(1) by forcible compulsion;

(2) by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution; or

(3) who is unconscious.

18 Pa. Con. Stat. Ann. §3128 (1990 Supp.)

269. If the husband notification provisions of the Act were to go into effect, PaDOH has prepared a form to be filled out by married women seeking an abortion prior to performance of the procedure. This form reads as follows:

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF HEALTH

ABORTIONS: SPOUSAL NOTICE

CERTIFICATION REGARDING SPOUSAL NOTICE

I understand that as a married woman, I am required to notify my spouse of the fact that I am about to undergo an abortion, prior to obtaining such abortion, unless I am exempt from the notification requirements due to one of the reasons set forth below. Pursuant to this requirement, I hereby certify that:

CHECK APPROPRIATE BLANK(S)

_____ I have notified my spouse that I am about to undergo an abortion.

_____ I have not notified my spouse that I am about to undergo an abortion for the following reason(s):

_____ My spouse is not the father of the child.

_____ My spouse, after diligent effort, could not be located.

_____ The pregnancy is a result ofspousal sexual assault which has been reported to a law enforcement agency having the requisite jurisdiction.

_____ I have reason to believe that the furnishing of notice to my spouse is likely to result in the infliction of bodily injury upon me by my spouse or by another individual.

_____ I understand that any false statement made herein is punishable by law.

_____
Signature/Date

NOTICE: ANY FALSE STATEMENT MADE HEREIN IS PUNISHABLE BY LAW.

[Trial Testimony of Dr. Potrzebowski, Vol. III at 111; Defendants' Exhibit 48].

270. Dr. Potrzebowski was unable to explain why the Commonwealth felt it necessary to include the warning against criminal penalties on the spousal notice twice. [Trial Testimony of Dr. Potrzebowski, Vol. II at 134-35].

271. The woman making a false statement under section 3209 is subject to the penalties for a third degree

misdemeanor. The physician is subject to license suspension or revocation and civil or criminal penalties for violation of this provision. See 18 Pa. Con. Stat. Ann. § 3209(e).

272. ACOG has taken an official position against forced husband notification. [Trial Testimony of Dr. Allen, Vol. I at 66].

273. The vast majority of women consult their husbands prior to deciding to terminate their pregnancy. [Trial Testimony of Ms. Roselle, Vol. II at 67-68].

274. The requirement that a married woman notify her husband prior to having an abortion will cause delay in performance of the abortion procedure. Those women without full knowledge of the provisions of the Act

will be required to make two visits tothe abortion provider.

275. The Act does not define the term "after diligent effort" contained in 18 Pa. Con. Stat. Ann. § 3206(b)(2).

276. The requirement that a woman make a "diligent effort" to locate her husband in order to comply with section 3209 will delay compliance with section 3209. [Trial Testimony of Dr. Walker, Vol. II at 46].

277. The criminal and civil penalties of section 3209 will force physicians and counselors to interpret "diligent effort" in a narrow fashion in order to avoid civil and criminal liability, and to counsel the patient properly so that the patient would not be subject to criminal penalties. [Trial Testimony of Dr. Davidson, Vol.

I at 34-35; Trial Testimony of Dr. Bolognese, Vol. I at 143-44].

278. Section 3209(b)(4) only permits a woman to claim an exception from husband notification when she has reason to believe she is in danger of the infliction of bodily injury upon her by her husband or by another individual.

279. The "bodily injury" exception could not be invoked by a married woman whose husband, if notified, would, in her reasonable belief, threaten to (1) publicize her intent to have an abortion to family, friends or acquaintances; (b) retaliate against her in future child custody or divorce proceedings; (c) inflict psychological intimidation or emotional harm upon her, her children or other persons; (d) inflict bodily harm

on other persons such as children, family members or other loved ones; or (e) use his control over finances to deprive of necessary monies for herself or her children. [Trial Testimony of Dr. Walker, Vol. II at 23, 50].

280. Because of the difference in the definition of abuse, a woman protected from her husband by a restraining order pursuant to the Protection From Abuse Act or a child protected under the Juvenile Act and Child Protective Services Act may not fall within an exception to section 3209(b).

281. Studies reveal that family violence occurs in two million families in the United States. This figure, however, is a conservative one that substantially understates (because

battering is usually not reported until it reaches life-threatening proportions) the actual number of families affected by domestic violence.[25] In fact, researchers estimate that one of every two women will be battered at some time in their life. [Trial Testimony of Dr. Walker, Vol. II at 12, 21].

282. A wife may not elect to notify her husband of her intention to have an abortion for a variety of reasons, including the husband's illness, concern about her own health, the imminent failure of the marriage, or the husband's absolute opposition to the abortion. [Trial Testimony of Ms.

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25. See also Hodgson v. Minnesota, ___ U.S. _____, ____ n.25, 110 S.Ct. 2926, 2939 n.25, 58 U.S.L.W. 4957, 4963 n.25 (1990).

Roselle, Vol. II at 69-70].

283. The required filing of the spousal consent form would require plaintiff-clinics to change their counseling procedures and force women to reveal their most intimate decision-making on pain of criminal sanctions. The confidentiality of these revelations could not be guaranteed, since the woman's records are not immune from subpoena. [Trial Testimony of Ms. Roselle, Vol. II at 71-72].

284. Women of all class levels, educational backgrounds, and racial, ethnic and religious groups are battered. [Trial Testimony of Dr. Walker, Vol. II at 14].

285. Wife-battering or abuse can take on many physical and psychological forms. The nature and scope of the

battering can cover a broad range of actions and be gruesome and torturous. [Trial Testimony of Dr. Walker, Vol. II at 15; Trial Testimony of Ms. Dillon, Vol. III at 147-48].

286. Married women, victims of battering, have been killed in Pennsylvania and throughout the United States. [Trial Testimony of Dr. Walker, Vol. II at 17, 22].

287. Battering can often involve a substantial amount of sexual abuse, including marital rape and sexual mutilation. [Trial Testimony of Dr. Walker, Vol. II at 12-14, 17; Trial Testimony of Ms. Dillon, Vol. III at 155-56].

288. In a domestic abuse situation, it is common for the battering husband to also abuse the

children in an attempt to coerce the wife. [Trial Testimony of Dr. Walker, Vol. II at 12; Trial Testimony of Ms. Dillon, Vol. III at 151-52].

289. Mere notification of pregnancy is frequently a flashpoint for battering and violence within the family. The number of battering incidents is high during the pregnancy and often the worst abuse can be associated with pregnancy. [Trial Testimony of Dr. Walker, Vol. II at 41, 44; Trial Testimony of Ms. Dillon, Vol. III at 144]. The battering husband may deny parentage and use the pregnancy as an excuse for abuse. [Trial Testimony of.Ms. Dillon, Vol. III at 144].

290. Secrecy typically shrouds abusive families. Family members are instructed not to tell anyone,

especially police or doctors, about the abuse and violence. Battering husbands often threaten their wives or her children with further abuse if she tells an outsider of the violence and tells her that nobody will believe her. A battered woman, therefore, is highly unlikely to disclose the violence against her for fear of retaliation by the abuser. [Trial Testimony of Dr. Walker, Vol. II at 48; Trial Testimony of Ms. Dillon, Vol. III at 150-51, 160-62].

291. Even when confronted directly by medical personnel or other helping professionals, battered women often will not admit to the battering because they have not admitted to themselves that they are battered. [Trial Testimony of Dr. Walker, Vol. II at 13, 49].

292. Battered women are monitored very closely by their abusers. Battered women are often expected to explain any absence from the home or work. Therefore, the opportunities of battered women to disclose battering to others are few, if any. [Trial Testimony of Dr. Walker, Vol. II at 19, 43; Trial Testimony of Ms. Dillon, Vol. III at 157, 162-63].

293. Battered women would find it extremely difficult to get to an abortion clinic because of the problem of accounting for her time. A 24-hour waiting period would be especially harsh upon battered women, since she would have to make two trips to the clinic. [Trial Testimony of Dr. Walker, Vol. II at 57; Trial Testimony of Ms. Dillon, Vol. III at 157].

294. A woman in a shelter or safe

house unknown to her husband is not "reasonably likely" to have bodily harm inflicted upon her by her batterer, however her attempt to notify her husband pursuant to section 3209 could accidently disclose her whereabouts to her husband. Her fear of future ramifications would be realistic under the circumstances.

295. Marital rape is rarely discussed with others or reported to law enforcement authorities, and of those reported only few are prosecuted. [Trial Testimony of Dr. Walker, Vol. II at 23, 47, 48; Trial Testimony of Ms. Dillon, Vol. III at 154- 55].

296. It is common for battered women to have sexual intercourse with their husbands to avoid being battered. While this type of coercive sexual

activity would be spousal sexual assault as defined by the Act, many women may not consider it to be so and others would fear disbelief. [Trial Testimony of Dr. Walker, Vol. II at 22, 47-48, 55; Trial Testimony of Ms. Dillon, Vol. III at 155-56].

297. The marital rape exception to section 3209 cannot be claimed by women who are victims of coercive sexual behavior other than penetration. The 90-day reporting requirement of the spousal sexual assault statute, 18 Pa. Con. Stat. Ann. § 3128(c), further narrows the class of sexually abused wives who can claim the exception, since many of these women may be psychologically unable to discuss or report the rape for several years after the incident. [Trial Testimony of Dr. Walker, Vol. II at 13].

298. Because of the nature of the battering relationship, battered women are unlikely to avail themselves of the exceptions to section 3209 of the Act, regardless of whether the section applies to them. [Trial Testimony of Dr. Walker, Vol. II at 46-49].

299. Battered women are often victims of psychological abuse, including verbal degradation, food and sleep deprivation, isolation and monitoring. This psychological abuse would fall within the definition of psychological torture utilized by Dr. Walker and Amnesty International. However, such abuse does not fall within any exception to the husband notification requirement in the Act. [Trial Testimony of Dr. Walker, Vol. II at 18-19].

300. Battered women who experience serious psychological abuse, who are sexually abused by a way not covered by the sexual assault statute, and who are fearful of the physical and sexual abuse of their children would not be covered by the exceptions to the Act. [Trial Testimony of Dr. Walker, Vol. II at 48-50].

301. Physical and sexual abuse of children is an aspect of the battering relationship in over half of the cases studies by Dr. Walker. In addition, many batterers use economic coercion against women and children. [Trial Testimony of Dr. Walker, Vol. II at 20].

302. Many medical and surgical procedures, including, but not limited to, sterilization, prostrate operations and chemotherapy, affect the capacity of males to have children within the

marriage. The Commonwealth does not require that a husband notify his wife of his intent to obtain a vasectomy or other surgical procedure affecting his capacity to be a father. [Trial Testimony of Dr. Allen, Vol. I at 65]. Further the Commonwealth does not require a woman to notify her husband of other surgical procedures, such as a hysterectomy, which would affect her capacity to be a mother.

303. Women unable to reveal the battering or leave a battering relationship suffer from the psychological manifestations of battery called "battered women syndrome." Battered women syndrome is one form of Post-Traumatic Stress Disorder ("PTSD"), as defined in The Diagnostic and Statistical Manual of Mental Disorders,

3d edition (revised). [Trial Testimony of Dr. Walker, Vol. II at 30-31; Plaintiffs' Exhibit 89].

304. Among the psychological manifestations of PTSD in the case of battered women are "learned helplessness" and "the cycle of violence." [Trial Testimony of Dr. Walker, Vol. II at 24, 30- 31].

305. Under the theory of learned helplessness, the battered woman develops a coping strategy, rather thanan escaping mechanism, when she learns that her responses to the random and variable levels of abuse will not make a difference. [Trial Testimony of Dr. Walker, Vol. II at 24-30].

306. The battering ordinarily involves a three-phase recurring cycle of violence. First, there is a period of increasing tension in which the

abusive behavior can be classified as mild or moderate on a scale of one to ten. This is followed by a period of acute battering during which the battering can attain life-threatening or endangering proportions. Lastly, the battering relationship enters into a period of "loving contrition." The final stage reinforces and perpetuates the violence and the relationship. [Trial Testimony of Dr. Walker, Vol. II at 30-34; Plaintiffs' Exhibit 88].

307. Due to learned helplessness and the cycle of violence, battered women deny and minimize the abuse in order to avoid the pain associated with discussing it. Most battered women do not have the psychological ability to avail themselves of the exceptions of section 3209. [Trial Testimony of Dr. Walker, Vol. II at 40-41, 49].

308. A woman's personal perception of the consequences which will likely result from notifying her husband is likely to be accurate. [Trial Testimony of Dr. Walker, Vol. II at 45]. Forced husband notification would not improve communication within a battering relationship nor improve the marital integrity. Instead, it would foster negative and abusive communication and increase the likelihood that a woman would be seriously battered. Dr. Walker likened forced husband notification in a battering situation to providing the husband with a hammer with which he can beat his wife. [Trial Testimony of Dr. Walker, Vol. II at 44-46, 50].

(5) Determination of Gestational Age (section 3210)

309. Section 321 of the Act, as amended, provides as follows:

> Except in the case of a medical emergency which prevents compliance with this section, no abortion shall be performed or induced unless the referring physician or the physician performing or inducing it has first made a determination of the probable gestational age of the unborn child. In making such a determination, the physician shall make such inquiries of the patient and perform or cause to be performed such medical examinations and tests as a prudent physician would consider necessary to make or perform in making an accurate diagnosis with respect to gestational age. The physician who performs or induces the abortion shall report the type of inquiriesmade and the type of examination and tests utilized to determine gestational age of the unborn child and the basis for the diagnosis with respect to gestational age on forms provided by the department.

18 Pa. Con. Stat. Ann. § 3210(a).

310. Section 3210 does not identify which specific examinations or tests should be performed by a physician in making an "accurate" diagnosis of gestational age. Instead,

the Act requires the physician to perform those tests that a "prudent physician would consider necessary to make an accurate" determination of gestational age.

311. If this portion of the Act were to go into effect, PaDOH proposes to use a form which would require a physician to provide a "clinical determination of gestational age at time of abortion," as well as identify the "types of inquiries/examinations/tests utilized" and the "basis for diagnosis" of gestational age. [Trial Testimony of Dr. Potrzebowski, Vol. III at 99-100; Defendants' Exhibit 47C].

312. There are various methods of determining gestational age, including physical examination, patient medical history, and ultrasound. [Court's

Exhibit 1-A at ¶ 106]. However, gestational age can ordinarily be accurately determined by review of a woman's menstrual history and a pelvic examination. [Trial Testimony of Dr. Bowes, Vol. III at 78].

313. All plaintiffs make a determination of gestational age prior to performing an abortion. [Court's Exhibit 1-A at ¶ 107].

314. An accurate determination of gestational age is desirable to determine the possibility of viability of the fetus, to assess the health risks to the patient seeking the abortion, and to determine which abortion technique would be appropriate under the circumstances.

315. The plaintiff-clinics utilize the following methods of determining gestational age at the following charges:

a. RHCC -- Pelvic examination - $10 and ultrasound - $70.

b. AWC -- Medical history and pelvic examination which are included in the cost of the $280 fee for the abortion procedure and sonogram - $50.

c. WSC -- Date of last menstrual period as told to WSC by client and pelvic examination by physician performing abortion just prior to starting the abortion. Occasionally, when a client is unsure of her last menstrual period or is late in her first trimester, the physician will do a pelvic examination separate from the procedure of abortion.

d. PPSP -- Pelvic sizing is performed by the physician prior to each abortion procedure which is included in the fee for the abortion procedure. An ultrasound is performed on all patients

in their last two weeks of the first trimester to determine gestational sizing. This is done by a staff RN or Medical Assistant whose pay ranges from $8.60 to $13.60. Each ultrasound requires approximately fifteen minutes to perform. Other staff involvement would include telephone scheduling of appointment at $9 per hour and intake procedure at $9.80 per hour. Cost to patient is $25 to $50. The clinic would incur additional costs for supplies and equipment.

e. WHS -- Prior to the abortion, the length of the pregnancy during the first fourteen weeks is determined by the length of time since the first day of the last normal menstrual period. This is verified by pelvic examination prior to the performance of the abortion. No fee is charged for this

examination. If the woman is uncertain of the date of her last menses or the date indicates the pregnancy is greater than fourteen weeks since LMP, the length of pregnancy is determined by a pelvic examination at a fee of $30 and ultrasonography at a fee of $100. [Court's Exhibit 1-A at § 108].

316. PPSP performs sonograms if the gestational age is near the end of the first trimester. [Court's Exhibit 1-A at ¶ 112].

317. For abortions from 12 to 16 weeks from the last menstrual period an ultrasound is required at RHCC. [Court's Exhibit 1 at ¶ I4].

318. At Magee, an ultrasound or sonogram is used to determine gestational age for pregnancies beyond 12 weeks. [Court's Exhibit 1-A at ¶ 86].

319. At WHS, an ultrasound or

sonogram is used to determine gestational age for any pregnancies beyond 14 weeks. [Court's Exhibit 1-A at ¶ 87].

320. WSC never uses a sonogram in determining gestational age. Instead, gestational age is determined by questioning the woman and the performance of a pelvic examination by the physician. If an ultrasound is ordered, it is performed at another facility. [Court's Exhibit 1-A at ¶ 132].

321. AWC determines gestational age by a woman's menstrual history and pelvic examination and, if AWC is unclear of the length of the woman's pregnancy, it will do a sonogram. The fee for a sonogram is $50 but is frequently waived. [Court's Exhibit 1-A at ¶ 132].

322. Section 3210 does not require physicians to perform those tests which will provide the most accurate determination of gestational age.

323. Section 3210, if implemented, would not cause physicians or other abortion providers to alter their current practices in determining the gestational age of the fetus.

(6) Public Disclosure and Reporting Requirements (Sections 3207 and 3214)

324. PaDOH's Division of Health Statistics and Research ("the Division") is responsible for the receipt, compilation and storage of all forms submitted under the Act. The Division is comprised of two sections -- Statistical Registry Section and Statistical Support Section. The Statistical Registry Section is responsible for the collection and

processing of data, while the Statistical Support Section analyzes the data received and prepares the annual report. [Trial Testimony of Dr. Potrzebowski, Vol. III at 88-90].

325. The Division is responsible for five forms under the Act: (1) the Abortion Facility Registration Form [Defendants' Exhibit 45]; (2) the Abortion: Quarterly Facilities Report [Defendants' Exhibit 46]; (3) the Report of Induced Termination of Pregnancy Defendants' Exhibit 47B];[26] (4) the

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26. Defendants' Exhibit 47B is the form presently being used. Defendants' Exhibit 47A is a version of the form PaDOH intended to use prior to the preliminary injunction, and Defendants' Exhibit 47C is the version of the form PaDOH proposes to use should the injunction be lifted completely. [Trial Testimony of Dr. Potrzebowski, Vol. III at 98].

Abortions: Report of Complications [Defendants' Exhibit 44]; and (5) the Maternal Death Report. [Trial Testimony of Dr. Potrzebowski, Vol. III at 90].

326. The content of the forms is determined by PaDOH's interpretations of of data on induced terminations of pregnancy. [Trial Testimony of Dr. Potrzebowski, Vol. III at 98].

327. The Division and its employees are familiar with maintaining the confidentiality of various reports and records. PaDOH's "Policies and Procedures for Confidentiality and Data Release" and the Division's "Handbook of Policies and Procedures" both address the non-release of confidential information. [Trial Testimony of Dr. Potrzebowski, Vol. III at 96-97;

Defendants' Exhibits 41 and 42].

328. Under Pennsylvania law, the Division is directed to gather data and maintain such data's confidentiality in additional areas other than abortion. For example, records must be kept confidential, other than in limited, strictly supervised exceptions, under the Disease Prevention and Control Law of 1955, 35 Pa. Con. Stat. Ann. § 521.15 (Purdon 1977); the Vital Statistics Law of 1953, 35 Pa. Con. Stat. Ann. §§ 450.801, 450.805 (Purdon 1977); and the Pennsylvania Cancer Control, Prevention and Research Act, 35 Pa. Con. Stat. Ann. § 5636 (Purdon 1990 Supp.).

329. In respect to each set of forms, PaDOH follows the following standard procedure: (1) the envelope containing the form is opened and date stamped by a secretary in the Division;

(2) the secretary returns the form to the envelope and takes it to the desk of the person within the Division responsible for processing the form; (3) that person reviews the form for completeness, enters the data on her personal computer, and checks certain forms against a master list; (4) that person, if necessary, contacts the facility to obtain additional or clarifying information; (5) the form is placed into a locked cabinet. The cabinet and computer diskettes are locked when not in use. The computer is password controlled and only three other persons have the password. [Trial Testimony of Dr. Potrzebowski, Vol. III at 91-93, 95]. After the forms reach a certain number, they are placed in a secure room within the Division where they are kept for two years.

Thereafter, the forms are transferred to the Division's section of the state records center where they are preserved in accordance with a retention schedule. When in the state records center, these forms are only accessible to authorized personnel from the Division. [Trial Testimony of Dr. Potrzebowski, Vol. III at 126-28, 139-40]

330. At the end of the year, the Statistical Support Section is given access to the computer records for the purpose of preparing the annual report. The same security measures are in place. [Trial Testimony of Dr. Potrzebowski, Vol. III at 93].

330. PaDOH's annual reports do not release or reveal the names of any performing or referring physician, any facility that is submitting the reports, or any woman who has had an abortion.

[Trial Testimony of Dr. Potrzebowski, Vol. III at 97].

332. Ms. Wall of PPSP has no knowledge of any case where PaDOH released the identity of a physician who performs abortions. [Court's Exhibit 1-A at ¶ 121].

a. **Public Disclosure.**

333. Section 3207(b), as amended, provides:

> Within 30 days after the effective date of this chapter, every facility at which abortions are performed shall file, and update immediately upon any change, a report with the department, containing the following information:
>
> (1) Name and address of the facility.
>
> (2) Name and address of any parent, subsidiary or affiliated organizations, corporations or associations.
>
> (3) Name and address of any parent, subsidiary or affiliated organizations, corporations or associations having contemporaneous commonality of ownership, beneficial interest, directorship or officership with any other facility.
>
> The information contained in those reports which are filed pursuant to this subsection by facilities which receive State appropriated funds during the 12-calendar-month period immediately preceding a request to inspect or copy such reports shall be deemed public information. Reports filed by facilities which do not receive State appropriated funds shall only be available to law enforcement officials, the State Board of Medicine and the State Board of Osteopathic Medicine for use in the performance of their official duties. Any facility failing to comply with the provisions of this subsection shall be assessed by the department a fine of $500 for each day it is in violation hereof.

18 Pa. Con. Stat. Ann. § 3207(b).

334. Section 3207(b) of the Act was not amended by Act 64. However, the existing version of section 3207(b) is more narrowly drawn than its 1982 predecessor. Under the earlier version, all reports filed under this section were available for public inspection and

copying. See 1982 Pa. Laws 476, 493, § 1. The same applies to section 3214(f). Id. at 487-91.

335. Section 3214(f), as amended, provides:

> Every facility in which an abortion is performed within this Commonwealth during any quarter year shall file with the department a report showing the total number of abortions performed within the hospital or other facility during that quarter year. This report shall also show the total abortions performed in each trimester of pregnancy. Any report shall be available for public inspection and copying only if the facility receives State-appropriated funds within the 12-calendar-month period immediately preceding the filing of the report. These reports shall be submitted on a form prescribed by the department which will enable a facility to indicate whether or not it is receiving State-appropriated funds. If the facility indicates on the form that it is not receiving State-appropriated funds, the department shall regard its report as confidential unless it receives other evidence which causes it to conclude that the facility receives state-appropriated funds.

18 Pa. Con. Stat. Ann. § 3214(f).

336. PaDOH presently receives Abortion Facility Registration Forms [Defendants' Exhibit 45] and Quarterly Facilities Reports [Defendants' Exhibit 46] from abortion providers as required by the Act. Both forms would be made available for public inspection and copying if sections 3207(b) and 3204(f) were permitted to go into effect, but only if the facility received state appropriated funds within the preceding twelve month period. Currently, the forms are maintained in accordance with PaDOH's confidentiality procedures. [Trial Testimony of Dr. Potrzebowski, Vol. III at 93-94, 95, 109-11].

337. Records of state appropriations and expenditures are maintained and generally available at the present time under Pennsylvania's Right-to-Know Law, 65 Pa. Cons. Stat.

Ann. §§ 66.1 to 66.4 (Purdon 1990 Supp.), unless the information fits within the exceptions enumerated within the statute.

338. Facilities at which abortions are performed, including plaintiff-clinics, hospitals and physician's offices, have traditionally received funding in the form of Medicaid payments for a wide variety of medically necessary services, including a narrow class of abortions for victims of rape and incest and women with life-threatening conditions. [Trial Testimony of Ms. Roselle, Vol. II at 65, 73-74; Verification of Ms. Roselle at ¶¶ 7, 29].

339. Facilities where abortions are performed, including clinics, hospitals and physician's offices, may also receive state appropriated funds

for related medical care, as well as building and construction costs and other purposes unrelated to the provision of abortion services. [Trial Testimony of Ms. Roselle, Vol. II at 65-66, 117; Verification of Ms. Roselle at ¶ 29].

340. In 1987, AWC, which serves approximately 350 patients a month, received less than $4,000 in medical assistance funds. [Verification of Ms. Stengle at ¶¶ 2, 7].

341. In 1988, WHS, which performs 6500-7000 abortions annually and has 3,000 client contacts monthly, received medical assistance reimbursement for only 249 patients. [Trial Testimony of Ms. Roselle, Vol. II at 74; Verification of Ms. Roselle at ¶¶ 7, 31].

342. All clinics receiving state appropriated funds apply the funds only

to the services for which they are allocated.

343. Because facilities at which abortion services and counseling are offered are subjected to acts of harassment and violence, plaintiff-clinics are concerned that their reports will be open for public inspection and copying under sections 3207(b) and 3214(f). [Trial Testimony of Ms. Roselle, Vol. II at 93; Verification of Ms. Roselle at ¶ 30; Verification of Ms. Stengle at ¶ 37].

344. WHS, as well as other abortion providers, has experienced harassment from anti-abortionists, including daily leafleting or picketing by few individuals, occasional false patient visits, and "hate" mail. [Trial Testimony of Ms. Roselle, Vol. II at 93, 95, 100; Preliminary Injunction

Hearing Testimony of Ms. Roselle at 12-13; Preliminary Injunction Hearing Testimony of Ms. Stengle at 33-34]. Other incidents include: break-ins; picketing the residences of physicians and employees; bomb, kidnapping, and death threats against the clinics, employees and employee's family members. [Trial Testimony of Ms. Roselle, Vol. II at 96].

345. At WHS, the harassment has escalated since September 1988. During September 1988, anti-abortion protestors blockaded WHS's doors. This resulted in the arrests of 370 anti-abortion protestors. [Trial Testimony of Ms. Roselle, Vol. II at 96, 121].

346. Also since that time, the hostility of the threats has escalated. [Trial Testimony of Ms. Roselle, Vol. II at 101].

347. One year later, on September 30, 1989, five individuals carrying buckets of tar forced their way into WHS as an employee arrived for work. While inside, these individuals positioned themselves in the hallway of the main patient care area with their feet in the tar. In the ensuing arrests, the buckets of tar spilled onto the floor and splashed against the walls. Also, the tar was tracked across the carpet by police officers while making the arrests.[27] Repairs cost in excess of $27,000. [Trial Testimony of Ms. Roselle, Vol. II at 96-98, 100; Plaintiffs' Exhibit 86].

348. More recent sources of demonstration and harassment at WHS have

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27. Later, the trespassers were found guilty of criminal mischief, conspiracy and defiant trespass.

been organized by "Operation Multitude." Operation Multitude conducted three demonstrations at WHS on February 17, 1990, April 21, 1990, and in June 1990. During the February event, approximately 1200 anti-abortion demonstrators assembled outside WHS for five hours which crowded the sidewalks on both sides of the streets leading to the clinic. Women required pro-choice escorts to reach the doors of the clinic. For the first time in the experience of Ms. Roselle, women refused to attempt to reach the clinic on April 21, 1990 because of the hostility of the crowd. [Trial Testimony of Ms. Roselle, Vol. II at 98-100].

349. The anti-abortion incidents described herein are commonplace and most facilities providing abortion services are subjected to such

incidents. [Verification of Ms. Stengle at ¶ 37]. The harassment extends to the patients and staff members of the facilities.

350. Some anti-abortion demonstrations could adversely affect the ability of the clinic to operate their business and offer valuable services to the public, including such things as contraceptive counseling or AIDS testing.

351. I find plaintiff-clinics' fears of increased harassment if these reports are subject to public inspection to be reasonable.

352. Because of its concern with public disclosure of reports filed with PaDOH, AWC has determined that it will discontinue accepting all state appropriated funds, including medical assistance funds for poverty level

women. [Verification of Ms. Stengle at ¶¶ 37-38]. Other clinics may also seriously consider following the same course of action.

353. I find it likely that clinics will refuse to accept patients who are on medical assistance. The likely result will be that indigent patients who have been the victims of rape or incest or who suffer from a life-threatening condition will find it difficult, if not impossible depending upon what part of the state the woman resides, to obtain abortion services.

b. **The Reporting Requirements.**

354. Section 3214(a), as amended, states:

> **General Rule.** For the purpose of promotion of maternal health and life by adding to the sum of medical and public health knowledge through the compilation of relevant data, and to promote the Commonwealth's interest in protection of the unborn child, a report of each abortion performed

shall be made to the department on forms prescribed by it. The report forms shall not identify the individual patient by name and shall include the following information:

(1) Identification of the physician who performed the abortion, the concurring physician as required by section 3211(c)(2) (relating to abortion on unborn child of 24 or more weeks gestational age), the second physician as required by section 3211(c)(5) and the facility where the abortion was performed and of the referring physician, agency or service, if any.

(2) The county and state in which the woman resides.

(3) The woman's age.

(4) The number of prior pregnancies and prior abortions of the woman.

(5) The gestational age of the unborn child at the time of the abortion.

(6) The type of procedure performed or prescribed and the date of the abortion.

(7) Pre-existing medical conditions of the woman which would complicate pregnancy, if any, and, if known, any medical complication which

resulted from the abortion itself.

(8) The basis for the medical judgment of the physician who performed the abortion that the abortion was necessary to prevent either the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman, where an abortion has been performed pursuant to section 3211(b)(1).

(9) The weight of the aborted child for any abortion performed pursuant to section 3211(b)(1).

(10) Basis for any medical judgment that a medical emergency existed which excused the physician from compliance with any provision of this chapter.

(11) The information required to be reported under Section 3210(a) (relating to determination of gestational age).

(12) Whether the abortion was performed upon a married woman and, if so, whether notice to her spouse was given. If no notice to her spouse was given, the report shall also indicate the reason for failure to provide notice.

18 Pa. Con. Stat. Ann. § 3214(a).

355. Act 31 required the reporting of the same basic information as the current version of section 3214(a) with the exception of that information tailored for specific provisions of the Act at the time. See 1988 Pa. Laws 262, 271-74, § 8. The 1982 version of the Act required that the report include the following additional information not presently contained in section 3214(a): (i) the woman's age, race and marital status; (ii) date of the woman's last menstrual period: (iii) the length and weight of the aborted fetus when measurable; (iv) how the abortion was paid for; (v) the date the determination of pregnancy was made; and (vi) other facts relating to specific sections of the 1982 version of the Act. See 1982 Pa. Laws 476, 487-91, § 1.

356. In addition to the information listed in section 3214(a),

PaDOH, if permitted, intends to collect other data, including marital status (even if the husband notification provisions were not in place); Hispanic origin; race; level of education; and date since last menses. [Trial Testimony of Dr. Potrzebowski, Vol. III at 100-01].

357. The reports are not public records within the meaning of Pennsylvania's Right-to-Know law, 65 Pa. Cons. Stat. Ann. §§ 66.1 to 66.4. 18 Pa. Con. Stat. Ann. § 3214(e)(2). Disclosure may be made to law enforcement officials only upon an order of the Court of Common Pleas after application showing good cause. Id. PaDOH's statistical report shall not lead to the disclosure of the identity of any physician, facility, or patient. See 18 Pa. Con. Stat. Ann. § 3214(e)(1).

358. PaDOH recognizes that this

information is not required by law, but maintains that it is authorized to seek more information than is required by law. [Trial Testimony of Dr. Potrzebowski, Vol. III at 100-01].

359. According to the testimony of Dr. Potrzebowski, this information is sought to (1) be consistent with the federal standards for the collection of data on induced terminations of pregnancy which were developed by the Center for Disease Control and (2) better study the three outcomes of pregnancy (live births, fetal deaths, and induced terminations of pregnancy) for which the Division collects data. [Trial Testimony of Dr. Potrzebowski, Vol. III at 101-02, 107; Defendants' Exhibit 43 (Handbook on the Reporting of Induced Terminations of Pregnancy ("Federal Handbook"))].

360. The federal government, through the National Center for Health Statistics, United States Department of Health and Human Services has prepared a "Standard Report of Induced Termination of Pregnancy" ("Federal Standard Report") which is intended to serve as a model for the states. Other than requiring some information pursuant to the Act, Pennsylvania's "Report of Induced Termination of Pregnancy" ("Pennsylvania Report") [Defendants' Exhibit 47C] is virtually identical to the Federal Standard Report. [Defendants' Exhibit 43 at 14].

361. The Federal Handbook states:

> Data from reports of induced termination of pregnancy provide unique information on the characteristics of women having induced abortions. Uniform annual data of such quality are nowhere else available. Medical and health information is provided to evaluate risks associated with

induced abortion at various lengths of gestation and by the type of abortion procedure used. Information on the characteristics of the women is used to evaluate the impact that induced abortion has on the birth rate, teenage pregnancy, and out-of-wedlock births. The data also help measure the role that induced abortion plays in birth prevention as compared with contraception. Because these abortion data provide information necessary to promote and monitor health, it is important that the forms be completed carefully.

[Defendants' Exhibit 43 at 2].

362. Both the Pennsylvania Report and the Federal Standard Report request the information listed in paragraph 356. The items of information required on the Pennsylvania Report but not required on the Federal Standard Report are: name of the referring physician and medical complications information.

363. Marital status, race and date of last normal menses are elements of

"the woman's personal history." Thornburgh, 476 U.S. at 766, 106 S.Ct. at 2181.

364. Abortion is another "pregnancy outcome," in addition to births and fetal death, upon which the Division of PaDOH gathers information. [Court's Exhibit 1-A at ¶ I04].

365. On the Certificate for Fetal Death which must be submitted to PaDOH on each instance of fetal death after 16 weeks of gestation, the physician or reporting entity must include information concerning Hispanic origin, race, educational background of the mother and father, marital status, and date of last normal menses. [Defendants' Exhibit 52].

366. On the Certificate of Live Birth which must be submitted to PaDOH upon each instance of live birth, the

physician or reporting entity must include information concerning Hispanic origin, race, educational background of the mother and father, marital status, and date of last normal menses. [Defendants' Exhibit 53].

367. Thirty-three states and New York City collect information on marital status and race of women having induced terminations of pregnancies; thirty-two states and New York City collect information concerning the date of last menses; twenty-eight states and New York City collect information relating to educational background; and sixteen states and New York City collect information concerning Hispanic origin. [Trial Testimony of Dr. Potrzebowski, Vol. III at 105-06].

368. As part of the patient's medical history, two (one of which makes

disclosure of this information optional) of the plaintiff-clinics collects data concerning the abortion patient's education, religion, and ethnic group. Three of the plaintiff-clinics collect information concerning the abortion patient's marital status and all of the plaintiff-clinics collect information concerning the patient's menstrual history. [Plaintiffs' Exhibits 6, 12, 18, 36, 44].

369. The requirement that the identity of the referring physician or agency be identified serves no legitimate scientific purpose.

370. Many physicians who refer patients for abortions are extremely protective of their anonymity because of fears (often based upon past experience) that any kind of documentation or record-keeping connecting them with any

phase of the abortion decision could have adverse effects on their medical practices and patients or their ability to reside peacefully in their communities. [Preliminary Injunction Hearing Testimony of Ms. Roselle at 20-21; Verification of Ms. Roselle at ¶ 36; Verification of Ms. Stengle at ¶ 42].

371. There are two medical doctors who, although they do not perform abortions, refer clients to WHS for abortions on the strict condition that WHS not use their names in any of its reports. These doctors insist upon this because each has been subjected to public abuse and harassment in the past. Under no circumstances would either doctor refer any patients to WHS or any other clinic if his name is reported under section 3214(a) even if there were no risk of public disclosure

of the report. [Preliminary Injunction Hearing Testimony of Ms. Roselle at 21; Verification of Ms. Roselle at ¶ 37]. Even though the information is available to these doctors, their patients would be unable to receive information concerning abortion services from their own physician and these women would have to go elsewhere for this information.

372. Several of AWC's current referring physicians will not permit AWC to send correspondence to their offices for fear that members of their own staffs would divulge to anti-abortion groups that they refer patients for abortions. [Verification of Ms. Stengle at ¶ 42]. One doctor has discontinued referring patients to AWC because of threats from anti-abortionists. [Verification of Ms. Stengle at ¶ 44].

373. On occasion the Division has had to contact a physician directly concerning forms submitted after the performance of an abortion, even when the facility at which the procedure was performed has a contact person that ordinarily handles such inquires. [Trial Testimony of Dr. Potrzebowski, Vol. III at 133].

374. Many physicians that have performed abortions have been subjected to harassment from anti-abortion demonstrators. As a result some physicians have ceased performing abortions. [Verification of Ms. Roselle at ¶ 37; Verification of Ms. Stengle at ¶ 41].

375. For this reason, some physicians reasonably prefer to keep the fact that they perform abortions out of the realm of public information.

[Preliminary Injunction Hearing Testimony of Ms. Stengle at 39; Verification of Ms. Stengle at ¶ 42].

376. One physician that performed abortions at AWC prior to the enactment of the new Act has discontinued working for AWC out of fear of public disclosure. Further, he has stopped performing abortions in his private practice as well. [Preliminary Injunction Hearing Testimony of Ms. Stengle at 39; Verification of Ms. Stengle at ¶ 43].

377. No physician has stopped performing abortions for PPSP because her or his identity was included on the Individual Reporting Form to PaDOH. [Court's Exhibit 1-A at ¶ 120].

378. Ms. Hollos, the Executive Director of WSC, knows of no physicians who have stopped performing abortions

because their identity is on the Pennsylvania Individual Report of Termination of Pregnancy Form. [Court's Exhibit 1-A at ¶ 131].

379. The evidence of record persuades me that the expectation of plaintiff-clinics that referring physicians and, to a lesser extent, performing physicians will terminate their relationship with the clinics is reasonable.

380. Section 3214(a) requires a physician who has performed an abortion to report the basis for his medical judgment to support his determination of gestational age, including the tests performed, under section 3210(a) or his conclusion that the abortion was necessary to prevent the death or a serious risk of substantial and irreversible impairment of a major

bodily function under any of the sections of the Act. This subsection also requires that the physician report whether a married patient informed her husband she was undergoing an abortion and, if not, the reason for her failure to do so.

381. These provisions of section 3214(a) serve no useful scientific purpose and unjustifiably interfere with the physician's exercise of his or her best medical judgment. [Preliminary Injunction Hearing Testimony of Dr. Dratman at 58-59].

382. Compliance with section 3214(a) costs WHS approximately $12,000 annually. [Trial Testimony of Ms. Roselle, Vol. II at 72-73].

383. Section 3214(h) requires every physician called upon to provide medial care and treatment to a woman suffering

from medical complications resulting from an abortion or attempted abortion to file a report with PaDOH within thirty days of first seeing the patient. See 18 Pa. Con. Stat. Ann. §3214(h).

384. No other surgical procedure has a complications reporting requirement. [Verification of Dr. Dratman at ¶ 14].

385. If a patient is treated by more than one physician, a single abortion complication may be reported by two or more treating physicians pursuant to section 3214(h). Since the reports omit the identity of the patient, they cannot be matched with complication reports filed by other physicians. Also, since complications from the abortion procedure can also be reported on the Pennsylvania Report, the same problem exists for these reports. This

may result in double counting of complications from abortion procedures.

386. Some women are hesitant to advise a physician, at least initially, that they have had an abortion because of the stigma and harassment emanating from anti-abortionists. This may cause physicians to provide inappropriate treatment for post-abortion symptoms or complications. Still other women delay in seeking post-abortion medical care for a complication. Thus, because of the delay, a minor problem may progress into a serious medical problem. [Verification of Dr. Dratman at ¶ 17, 18, 20].

387. While the problems noted above may result in a degree of misinformation or unreliable reporting of post-abortion complications, I conclude that data received will not be statistically

meaningless. The information sought, though not perfectly collected, is relevant to a legitimate medical and public health purpose.

III.

DISCUSSION

THE CONSTITUTIONAL STANDARD

The hostility of Pennsylvania's legislature to the protection of a woman's right of privacy to choose abortion is apparent from the history of the legislation purporting to regulate abortion in Pennyslvania. See supra at 5-11. In 1986, the Supreme Court determined that "[c]lose analysis of [the] provisions of [the Act] . . . shows that they wholly subordinate constitutional privacy interests and concerns with maternal health in an effort to deter a woman from making a

decision, that with her physician, is hers to make." Thornburgh, 476 U.S. at 759, 106 S.Ct. at 2178. Of the informed consent requirements of the 1982 verson of the Act, the Supreme Court determined that the information sought was not "medical information that is always relevant to the woman's decision,and it may serve only to confuse and punish her and to heighten her anxiety, contrary to accepted medical practice." Id. at 762, 106 S.Ct. at 2179. Similarly, when addressing the reporting requirements, the Court stated that "the reports required under the Act before us today go well beyond the health-related interests that served to justify" them and "raise the specter of public exposure and harassment of women . . . [and] pose an unacceptable danger of deterring the exercise" of a woman's

right to end a pregnancy. Id. at 766, 767-68, 106 S.Ct. at 2181, 2182.

This hostility is equally apparent in the 1988 and 1989 amendements to the Act. In fact, substantial portions of Act 64 are nothing more than a reenactment of provisions of the Act found unconstitutional by the Third Circuit and United States Supreme Court not too long ago in Thornburgh. Clearly, the Commonwealth of Pennsylvania seeks to challenge the very foundation of Thornburgh and those cases that preceded it, including Roe v. Wade.

Without question, the issue of abortion has generated much debate and controversy over the past several years. And, undoubtedly, it will likely engender continued debate and controversy over the next several years -- perhaps decades. However, my

function is not to debate the philosophical and moral dilemmas raised by a decision which Justice Blackmun aptly described as follows:

> Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision -- with the guidance of her physician and within the limits specified in Roe -- whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.

Thornburgh, 476 U.S. at 772, 106 S.Ct. at 2184. Instead, my function is to "uphold the law even when its content gives rise to bitter dispute." Id. at 771, 106 S.Ct. at 2184; see also Cooper v. Aaron, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed. 2d 5 (1958).

Defendants seem to argue that the

constitutional standard applicable to judicial review of abortion regulations has somehow been modified by recent Supreme Court decisions. For reasons explained fully below, I most respectfully disagree. Whatever the Supreme Court may decide to do with this issue in the future, one thing is presently clear -- many of the challenged provisions of the Act are unconstitutional under Roe v. Wade and its progeny, including Thornburgh. "[O]nly [the Supreme] Court may overrule one of its precedents," Thurston Motor Lines, Inc. v. Jordan K. Rand Ltd., 460 U.S. 533, 535, 103 S.Ct. 1343, 1344, 75 L.Ed. 2d 260 (1983), for "unless we wish anarchy to prevail within the federal judicial system, a precedent of [the Supreme] Court must be followed by lower federal courts no matter how misguided

the judges of those courts think it to be." Hutto v. Davis, 454 U.S. 370, 375, 102 S.Ct. 703, 705, 70 L. Ed. 2d 556 (1982). The Supreme Court has recently stated:

> If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Rodriguez de Quijas v. Shearson/American Express, Inc., ____ U.S. ____, ____, 109 S.Ct. 1917, 1921, 104 L.Ed. 2d 526 (1989); see also National Ass'n for the Advancement of Colored People v. Medical Center, Inc., 657 F.2d 1322, 1329-30 (3d Cir. 1981) ("The prerogative of overruling its cases rests with the Supreme Court, and not with us").

Relying upon prior cases which held

that the fundamental constitutional right of privacy which guarantees freedom of personal choice in matters of marriage and family life, see, e.g., Fisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed. 2d 349 (1972) (Massachusetts statute permitting married persons to obtain contraceptives to prevent pregnancy but preventing distribution of contraceptives to single persons for same purpose was unconstitutional); Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed. 2d 1010 (1967) (invalidating Virginia miscegenation statute which prohibited marriages between people solely on the basis of race); Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed. 2d 510 (1965) (Connecticut statute prohibiting use of contraceptives unconstitutionally intrudes upon the

right of marital privacy), the Supreme Court concluded that a woman's right to choose an abortion is encompassed in that right. Roe v. Wade, 410 U.S. at 153, 93 S.Ct. at 726. In the nearly two decades since the landmark decision of Roe v. Wade was announced, this basic principle has frequently been reaffirmed. See, e.g., Thornburgh, 476 U.S. at 759, 106 S.Ct. at 2178; Akron, 462 U.S. at 420 n.1, 103 S.Ct. at 2487 n.1.

This fundamental right may be significantly limited only where the state demonstrates that its regulation is narrowly drawn to serve a compelling state interest. Casey I, 686 F. Supp. at 1125; see also Roe v. Wade, 410 U.S. at 155, 93 S.Ct. at 728. Where abortion regulations do not impose a legally significant burden, the state need only

show a rational basis for the regulation. American College I, 552 F. Supp. at 796. However, a state may not, under the pretense of protecting maternal health or potential life, restrict a woman's right to obtain an abortion or otherwise intimidate her into continuing her pregnancy. Thornburgh, 476 U.S. at 759, 106 S.Ct. at 2178. Simply stated, "[p]rovisions which wholly subordinate constitutional privacy interests and concerns with maternal health in an effort to deter a woman from exercising her right to choose abortion will not be tolerated." Casey I, 686 F. Supp. at 1125 (citing Thornburgh).

"[R]estrictive state regulation of the right to choose abortion, as with other fundamental rights subject to searching judicial examination, must be

supported by a compelling state interest." Akron, 462 U.S. at 427, 103 S.Ct. at 2491; see also Roe v. Wade, 410 U.S. at 155, 93 S.Ct. at 728. In the context of a woman's right to elect to terminate her pregnancy, two compelling state interests have been identified -- the protection of a fetus capable of meaningful life and the protection of maternal health. American College II, 737 F.2d at 291. Recognizing other interests in cases involving minors -- "the interest in the welfare of the pregnant minor, the interest of the parents, and the interest of the family unit" -- the state may limit the right of a minor woman to obtain an abortion in a manner which would not be permissible in the case of an adult.[28]

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28. I will discuss these interests in greater detail when addressing section 3206 of the Act relating to parental informed consent.

Id. at 296. The relative "strength" of either of these interests varies depending upon the trimester of pregnancy involved.[29]

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29. Critics of Roe v. Wade argue that the critical elements of its framework -- trimesters and viability -- are somehow inconsistent with our Constitution and unworkable in practice. There is certainly room for disagreement over this complex issue. But "[t]o overturn a constitutional decision is a rare and grave undertaking. To overturn a constitutional decision that secured a fundamental personal liberty to millions of persons would be unprecedented in our 200 years of constitutional history." Webster, ___ U.S. at ____, 109 S.Ct. at 3078 (Blackmun, J., dissenting in part and concurring in part).

The trimester framework provides a mechanism, in the context of abortion, from which the right to privacy can be restricted so as to accommodate, when appropriate, the state's legitimate interests in protecting maternal health and in preserving potential human life. "[E]stablishing benchmarks and standards with which to evaluate the competing claims of individuals and government, lies at the very heart of constitutional adjudication." Id. at ___ 109 S.Ct. at 3073.

(... continued)

"Because abortion is a medical procedure requiring the advice and assistance of competent, trained medical personnel, a woman cannot exercise her fundamental right alone." American College II, 737 F.2d at 283. In the first trimester, only regulations which do not significantly burden the woman's decision and are justified by important state objectives will be permitted.

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29. (... continued)

Justice Scalia attacks the trimester as an improper creation of "an Abortion Code," Hodgson, 110 S.Ct. at 2960, 58 U.S.L.W. at 4974 (Scalia, J., dissenting in part and concurring in judgment in part); see also Webster, ____ U.S. at _____, 109 S.Ct. at 3064 (Scalia, J., dissenting in part and concurring in judgment in part). Isn't it a court's function to draw narrow differentiations in all areas, including the rights of prisoners and criminal defendants, of constitutional law?

Finally, some, in the past, have argued that Roe v. Wade was "on a collision course with itself." See Akron, 462 U.S. at 458, 103 S.Ct. at

(... continued)

Ashcroft, 462 U.S. at 489-90, 103 S.Ct. at 2523-2524. In light of the relative simplicity and safety of the abortion procedure, regulations that restrict competent medical personnel do not appreciably advance the state's interest in maternal health. Akron, 462 U.S. at 428-30 & n.11, 434, 103 S.Ct. at 2492 & n.11, 2495. Due to the absence of a compelling state interest in the first trimester, the abortion decision must be free from state interference and its effectuation must be left to the woman

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29. (... continued)

2507 (O'Connor, J., dissenting). The presently prevailing medical information establishes that the development of the crucial organs necessary for extrauterine survival occurs during the 23rd or 24th week of gestation. "The threshold of fetal viability is, and will remain, no different from what it was at the time Roe was decided. Predictions to the contrary are pure science fiction." Webster, ___ U.S. at ___ n.9, 109 S.Ct. at 3075 n.9 (Blackmun, J., dissenting in part and concurring in part).

and the medical judgment of her attending physician. Id.; Roe v. Wade, 410 U.S. at 163-64, 93 S.Ct. at 732. However, certain regulations which do not significantly impact upon a woman's decision in the first trimester may be permissible, if the state can prove that they further an important state interest without interfering with the woman's choice and the independent medical judgment of her physician. See Ashcroft, 462 U.S. at 486-90, 103 S.Ct. at 2522-25; Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 65-67, 79-81, 96 S.Ct. 2831, 2839-40, 2845-46, 49 L.Ed. 2d 788 (1976) ("Danforth").

At approximately the beginning of the second trimester of pregnancy, the state's interest in promoting maternal health becomes compelling. "[T]o the

extent that the regulation reasonably relates to the preservation of maternal health," the state may justify regulations which significantly burden the woman's right to terminate her pregnancy. Roe v. Wade, 410 U.S. at 164, 93 S.Ct. at 732. However, these regulations must not depart from accepted medical practice, Akron, 462 U.S. at 431, 103 S.Ct. at 2493; see also American College II, 737 F.2d at 292, and cannot "directly restrict[] a woman's decision whether or not to terminate her pregnancy." Colautti v. Franklin, 439 U.S. at 386, 99 S.Ct. at 681.

Finally, at "viability," a state may regulate, and even proscribe, abortion in the name of its interest in the potentiality of human life, except when necessary, in appropriate medical

judgment, for the preservation of the life or health of the mother. Id. at 387-88, 99 S.Ct. at 681-82; Roe v. Wade, 410 U.S. at 164-65, 93 S.Ct. at 732. The point of viability is not for this court or the legislature to determine. Instead, this task must be left to the attending physician's medical judgment as to whether, based upon the facts of the particular case before him or her, there is "a reasonable likelihood of the fetus' 'sustained survival' and 'meaningful life' outside the womb." American College II, 737 F.2d at 292 (quoting Colautti v. Franklin, 439 U.S. at 386, 99 S.Ct. at 681).

Once the plaintiffs have demonstrated that a regulation imposes a significant burden on the woman's right to an abortion, the Commonwealth has the burden of proving that the regulation is

narrowly tailored to the precise compelling interest at stake. Casey I, 686 F. Supp. at 1125-26; see also Akron, 462 U.S. at 433-34, 103 S.Ct. at 2494-95; Roe v. Wade, 410 U.S. at 155, 165, 93 S.Ct. at 728, 732; American College II, 737 F.2d at 292. For example, the Commonwealth must make a reasonable effort to limit the effect of its regulation to that portion of the trimester during which its interests will be furthered. Akron, 462 U.S. at 434, 103 S.Ct. at 2494-95.

The three recent Supreme Court decisions relating to abortion regulation have not changed or modified these basic tenets. In Webster, the Supreme Court reviewed provisions of the Missouri statute which: (1) bans the performance of abortions by public employees and in public facilities

except to save the life of the mother; and (2) requires physicians to perform "such medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child" on any woman the physician had reason to believe was 20 weeks or more pregnant. In addition, the Court also considered the preamble to the Missouri statute which declares that life begins at conception.[30]

The Court determined that "none of the challenged provisions of the Missouri Act properly before [it]

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30. In respect to the preamble, the majority of the Court determined that it need not address its constitutionality because the clause was "abortion-neutral." See Webster, ____ U.S. at ____ 109 S.Ct. at 3049-50; id. at ___ , 109 S.Ct. at 3059 (O'Connor, J., concurring).

conflict with the Constitution." Webster, ___ U.S. at ___, 109 S.Ct. at 3059. Indeed, a plurality of the Court was prepared to modify Roe v. Wade, but only "to the extent" required to uphold the Missouri statute. Id. Providing the decisive fifth vote, Justice O'Connor, declined the plurality's invitation to revisit Roe v. Wade even in the slightest degree. Concurring in judgment on this issue, Justice O'Connor stated "[t]he Court today has accepted the State's every interpretation of [Missouri's] abortion statute and has upheld, under our existing precedents, every provision of the statute which is properly before us." Id. at ___, 109 S.Ct. at 3061 (O'Connor, J., concurring in judgment) (emphasis added). After Webster the standard of review for abortion legislation remained

unchanged. See id. at ___, 109 S.Ct. at 3067 (Blackmun, J., dissenting) ("the Court extricates itself from [Webster] without making a single, even incremental, change in the law of abortion"); see also Lewis v. Pearson Foundation, Inc., ___ F.2d ___ (slip op. at 5) (8th Cir. July 10, 1990) (Webster and Hodgson both "recognized the continuing viability of Roe v. Wade" and, therefore, Roe v. Wade remains controlling); Massachusetts v. Secretary of Health and Human Services 899 F.2d 53, 54 (1st Cir. 1990) ("The [Webster] Court relied upon and reaffirmed the holdings of McRae and Maher v. Roe . . . and upheld the validity of Roe v. Wade"); Arnold v. Board of Educ. of Escambia County, Alabama, 880 F.2d 305, 311 & n.6 (11th Cir. 1989) (reaffirming the principles of Roe v. Wade and

concluding that Webster did not affect its decision); Florida Women's Medical Clinic, Inc. v. Smith, No. 79-6063, slip op. at 2 (S.D. Fla. Aug. 1, 1990) ("Defendant's[']reading of Webster is simply wrong. Webster did not overrule or modify Roe"); In Re Air Crash Disaster at Detroit Metropolitan Airport on August 16, 1987, 737 F. Supp. 427, 429 (E.D. Mich. 1989) ("The Webster Court neither overturned Roe with respect to viability nor found as a matter of law that viability occurs at twenty weeks").

Further, nothing in Hodgson or Ohio v. Akron Center for Reproductive Health, ____ U.S. ____, 110 S.Ct. 2972, 58 U.S.L.W. 4979 (1990), the Supreme Court's recent decisions dealing with the rights of minors to obtain abortions, modifies Roe v. Wade. In

these two cases, the Court struck down a Minnesota statute requiring minor women to notify both their parents, without a judicial by-pass procedure, before obtaining an abortion; upheld another section of the Minnesota statute which required two-parent notice but included judicial by-pass procedures; upheld a 48-hour waiting period, after notification was given to the parents, for all minor women; upheld Ohio's single-parent notice requirement which included a by-pass mechanism; and upheld Ohio's requirement that the physician notify the parent personally.[31]

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31. Justice Scalia's understanding of the opinions in Hodgson and Ohio is as follows:

> One Justice holds that two-parent notification is unconstitutional (at

(... continued)

Neither Hodgson nor Ohio overrules Roe v. Wade. Justice Marshall wrote:

> Roe remains the law of the land. Indeed, today's decision reaffirms the vitality of Roe, as five Justices have voted to strike down a state law restricting a woman's right to abortion. Accordingly, to be constitutional, the rigorous test [of strict judicial scrutiny].

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31. (... continued)

> least in the present circumstances) without judicial bypass, but constitutional with bypass . . . ; four Justices would hold that two-parent notification is constitutional with or without bypass . . . .; four Justices would hold that two-parent notification is unconstitutional with or without bypass, though the four would apply two different standards . . . .; six Justices hold that one-parent notification with bypass is constitutional, though for two different sets of reasons . . . .; and three Justices would hold that one-parent notification with bypass is unconstitutional . . . .

Hodgson, 110 S.Ct. at 2960, 58 U.S.L.W. at 4973-74 (Scalia, J., concurring in judgment in part and dissenting in part).

Hodgson, 110 S.Ct. at 2952, 58 U.S.L.W. at 4969 (Marshall, J., concurring in part, concurring in judgment in part, and dissenting in part) (citations omitted).

Moreover, in neither case did a majority of the Court articulate a new standard of review in abortion cases. In Hodgson, Justice Kennedy, joined by three other members of the Court, upheld the by-pass procedure because it "comports in all respects with our precedents . . . . In providing for the bypass, Minnesota has done nothing other than attempt to fit its legislation into the framework that we have supplied in our previous cases." Id. at 2970, 58 U.S.L.W. at 4978. Once again, the critical fifth vote came from Justice O'Connor. Justice O'Connor's opinion

relied upon the Court's prior decisions in Danforth and Bellotti v. Baird, 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed. 2d 797 (1979) ("Bellotti II") in which the Court approved the use of a by-pass mechanism to ameliorate the unconstitutional burdens imposed by parental consent statutes. Id. at 2949-50, 58 U.S.L.W. at 4968 (O'Connor, J., concurring). In Ohio, the majority opinion concluded that the Ohio statute was constitutional because it "meets the requirements for parental consent statutes in Danforth, Bellotti, Ashcroft, and Akron." Ohio, 110 S.Ct. at 2979, 58 U.S.L.W. at 4982. Finally, a majority of the Court emphasized that its opinions in Hodgson and Ohio did not conflict or modify Akron. See id. at 2983, 58 U.S.L.W. at 4984 ("The distinction between notifying a minor's

parents and informing a woman of the routine risks of an abortion has ample justification"); see also Hodgson, 110 S.Ct. at 2944 n.35, 58 U.S.L.W. at 4965 n.35.

With these principles in mind, I turn to the specific challenges raised by plaintiffs in this action.

THE DEFINITION OF MEDICAL EMERGENCY

As noted above, the Commonwealth may not adopt abortion regulations which depart from accepted medical practices. Akron, 462 U.S. at 434, 103 S.Ct. at 2494-95; American College II, 737 F.2d at 292. At every stage of the pregnancy, the woman's health must always remain the paramount consideration. See Colautti v. Franklin, 439 U.S. at 400, 99 S.Ct. at 688; see also American College II,

737 F.2d at 300. For this reason, the Commonwealth's interest in promoting the integrity of the marital relationship and the prenatal life of a spouse's child (assuming that such a legitimate interest does in fact exist) or encouraging informed consent and parental involvement in abortion decisions must take the back seat to any immediate and serious threat to maternal health. Therefore, to pass constitutional muster, regulations of a woman's right to choose to terminate her pregnancy must contain an adequate exception for medical emergencies. Casey I, 686 F. Supp. at 1137.

While the Act does contain an exception for medical emergencies, I find that is far from adequate. The definition of medical emergency within the Act interferes with the physician's

independent medical judgment. Without question, the definition of medical emergency is more restrictive than any other as applied in medical situations. Compare 18 Pa. Con. Stat. Ann. § 3203 with 35 Pa. Con. Stat. Ann. § 6923 and Findings of Fact (¶ 152), supra at 55-56. previously, I concluded:

> [T]he narrow definition of medical emergency contained in Section 3203 may compel a physician to act against his own best judgment and creates an unconstitutional trade off between the woman's health and the life or health of the fetus, or between the minor's health and the involvement of her parent in the abortion decision.

Casey I, 686 F. Supp. at 1137. This conclusion applies with equal force today. If anything, the record established herein makes this conclusion more certain.

Under the Act, the physician may only act in the best interests of his or her patient, if a delay would create a

"serious risk of substantial and irreversible impairment of [a] major bodily function" or death. At the risk of license suspension or revocation, as well as rather substantial potential criminal penalties, a physician is asked under the Act to proceed with the care of his or her pregnant patient in a manner inconsistent with his or her best medical judgment and incompatible with the best interests of his or her patient. This trade-off cannot be tolerated.

Defendants argue that the plaintiffs cannot demonstrate any situations in which a pregnant woman would be suffering from a condition requiring immediate medical care under generally accepted medical standards that would not also fall within the definition of medical emergency. The record before me

is very much to the contrary. Plaintiffs have identified three serious conditions, e.g. preeclampsia, inevitable abortion, and premature ruptured membrane, arising out of pregnancy that could pose a serious threat to a woman's health without creating a serious risk of substantial and irreversible impairment to a major bodily function. In such instances, delay might cause a risk of an impairment to a bodily function, but not a "serious risk of substantial and irreversible impairment to major bodily function." A pregnant woman, or any other person for that matter, should not be required to bear that risk. The Act's definition of medical emergency would hinder a physician's ability to respond rapidly to emergency circumstances and cause delay which could jeopardize a woman's health.

Defendant's also argue that the definition of medical emergency in the Act is less restrictive than the definition of medical emergency contained in the Missouri statute upheld in Hodgson. This argument is without merit. Without question, the Missouri statute does narrowly define the term "medical emergency," however, neither the lower courts nor the Supreme Court had occasion to consider its constitutionality.

I will, therefore, permanently enjoin the enforcement of all provisions of the Act containing the term "medical emergency."[32] Since this conclusion

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32. I decline to reach the merits of plaintiffs' vagueness argument. However, I note that the Supreme Court has stated that a statute is unconstitutionally vague if "'it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the

enjoins all those provisions challenged by plaintiffs substantively, I technically need not reach the merits of the remaining challenges to the Act. However, to avoid potential piecemeal appellate review, I shall address the remainder of the issues raised.

TWENTY-FOUR HOUR WAITING PERIOD

Section 3205 of the Act requires a mandatory 24-hour delay between the time

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32. (... continued)
statute' . . . [and] is so indefinite that 'it encourages arbitrary and erratic arrests and convictions.'" Colautti v. Franklin, 439 U.S. at 390, 99 S.Ct. at 683. It can be persuasively argued that, like the provision at issue in Colautti, the Act "conditions potential criminal liability on confusing and ambiguous criteria" and, therefore, presents "serious problems of notice, discriminatory application, and chilling effect on the exercise of constitutional rights." Id.

the woman's consent for an abortion is obtained and the actual time the procedure is performed. Section 3205 applies to all abortions regardless of which trimester of pregnancy is involved. Essentially, the Commonwealth seeks a decision which would effectively overrule Akron, as well as reverse the result reached in American College I, 552 F. Supp. at 797-98, and conceded by the Commonwealth in American College II, 737 F.2d at 293. This is something which I cannot, and will not, do, based upon the weight of authority and the record before me. While increasing the cost and risk of delay of abortions by requiring two trips to an abortion facility, this arbitrary and inflexible

waiting period does not further the state's interest in maternal health and it impermissibly infringes the physician's discretion to exercise sound medical judgment. Therefore, a mandatory 24-hour waiting period unconstitutionally imposes a legally significant burden on a woman's rights to seek an abortion.

This issue is identical to the issue addressed by the Supreme Court in Akron. The Court invalidated a provision that required women, capable of consenting to abortion, to wait a period of 24 hours after giving consent before undergoing an abortion. The Court determined that "if a woman, after appropriate counseling, is prepared to give her written informed consent and proceed with the abortion, a State may

not demand that she delay the effectuation of that decision." Akron, 462 U.S. at 450-51, 103 S.Ct. at 2503.

The record before me amply supports this result. However, I shall only briefly summarize my findings. Only a very small percentage of women are ambivalent concerning whether to have an abortion when they arrive at the facility.[33] Once a woman gives her informed consent to the abortion procedure, there is absolutely no medical reason for delay. In fact, a mandatory 24-hour waiting period could,

33. Special arrangements are made for counseling sessions for women demonstrating any ambivalence about their decision.

in reality, lead to delays in excess of 24 hours and perhaps as long as two weeks given the current practices of abortion providers and the individual circumstances of each patient. Any such delay presents an increased risk to the health of the patient. In some cases, the delay could force the woman into the second trimester of her pregnancy. This would increase the cost of the procedure, as well as the risk.

Moreover, a mandatory 24-hour waiting period would require two visits to the abortion provider. This would double the woman's travel time,[34] her exposure to the harassment of demonstrators located outside of most abortion facilities on a regular basis, and significantly increase her costs in

34. I note that many women must travel substantial distances to reach the nearest abortion provider.

obtaining the procedure. Further, women that work in the home and have children will have to expend additional sums for day care or baby sitting services, and women working outside the home will be required to take additional time off work. The economic impact of this provision will be most burdensome upon those women with the least financial resources, the poor and the young. Finally, women living in rural areas and those women that have difficulty explaining their whereabouts, such as school age women, battered women, and working women without sick leave, will also experience significant burdens in attempting to effectuate their abortion decision, if a mandatory 24-hour waiting period were in place.

The Court's recent validation, in Hodgson, of a 48-hour waiting period for

minors seeking an abortion to permit parental involvement in their decision does not alter this conclusion. In fact, a majority of the Court explicitly distinguished the situation before it from that presented in Akron. See Hodgson, 110 S.Ct. at 2944 n.35, 58 U.S.L.W. at 4965 n.35; see also Ohio, 110 S.Ct. at 2983, 58 U.S.L.W. at 4984 ("The distinction between notifying a minor's parents and informing a woman of routine risks of abortion has ample justification"). Significantly, the statute in Hodgson did not require any delay once the minor obtained the affirmative consent of a substitute decision-maker -- either the court or a parent.

Based upon the record before me, I conclude that the 24-hour waiting period in section 3205 is unconstitutional.

PHYSICIAN-ONLY DISCLOSURE REQUIREMENT

Plaintiffs challenge the provision of section 3205(a)(1) requiring that the information required to be disclosed to the patient pursuant to (a)(1)[35] be imparted by the physician and not his agent. The 1982 version of the Act contained the same requirement. Based upon virtually identical language, the Supreme Court found such a provision unconstitutional. Akron, 462 U.S. at 446-49, 103 S.Ct. at 2501-02. As with

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35. Specifically, section 3205(a)(1), quoted supra at 65-66, requires the physician to orally inform the woman of (1) the nature of the proposed treatment and procedure and of the risks and alternatives to the procedure; (2) the probable gestational age of the fetus at the time the abortion is to be performed; and (3) the medical risks associated with carrying the pregnancy to term.

the 24-hour waiting period provision, the Commonwealth conceded the unconstitutionality of the physician-only disclosure requirement before the Third Circuit. American College II, 737 F.2d at 793. I find that no basis exists in the record before me to reach a contrary conclusion.

The Supreme Court concluded in Akron that it was "unreasonable for a State to insist that only a physician is competent to provide the information and counseling relevant to informed consent," Akron, 462 U.S. at 449, 103 S.Ct. at 2502, since "the State's interest is in ensuring that the woman's consent is informed and unpressured; the critical factor is whether she obtains the necessary information and counseling from a qualified person, not the identity of the person from whom she

obtains it." Id. at 448, 103 S.Ct. at 2502 (emphasis added).

The record before me establishes that prior to performing an abortion, trained counselors at plaintiff-clinics provide a patient with options counseling and obtain her informed consent for the procedure. The record further establishes that these counselors are well-trained and extremely competent to impart such information to patients seeking to terminate their pregnancy. A physician-only disclosure requirement will require the plaintiff-clinics to substantially alter their current practices. Any changes of this nature would necessarily increase costs to the plaintiff-clinics for providing the service, which would undoubtedly be passed along to patients seeking an abortion.

Trained counselors, such as those employed or utilized on a volunteer basis by plaintiff-clinics, are fully capable, by virtue of their training and experience, to provide information to patients, to discuss the alternatives to abortion, and to secure the patient's informed consent. In many instances, trained counselors, who are women, are more understanding than physicians and have more time to spend with the patients. Consequently, in certain cases, the state's interest "in ensuring that the woman's consent is informed and unpressured" may be better served when trained counselors are able to impart the necessary information to the patient. A physician-only disclosure requirement is not narrowly tailored to serve the Commonwealth's interest in protecting maternal health.

Accordingly, I find that the

physician-only informed consent requirements set forth in section 3205(a)(1) of the Act are unconstitutional.

CONTENT-BASED INFORMED CONSENT

"The validity of an informed consent requirement . . . rests on the State's interest in protecting the health of the pregnant woman." Akron, 462 U.S. at 443, 103 S.Ct. at 2499. Plaintiffs do not dispute that a requirement that the woman give what is truly a volunary and informed consent is proper and constitutional. Thornburgh, 476 U.S. at 760, 106 S.Ct. at 2178; Danforth, 428 U.S. at 67, 96 S.Ct. at 2840. However, a state, under the guise of informed consent requirements, "may not require the delivery of information designed 'to influence the woman's informed choice between abortion or childbirth.'"

Thornburgh, 476 U.S. at 760, 106 S.Ct. at 2178 (quoting Akron, 462 U.S. at 443-44, 103 S.Ct. at 2500). Also, rigid requirements that a specific body of information be imparted to a woman in all cases, regardless of the needs of the patient, improperly intrudes upon the discretion of the pregnant woman's physician and thereby imposes an "undesired and uncomfortable straitjacket." See Danforth, 428 U.S. at 67 n.8, 96 S.Ct. at 2840 n.8 (quoted in Thornburgh, 476 U.S. at 762, 106 S.Ct. at 2179).

Section 3205 of the Act states that five specific types of information, three of which must be presented by a physician, must be delivered to the woman at least 24 hours prior to the abortion. The five are: (a) the "nature

of the proposed procedure or treatment and of those risks and alternatives to the procedure or treatment that a reasonable patient would consider material to the decision," (b) the "probable gestational age of the unborn child at the time the abortion is to be performed," (c) the "medical risks associated with carrying her child to term," (d) the fact that the "father of the unborn child is liable to assist in the support of her child," and (e) that "Medical Assistance benefits may be available for prenatal care, childbirth and neonatal care." See 18 Pa. Con. Stat. Ann. § 3205(a)(1) and (2). The woman must also be advised that materials printed and supplied by the Commonwealth that describe the fetus and that "list agencies which offer alternatives to abortion" are available

for her review. See 18 Pa. Con. Stat. Ann. § 3205(a)(2)(i). If the woman elects to review the printed materials, a copy of the materials must be provided to her. See 18 Pa. Con. Stat. Ann. § 3205(a)(3). Finally, the pregnant woman must certify, prior to the abortion, that all of this information has been provided to her. See 18 Pa. Con. Stat. Ann. § 3205(a)(4).

Pursuant to section 3208 of the Act, PaDOH must prepare, publish and update, on an annual basis, easily comprehensible printed materials which would comply with the informed consent provisions of section 3205(a) of the Act. First, PaDOH must prepare "[g]eographically indexed materials designed to inform the woman of public and private agencies" available to assist her through pregnancy. See 18

Pa. Con. Stat. Ann. § 3208(a)(1). Second, PaDOH must prepare "[m]aterials designed to inform the woman of the probable anatomical and physiological characteristics of the unborn child at two-week gestational increments from fertilization to full term, including pictures representing the development of unborn children at two-week gestational increments." See 18 Pa. Con. Stat. Ann. § 3205(a)(2).

The Supreme Court's assessment in Thornburgh of the content-based informed consent imposed by sections 3205 and 3208 of the Act applies with equal force today. For this reason, I shall quote Thornburgh at length. Justice Blackmun wrote:

> The printed materials required by §§ 3205 and 3208 seem to us to be nothing less than an outright attempt to wedge the Commonwealth's message discouraging abortion into

> the privacy of the informed-consent dialogue between the woman and her physician. The mandated description of fetal characteristics at 2-week intervals, no matter how objective, is plainly overinclusive. This is not medical information that is always relevant to the woman's decision, and it may serve only to confuse and punish her and to heighten her anxiety, contrary to accepted medical practice. Even the listing of agencies in the printed Pennsylvania form presents serious problems; it contains names of agencies that may well be out of step with the needs of the particular woman and thus places the physician in an awkward position and infringes upon his or her professional responsibilities. Forcing the physician or counselor to present materials and the list to the woman makes him or her in effect an agent of the State in treating the woman and places his or her imprimatur upon both the materials and the list. All this is, or comes close to being, state medicine imposed upon the woman, not the professional medical guidance she seeks, and it officially structures -- as it obviously was intended to do -- the dialogue between the woman and her physician.
>
> The requirements of §§ 3205(a)(2)[(ii) and (iii)] that the woman be advised that medical

> assistance benefits may be available, and that the father is responsible for the support of the child similarly are poorly disguised elements of discouragement for the abortion decision. Much of this would be nonmedical information beyond the physician's area of expertise and, for many patients, would be irrelevant and inappropriate. For a patient with a life-threatening pregnancy, the "information" in its very rendition may be cruel as well as destructive of the physician-patient relationship. As any experienced social worker or other counselor knows, theoretical financial responsibility often does not equate with fulfillment. . . . Under the guise of informed consent, the Act requires the dissemination of information that is not relevant to such consent, and, thus, it advances no legitimate state interest.

Thornburgh, 476 U.S at 762-63, 106 S.Ct. at 2179-80 (citations and footnotes omitted); see American College II, 737 F.2d at 295-96; see also Akron, 462 U.S. at 444-45, 103 S.Ct. at 2500-01 (invalidating substantially similar informed consent provisions).

The type of compelled informed

consent contemplated by sections 3205 and 3208 of the Act is the antithesis of informed consent and goes far beyond merely describing the general subject matter relevant to the woman's decision. For this reason, I find that sections 3205 and 3208 are unconstitutional on their face. Thornburgh, 476 U.S. at 764, 106 S.Ct. at 2180.[36]

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36. The Court in Thornburgh concluded as follows: "These statutory defects cannot be saved by any facts that might be forthcoming at a subsequent hearing." Id. I note, however, that my holding does not bar the Commonwealth from preparing the documents required by section 3208. Instead, I merely enjoin the requirement that these items must be offered to the pregnant woman during the informed consent process as outlined by section 3205.

PARENTAL INFORMED CONSENT[37]

> [T]he potentially severe detriment facing a pregnant woman, see Roe v. Wade, 410 U.S. [at 153, 93 S.Ct. at 726] is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor. In addition, the fact of having a child brings with it adult legal responsibility, for parenthood, like attainment of the age of majority, is one of the traditional criteria for the termination of the legal disabilities of minority. In sum, there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.

Bellotti II, 443 U.S. at 642, 99 S.Ct. at 3047-48.

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37. To the extent that section 3206 required that at least one parent give "informed consent" to the minor's decision, this section must be deemed unconstitutional given the unconstitutional content-based informed consent requirements of section 3205. However, I shall review the constitutionality of parental "informed consent" under the assumption that the informed consent requirements imposed by the Act were in fact constitutional.

Except in the case of a "medical emergency," section 3206 requires a physician to obtain the informed consent of a parent or guardian before performing an abortion on an unemancipated minor or an incompetent woman. Because section 3206 does not define "informed parental consent," I must look to the provisions of section 3205(a) to give meaning to the term. To be "informed" within the meaning of the Act, the physician must have orally informed the parent of all the information required by section 3205(a)(1). In addition, the parent must also be informed of the information required by section 3205(a)(2).

To be constitutional, a parental consent provision must not unduly burden the minor's right to seek an abortion. Bellotti II, 443 U.S. at 640, 99 S.Ct.

at 3046. Although parents may not exercise "an absolute, and possibly arbitrary veto" over the decision, Danforth, 428 U.S. at 74, 96 S.Ct. at 2843, the state's reasonable judgment that the decision should be made after notification to and consultation with a parent has never been questioned. Id. at 75, 96 S.Ct. at 2844; see also Ohio, 110 S.Ct. at 2978-81, 58 U.S.L.W. at 4981-83; Akron, 462 U.S. at 428 n.10, 439, 103 S.Ct. at 2491 n.10, 2497; H.L. v. Matheson, 450 U.S. 398, 409-10, 101 S.Ct. 1164, 1171, 67 L.Ed. 2d 388 (1981). "[P]arental notice and consent are qualifications that typically may be imposed by the State on a minor's right to make important decisions. As immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range

consequences, a State reasonably may determine that parental consultation often is desirable and in the best interest of the minor." Bellotti II, 443 U.S. at 640-41, 99 S.Ct. at 3046-47.

While not explicitly requiring the parent to make an in-person visit to the abortion facility, I conclude, based upon the evidence of record, that an in-person visit to the facility will be necessary under generally accepted medical principles of informed consent in order for the facility to obtain the informed consent of the parent.[38]

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38. I recognize that I reached a contrary conclusion previously. Casey I, 686 F. Supp. at 1126-27. However, I am not bound by my earlier findings. The weight of the evidence at the preliminary injunction hearing did not support plaintiffs' argument. The same, however, cannot be said for the record as it now exists given the credible testimony of Dr. Grodin, a medical ethicist.

Addressing the requirement that a parent make an in-person visit to the facility, I wrote:

> Any requirement that a parent make an in-person visit to the clinic would carry with it the risk of a delay of several days or possibly weeks in obtaining an abortion, even where the parent is willing to consent. It may create additional financial and emotional burdens for the minor and her family. The parent may be obliged to take time off from work, which may entail loss of wages and scheduling difficulties. The parent may incur child care or travel expenses. The parent may be reluctant to explain his or her absence from work, or may not wish to be seen entering an abortion clinic. Such a requirement would also increase the clinics' costs, which would eventually be passed on to their patients.
>
> Because a delay of even a few days can significantly increase the risks and costs associated with abortion, particularly where the minor is near or into her second trimester before she seeks the abortion, the delays inherent in any requirement of an in-person parental consultation could effectively deprive some minors of the right to obtain an abortion. If there is a

> less burdensome means of achieving the Commonwealth's goal of parental involvement in the minor's decision itmust be applied.

Casey I, 686 F. Supp. at 1126.

One could not reasonably dispute that "informed" parental consent would support the Commonwealth's interest in encouraging involvement in the minor's abortion decision so as to enable the parent to determine whether an abortion is in her best interests. Id. However, this interest can be served without requiring an in-person visit by the parent to the abortion provider. Therefore, section 3206 is not narrowly drawn to serve the Commonwealth's interest and unduly burdens the minor's rights. See Planned Parenthood Ass'n of Atlanta Area, Inc. v. Harris, 670 F. Supp. 971, 987-88 (N.D. Ga. 1987).

The question then becomes whether the existence of a judicial by-pass

procedure eliminates this undue burden.[39] The Commonwealth may require the consent of one parent as long as it provides "an alternative procedure whereby a pregnant minor may

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39. Plaintiffs argue that the defendants have failed to sustain their burden of establishing the readiness of the Pennsylvania judiciary to implement the by-pass procedure contained in section 3206, see 18 Pa. Con. Stat. Ann. § 3206(c), (d), (e), and (f), in an expeditious and confidential fashion. Defendants argue that the burden rests with the plaintiffs to establish the non-readiness of the Pennsylvania judiciary to implement the by-pass procedures. I must agree with defendants. Because there is no need to address the sufficiency of the by-pass mechanism since section 3206 has been enjoined for other reasons and because there is no evidence of record to suggest that Pennsylvania's judiciary is not prepared to implement the by-pass procedure, I shall not reach this issue. However, should section 3206 go into effect in the future, plaintiffs may take appropriate action to challenge the sufficiency of the by-pass procedure at that time, if they can establish that Pennsylvania courts are ill-prepared to meet the needs of minor women seeking to avail themselves of the by-pass procedure.

demonstrate that she is sufficiently mature to make the abortion decision herself, or that, despite her immaturity, an abortion would be in her best interests." Akron, 462 U.S. at 439-40, 103 S.Ct. at 2497; see also Ohio, 110 S.Ct. at 2972, 58 U.S.L.W. at 4979 (upholding a single-parent notice requirement with alternative of judicial by-pass); Hodgson, 110 S.Ct. at 2926, 58 U.S.L.W. at 4963 (upholding two-parent notice requirement with alternative of judicial by-pass). The purpose of the by-pass procedure is to eliminate the need for a minor to notify a parent of her decision or the need to obtain a parent's consent. Judicial by-pass acts as a safeguard against the possibility that aparent might attempt to exercise an absolute veto over his or her daughter's decision to obtain an abortion.

No abortion statute considered by

the Supreme Court, including Hodgson and Ohio, has required parental "informed" consent. Nor have the parties identified any such statute for the court. A requirement of informed parental consent, if implemented, would greatly expand the instances in which judicial by-pass would be necessary. Under the requirements of section 3206, a minor who has obtained the consent of a parent will be burdened by the judicial by-pass procedure in order to effectuate her decision, if the parent is unable or unwilling to make an in-person visit to give informed consent for the procedure. Thus, a minor, after communicating with her parent about her decision (either because she was forced to do so under the Act or because she did so of her own volition) and having obtained the concurrence of a parent

that an abortion is in her best interests, will nonetheless have to resort to the more burdensome judicial process, causing unnecessary delay and heightened apprehension and anxiety. Notwithstanding the fact that a by-pass procedure has been considered sufficient, in the judgment of the Supreme Court, both before and after Webster, Hodgson, and Ohio, to eviscerate the burden upon a minor's right to elect to terminate her pregnancy when the state requires notice or consent of a parent prior to the performance of the abortion, I conclude that requiring minors, who would not otherwise have to do so, to resort to ajudicial by-pass procedure imposes an undue burden on the minor's abortion decision and is constitutionally impermissible. Section 3206 is distinct from the statutes considered in Hodgson

and Ohio in that it will require minors who have consulted their parent to endure an otherwise unnecessary judicial by-pass procedure to effectuate their decision.

For the foregoing reasons, I agree with plaintiffs' argument that any requirement of informed parental consent is invalid even when a judicial by-pass procedure is in place. In addition, to the extent that section 3206 does not contain an adequate definition of medical emergency and the content-based informed consent required by section 3205 is impermissible, the Commonwealth will be permanently enjoined from implementing section 3206.

HUSBAND NOTIFICATION

Of all the sections of the Act, this is probably the most problematic. Section 3209 of the Act requires that no physician may perform an abortion on a

married woman unless he or she has received a signed statement from the woman stating that she has notified her spouse that she is about to undergo an abortion. See 18 Pa. Con. Stat. Ann. § 3209(a). However, such notice is not required if the woman certifies: (a) that her spouse is not the father of the child, 18 Pa. Con. Stat. Ann. § 3209(b)(1); (b) that she could not locate her spouse after diligent effort, 18 Pa. Con. Stat. Ann. § 3209(b)(2); (c) that the pregnancy is a result of spousal sexual abuse, 18 Pa. Con. Stat. Ann. § 3209(b)(3); and (d) that she has reason to believe that furnishing notice to her spouse would likely result in the infliction of bodily injury upon her by her spouse or by another individual. 18 Pa. Con. Stat. Ann. § 3209(b)(4). Also, spousal notification is not necessary in cases of a medical emergency as defined

by section 3203. See 18 Pa. Con. Stat. Ann. § 3209(c). The Commonwealth argues that this section furthers its "interest in promoting the integrity of the marital relationship and to protect a spouse's interests in having children within the marriage and in promoting prenatal life of that spouse's child." 18 Pa. Con. Stat. Ann. § 3209(a). Because I conclude that section 3209 is constitutionally defective in that it impermissibly invades a woman's fundamental right to privacy in the abortion decision, I will permanently enjoin the enforcement of this section.

At the risk of repetition, interference with a woman's abortion decision may be justified only by a "compelling state interest" and then the interference must be "narrowly drawn to express only the legitimate state interest at stake." Roe v. Wade, 410 U.S. at 155, 93 S.Ct. at

728. In Roe v. Wade, the Supreme Court identified only two compelling state interests -- (1) an interest in maternal health which becomes compelling after the first trimester of pregnancy and (2) an interest in the protection of a potential human life which becomes compelling at the point of viability. Id. at 154, 163, 93 S.Ct. at 727, 731. If a challenged regulation does not impinge upon a woman's decision to have a first trimester abortion and does not place obstacles in the path of effectuating that decision, the Commonwealth need only demonstrate a rational relationship to a legitimate purpose. See, e.g., Maher v. Roe, 432 U.S. 464, 478-180, 97 S.Ct. 2376, 2385, 53 L.Ed. 2d 484 (1977) (upholding welfare regulations that fund childbirth but do not pay for an abortion unless a physician certifies the abortion is

"medically necessary"); Connecticut v. Menillo, 423 U.S. 9, 96 S.Ct. 170, 46 L.Ed. 2d 152 (1975) (criminal statute proscribing unlicensed physician from performing an abortion does not impinge on abortion decision). However, when a regulation does impose a legally significant burden on the abortion decision and a state's interest has not yet become compelling, "a pregnant woman must be permitted, in consultation with her physician, to decide to have an abortion and to effectuate that decision 'free of interference by the State.'" Akron, 462 U.S. at 429-30, 103 S.Ct. at 2492 (quoting Roe v. Wade, 410 U.S. at 163, 93 S.Ct. at 731).

Moving through the requisite analysis, I conclude that any statute which requires a physician to notify a third party of a woman's abortion decision is, as a matter of law, a

constitutionally significant burden on the woman's right to an abortion.[40] See Planned Parenthood of Rhode Island v. Board of Medical Review, 598 F.Supp. 625, 633 (D.R.I. 1984) ("PPRI"), see

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40. I note that this situation is distinct from that presented by parental notice or consent provisions which have been upheld by the Supreme Court, see e.g., Hodgson, Ohio, Akron, Danforth, because the state has a compelling interest in assuring familial integrity and the protection of adolescents who may not be sufficiently mature or competent to make that decision. For adult women, the same concern regarding competency and maturity to make this important decision does not exist. See PPRI, 598 F. Supp. at 639. Indeed, absent evidence to the contrary, adult women are presumed to be competent to make such medical decision on their own behalf. For that matter, under Pennsylvania law, a married minor or a minor having a child are considered competent to provide informed consent for any medical procedures. See 35 Pa. Con. Stat. Ann. §§ 10101, 10102. Moreover, even in the context of a minor's abortion decision, the parent cannot bar her from obtaining an abortion, if a court determines that she is competent to make the decision without intervention by a third party.

also Eubanks v. Brown, 604 F.Supp. 141, 148 (W.D. Kent. 1984); Scheinberg v. Smith, 482 F.Supp. 529, 537-38 (S.D. Fla. 1979), aff'd in part and vacated and remanded on other grounds in part, 659 F.2d 476, 482-83 (5th Cir. 1981), on remand, 550 F.Supp. 1112 (S.D. Fla. 1982). However, even if such a notice requirement was not burdensome on its face, the evidence of record convinces me that enforcement of section 3209 would result in a severe impact on and interference with the abortion decision. Accordingly, strict judicial scrutiny of section 3209 would be required.

The pivotal inquiry is whether the challenged law places an obstacle, absolute or otherwise, in the path of a woman's free exercise of her decision. Maher v. Roe, 432 U.S. at 474, 97 S.Ct. at 2382; see also PPRI, 598 F. Supp. at

634 (a state regulation which merely has the potential to frustrate or delay a woman's abortion decision imposes a legally significant burden upon that decision). If Pennsylvania's spousal notification provision is enforced, it will have the effect of delaying or, in some cases, totally frustrating, a woman's decision to have an abortion. Women apprehensive about advising their husbands of their decision may delay in notifying him. Further, assuming one of the proffered interests for a notice requirement -- promoting marital integrity -- was valid, any notice could foster some delay to permit thoughtful marital communication. As previously stated, delay in the performance of an abortion could heighten the risk of complications and mortality. Perhaps more importantly, a forced notification requirement opens the door to total

frustration of the woman's decision. Once advised, some husbands may exert pressure, physical or emotional, to coerce their wives to forego the abortion altogether. In addition, the woman who is forced to notify her husband (because she does not fall within the language of one of the exceptions contained in the Act) in order to obtain an abortion despite her better judgment to the contrary will be subjected to additional anxiety and stress. Finally, when faced with forced notice and her perceived view of the risk such notice poses to her or her family, a pregnant wife may elect a different alternative -- carrying the pregnancy to term or an illegal abortion.[41]

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41. It would be disingenuous for the Commonwealth to claim that any burden (...continued)

Moreover, the existence of limited exceptions to the notice requirements of section 3209 do not alter this conclusion. The exceptions do not provide adequate protection for pregnant wives with perfectly valid reasons for not informing her husband of the decision. First, a pregnant wife, living apart from her husband, must make a "diligent effort" to locate her husband before she can claim an exception to the notice requirement. See 18 Pa. Con. Stat. Ann. § 3209(b)(2). This, as explained in the preceding paragraph, fosters delay and would, therefore, create an undue or

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41. (...continued)

placed upon a woman's right is not the result of state action. The Commonwealth cannot disclaim responsibility for the fact that a husband, once notified, may attempt to prevent an abortion altogether. But for the state requirement of notification, the woman would be able to effectuate her decision freely. PPRI, 598 F. Supp. at 636.

legally significant burden. Second, section 3209 provides an exception to the notice requirement for women whose pregnancies resulted from spousal sexual assault, 18 Pa. Con. Stat. Ann. § 3209(b)(3), but does not provide an exception for women abused sexually in the past in ways not within the rather limited definition of spousal sexual assault. Third, the exceptions do not account for spouses that reasonably fear abuse to their children or for other types of spousal abuse, including psychological or economical, if her husband was notified of her decision. Lastly, the Act does not account for many other numerous legitimate reasons a wife may have for not advising her husband of her abortion decision.[42]

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42. The list of justifications for a women wishing not to involve her husband (...continued)

Having identified a legally significant burden upon the woman's right to terminate her pregnancy, I must now consider whether the Commonwealth

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42. (...continued)

in the decision could include: (a) fear of physical or psychological abuse; (b) fear that such communication would jeopardize the marriage itself; (c) her husband is not the father of the fetus; (d) she was the victim of a rape which she has not disclosed to her husband and she subsequently becomes pregnant; (e) her husband is suffering from an illness and she fears communication concerning the decision could worsen his condition; (f) her husband has strong moral or religious beliefs which lead her to believe that he will object to her decision; (g) she fears her husband will attempt to prevent her from effectuating her decision; (h) she is a battered woman and fears such communication would precipitate future physical violence or other abusive behavior (including psychological and economic abuse) against her, her children or a loved one; and (i) she is recently separated or divorced from her husband. I doubt very seriously that this is an exhaustive list. For this reason, mandatory spousal notice provisions place a legally significant or undue burden on the right of women to decide to terminate their pregnancies.

can justify this burden with a compelling state interest. Admittedly, the Supreme Court has recognized the need to afford the institution of marriage and the family protection from state interference and intervention. See, e.g., Moore v. East Cleveland, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed. 2d 531 (1977); Griswold v. Connecticut, 381 U.S. at 479, 85 S.Ct. at 1678. Similarly, the Court has determined that a husband has a constitutionally protected right to procreate. Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 2d d1655 (1942). It is important to note that these cases focused on the protection of these admittedly important rights.

I do not wish to denigrate the importance of these rights. However, in

Eisenstadt v. Baird, the Supreme Court stated:

> [T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional make-up. If the right to privacy means anything, it is the right of an individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Eisenstadt v. Baird, 405 U.S. at 453, 92 S.Ct. at 1038 (emphasis in original).

No Supreme Court case has decided the issue of whether a mandatory spousal notification provision is constitutional. But while acknowledging the importance of protecting the marital relationship and the potential impact the abortion decision could have on the relationship, the Supreme Court concluded that conditioning a woman's abortion decision on the consent of her

spouse was invalid.[43] See Danforth, 428 U.S. at 67-72, 96 S.Ct. at 2840-2842 (since the woman physically bears the child and is more affected by the pregnancy, the state lacks the constitutional authority to give the spouse the unilateral authority to veto his wife's decision to have an abortion).

It is important to note that neither Danforth, despite the clear opportunity to do so, or any other Supreme Court opinion has interposed an additional compelling state interest - either in the marital relationship, protecting the procreation interests of

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43. Previously, the Supreme Court reserved decision on the question of whether a requirement that the consent by the spouse prior to the performance of an abortion could be constitutionally imposed. Roe v. Wade, 410 U.S. at 165 n.67, 93 S.Ct. at 733 n.67.

the husband or promoting prenatal life in the spouse's child - relating to the spouse of a woman seeking an abortion. For the reasons stated above and those contained in PPRI, 598 F. Supp. at 637-40, I conclude that none of these represent a compelling state interest.

The Fifth Circuit's opinion in Scheinberg, upon which defendants rely extensively, does not alter this conclusion. In that case, the court held that mandatory husband notification was justifiable if the state could establish that an aboriton procedure interferes with a married woman's future capacity to have children and, hence, the husband's right to procreate within the marriage. Scheinberg, 659 F.2d at 486-87. After a remand for further consideration of this possibility, the district court found that abortion posed

no increased risk to a married woman's future ability to bear children. Scheinberg, 550 F. Supp. at 1122-23. Because the Commonwealth has not presented any proof that abortion would affect a woman's future child bearing capacity or even advanced this argument, Scheinberg does not support the Commonwealth's argument and, in fact, supports the conclusions reached herein.[44]

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44. I also note that adoption of this argument could have potentially broad consequences upon a married, male or female, individual's autonomy to make procreative choices. An obvious extension of the Commonwealth's alleged interest would be to require an individual to be notified prior to his or her spouse undergoing a sterilization procedure. After all, following the Commonwealth's argument to its logical extreme would suggest that since such operations are permanent, the Commonwealth would have an even more

(... continued)

Considering separately the state's asserted interest in promoting the prenatal life of the spouse's child, the state is essentially attempting to circumvent the holding of Roe v. Wade and its progeny. If the state's interest in the potentiality of life does not become sufficiently compelling until the point of viability so as to permit the state to prohibit abortions except those necessary to protect the life of the mother, then the state's interest in protecting the prenatal life of the spouse's child cannot become compelling until that point. Cf.

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44. (...continued)

significant interest in requiring prior notice. I suspect that the reason that the Commonwealth is proffering this justification in the abortion context is solely because it really wishes to discourage abortion and not encourage marital integrity or protect a spouse's right to procreate within the marriage.

Danforth, 428 U.S. at 69, 96 S.Ct. at 2841 (while recognizing the state's interest in promoting marital integrity and procreation choices, concluding that such interests are not sufficiently compelling for the state to validly delegate the power -- a power which it does not possess itself -- to veto the wife's abortion decision to the husband). Since the Act applies the notice requirement to all trimesters of pregnancy, it must be considered invalid for the state's alleged interest in protecting the prenatal life of a spouse's child could not become compelling until the point of viability, if at all.

Even assuming that the state has a compelling interest in promoting marital integrity, I conclude that section 3209 does not promote that interest. In a

substantial number of cases, the decision to seek an abortion stems from the voluntary consultation of husband and wife. In fact, married couples are often encouraged to consult on important decisions, such as whether to terminate a pregnancy. I doubt that anyone would question the conclusion that a sound marital relationship is one in which communication on sensitive topics, like childbirth and abortion, is routine rather than unusual. However, I, as well as the Pennsylvania legislature, would be ignoring the stark, sometimes tragic, realities of a substantial number of present day marital relationships by assuming that all marriages are predicated on mutual communication, decision-making and respect. Dysfunctional marriages are not uncommon in our society. In many

instances, a pregnant wife may be unwilling, or perhaps unable, to discuss the abortion decision with her husband. See supra at 164 n.42.

Writing for the Court in Danforth, Justice Blackmun commented:

> It seems manifest that, ideally, the decision to terminate a pregnancy should be one concurred in by both the wife and her husband. No marriage may be viewed harmonious or successful if the marriage partners are fundamentally divided on so important and vital an issue. But it is difficult to believe that the goal of fostering mutuality and trust in a marriage, and of strengthening the marital relationship and the marriage institution, will be achieved by giving the husband a veto power exercisable for any reason whatsoever or for no reason at all. Even if the State had the ability to delegate to the husband a power it itself could not exercise, it is not at all likely that such action would further . . . the "interest of the state in protecting the mutuality of decisions vital to the marriage relationship."

Danforth, 428 U.S. at 71, 96 S.Ct. at

2841 (citation omitted). The reasoning of Danforth applies with equal force to compelled mandatory spousal notification.

Marital accord arises from within the relationship not from the intervention of the state. Therefore, forced spousal notification is a totally irrational vehicle to achieve any of the state's purported goals. The record clearly establishes that instead of fostering marital communication and bolstering the state's interest in marital integrity, the exact opposite effect would likely occur. See also Eubanks v. Brown, 604 F. Supp. at 148; PPRI, 598 F. Supp. at 640-42. Not only could forced notice hasten the dissolution of a troubled marriage, but it could have potentially disastrous consequences, including subjecting the

woman to physical abuse.[45] In the words of Governor Casey, "a state cannot intervene in a marital relationship to dictate the relationships between husband and wife." See Veto Message to House at 5 (December 17, 1987) (quoted at length supra at 11 n.13). For this reason and the reasons stated above, I

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45. This is particularly true of battered women suffering from battered woman syndrome, a type of post-traumatic stress disorder. The record before me establishes that many battered women, because of learned helplessness and cycle of violence, would not even be able to avail themselves of the physical abuse exception to the notice requirement. Therefore, these women may elect to continue their pregnancy, seeing no other viable alternative. Dr. Walker's testimony clearly establishes that incidents of abuse are heightened during pregnancy. This heightened abuse during pregnancy coupled with a batterer's anger over his wife's attempt to obtain an abortion (if he somehow discovers this) could result in the serious injury or death of the woman.

will permanently enjoin section 3209 of the Act.

DETERMINATION OF GESTATIONAL AGE

Except in the case of a medical emergency,[46] the Act provides that "no abortion shall be performed or induced unless the referring [or performing] physician . . . first made a determination of the probable gestational age of the unborn child." 18 Pa. Con. Stat. Ann. § 3210(a). The Act further requires the physician to make "such inquiries of the patient and perform or cause to be

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46. To the extent that section 3210 contains the phrase "medical emergency," it is enjoined by earlier portions of this opinion. See supra at 139-42. However, I shall briefly address plaintiffs' challenge to section 3210 which requires an "accurate diagnosis" of the gestational age of the fetus at the time the abortion is performed. The reporting requirements of section 3210 will be addressed below. See infra at 180.

performed such medical examinationsand tests as a prudent physician would consider necessary to make or perform in making an accurate diagnosis with respect to gestational age." Id. (emphasis added). Plaintiffs argue that "Section 3210 requires that the doctor perform a battery of tests to make an 'accurate diagnosis,'" see Plaintiffs' Pretrial Memorandum of Law at 59, and, therefore, will significantly increase the cost of an abortion without any corresponding benefit to any legitimate state interest. On the other hand, defendants maintain that this section does not require the performance of tests to obtain the most accurate diagnosis of gestational age and only those inquiries and tests which a prudent physician would consider to be necessary under

standard medical practice are required. See Defendants' Pretrial Memorandum of Law at 36-38. I agree with the Commonwealth's interpretation of section 3210(a).

A determination of probable gestational age is part of the routine care of a pregnant woman, regardless of whether she is considering terminating her pregnancy. In the abortion context, an accurate determination of gestational age is relevant to the physician's choice of abortion procedure, and the selection of the incorrect procedure could increase the risk of complications for the patient. Ordinarily, an accurate determination of gestational age can be made after review of a woman's menstrual history and a pelvic examination. Unless, considering the circumstances peculiar to the patient, a

prudent physician would perform more tests to obtain an accurate diagnosis of gestational age, the Act requires no more than this.

The requirements of section 3210(a) are reasonably related to the Commonwealth's compelling interest in the protection of maternal health.[47] Section 3210(a) only requires the performance of those tests which a prudent physician would consider necessary to making a determination of gestational age. Consequently, section 3210(a) does not seek a departure from generally accepted medical standards. Thus, I perceive no burden on the

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47. To the extent that a determination of gestational age may be useful as an indicator of viability for pregnancies near the end of the second trimester, then the state's interest in the potentiality of life also becomes compelling.

woman's right to choose an abortion under this section.

This conclusion is supported by the Supreme Court's decision in Webster. In that case, the Court upheld a Missouri statute which reads as follows:

> Before a physician performs an abortion on a woman he has reason to believe is carrying an unborn child of twenty or more weeks gestational age, the physician shall first determine if the unborn child is viable by using and exercising that degree of care, skill, and proficiency commonly exercised by the ordinarily skillful, careful, and prudent physician engaged in similar practice under the same or similar conditions. In making this determination of viability, the physician shall perform or cause to be performed such medical examinations and tests as are necessary to make a finding of gestational age . . .

Webster, ___ U.S. at ____, 109 S.Ct. at 3054 (quoting Mo. Rev. Stat. § 188.029). The plurality determined that this section of the Missouri Act

did not require a physician to perform tests which "would be irrelevant to determining viability or even dangerous to the mother and the fetus." Id. at __, 109 S.Ct. at 3055 (plurality); id. at__, 109 S.Ct. at 3060-64 (O'Connor, J., concurring in judgment); id. at ___, 109 S.Ct. at 3064 (Scalia, J., concurring in judgment).[48]

Because I conclude that section 3210(a) requires only those tests and inquiries that a prudent physician would consider necessary under standard medical practice for the determination

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48. While I recognize that this conclusion was sharply critized by the dissenting opinion of Justice Blackmun joined by Justices Brennen and Marshall, id., at _____, 109 S.Ct. at 3068 n.1, as well as the dissenting opinion of Justice Stevens, id. at _____, 109 S.Ct. at 3079-80, this reasoning did secure the approval, at least in the narrowest possible sense, of five members of the Court.

of gestational age, and because this section protects the Commonwealth's compelling interest in protecting maternal health without imposing an undue burden on a woman's right to choose an abortion, the requirement in section 3210(a) that a physician make a determination of gestational age is constitutional.[49]

PUBLIC DISCLOSURE REQUIREMENTS

Record keeping and reporting requirements which are reasonably directed to the preservation of maternal health and which properly respect a patient's confidentiality and privacy are permissible. Danforth, 428 U.S. at

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49. Plaintiffs filed a motion for partial summary judgment on this issue. By separate order, I shall deny this motion for the reasons stated herein.

80-81, 96 S.Ct. at 2846; see also Thornburgh, 476 U.S. at 766, 106 S.Ct. at 2181; Casey I, 686 F. Supp. at 1129.

Sections 3207(b) and 3214(f) require that every facility at which abortions are performed file certain reports.[50] Plaintiffs argue that the provision which subjects these reports to public inspection, if the facility received state appropriated funds during the preceding 12 months regardless of the amount or the type of funding, is unconstitutional. The Commonwealth attempts to justify the reports on the ground that the public has a right to know how its tax dollars are spent.

When first presented with this issue in 1982, I concluded that

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50. Importantly, plaintiffs do not challenge the requirement that they file reports under sections 3207(b) and 3214(f).

plaintiffs had not established that disclosure would impose a legally significant burden on the abortion decision. American College I, 552 F. Supp. at 803-04. Similarly, the Third Circuit determined that the plaintiffs had not "as yet demonstrated a nexus between the disclosure of such information and the chilling of constitutional rights." American College II, 737 F.2d at 297. Not long after that, I found that public disclosure of these reports would impose a legally significant burden on a woman's fundamental right to obtain an abortion. American College III, 613 F. Supp. at 666. Only two years ago, I stated "[t]he evidence of record in this action persuades me that the situation has not changed." Casey I, 686 F. Supp. at 1129. Once again, I am convinced, on

the basis of the record presently before me, that the public disclosure requirements contemplated by sections 3207(b) and 3214(f) impose a legally significant burden on a woman's right to obtain an abortion.

Abortion facilities, physicians and their staffs remain under intense pressure from anti-abortion demonstrators. In fact, in recent months, this pressure has become more onerous. The pattern of hostile behavior which has developed in the past includes picketing and verbal harassment of clinic physicians and staff members at the facilities, their private offices and their homes. Pregnant women must also suffer extreme harassment upon entering a facility. While verbal harassment is most common, attempts to block egress and ingress at a facility,

forced entries into abortion clinics as well as pushing and shoving have become more commonplace. Death, bombing and kidnapping threats also have been documented.

While this activity comes from members of the public, and not from the Commonwealth, any action of the Commonwealth which may increase the risk of harassment must be carefully scrutinized.[51] Casey I, 686 F. Supp. at 1129; see also Brown v. Socialist Workers' 74 Campaign Comm., 459 U.S. 87,

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51. The Commonwealth's argument that the plaintiff-clinics subject themselves to such harassment by advertising in telephone directories is without merit. American College III, 613 F. Supp. at 669. I find that public disclosure of reports under sections 3207(b) and 3214(f) creates a reasonable probability that plaintiff-clinics, other abortion providers, and patients will be subjected to increased threats and harassment.

103 S.Ct. 416, 74 L.Ed. 2d 250 (1982) (evidence of specific incidents of private and government hostility towards the Socialist Workers Party and its members during the four years preceding trial was sufficient to establish that disclosure would chill first amendment rights of association); Buckley v. Valeo, 424 U.S. 1, 74, 96 S.Ct. 612, 661, 46 L.Ed. 2d 659 (1976) ("[t]he evidence offered need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisal from either Government officials or private parties"); National Ass'n for the Advancement of Colored People v. Alabama ex rel. Patterson, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed. 2d 1488 (1958) (in light of evidence of past incidents of

retaliation upon disclosure, compelled disclosure of the NAACP's membership is likely to affect adversely the ability of petitioner and its membership to pursue their collective effort).

A regulation designed to inform the public about public expenditures does not further the Commonwealth's interest in protecting maternal health. Therefore, such a regulation cannot justify a legally significant burden on a woman's right to obtain an abortion. Moreover, I once again note that there are less obtrusive means through which the Commonwealth may satisfy the public's need to know how funds are spent. See Casey I, 686 F. Supp. at 1129-30.

Therefore, I will permanently enjoin the provisions of sections 3207(b) and 3214(f) which provide for the public disclosure of reports.

REPORTING REQUIREMENTS

Plaintiffs challenge various reporting requirements contained in sections 3214(a) and 3214(h). At the outset, it is important to note that the information to be reported under sections 3214(a) and 3214(h) will, by statute, remain confidential.[52] Further, the record before me suggests that the statutory provisions regarding the confidentiality of these reports will be strictly enforced. PaDOH has taken the necessary measures to ensure

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52. The reports are not public records within the meaning of Pennsylvania's Right-to-Know law, 65 Pa. Cons. Stat. Ann. §§ 66.1 to 66.4. 18 Pa. Con. Stat. Ann. § 3214(e)(2). Disclosure may be made to law enforcement officials only upon an order of the Court of Common Pleas after application showing good cause. Id. PaDOH's statistical report shall not lead to the disclosure of the identity of any physician, facility, or patient. See 18 Pa. Con. Stat. Ann. § 3214(e)(1).

compliance with the Act and that these reports will not be subjected to public disclosure. Standing alone, however, this may not be sufficient to withstand constitutional challenge. Casey I, 686 F. Supp. at 1130. Reporting requirements which "pose an unacceptable danger of deterring the exercise" of a woman's right to end a pregnancy must be invalidated. Thornburgh, 476 U.S. at 767-68; 106 S.Ct. at 2182.

Before turning to plaintiffs' specific challenges to these reporting requirements, I note that plaintiffs argue that the reporting requirements of section 3214 will impose a significant financial burden on the clinics, which will be passed on to their patients. The evidence of record suggests that plaintiff-clinics have, in fact, incurred additional administrative costs

as a result of the reporting requirements. However, there was no testimony which suggests that any of the plaintiff-clinics have raised the fees for an abortion because of these added expenses. Further, I find that the additional cost to plaintiff-clinics is not so great that, in and of itself, it imposes a legally significant burden on the right to obtain an abortion.

Plaintiffs first specifically challenge the requirement of section 3214(a)(1) that the referring physician, if any, and the performing physician be identified on the individual abortion report.[53] Each requires a separate

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53. It does not appear that plaintiffs challenge the requirement that the concurring physician and second physician required by sections 3211(c)(2) and 3211(c)(5) also be (... continued)

analysis. As to the performing physician, he or she is the best person to answer the questions of PaDOH which may arise as a result of the information contained on the report or errantly omitted from the report. While often plaintiff-clinics have contact persons to handle PaDOH inquiries concerning the reports, PaDOH has still, on occasion, been required to contact the performing physician directly. Further, for those abortion procedures not performed in abortion facilities, direct contact with the physician may be required. I am not

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53. (... continued)

reported. This would only apply to abortions performed at 24 or more weeks gestation. Therefore, I shall not address these requirements at length herein. However, for substantially the same reasons that the reporting of the identity of the performing physician is reasonably related to the Commonwealth's interest in promoting maternal health, I find these requirements to be constitutional.

unmindful of the fact that some physicians who previously performed abortions may be deterred from doing so under the Act. However, while plaintiff-clinics may have had more difficulty in locating doctors to perform abortion procedures, the record is void of any evidence that a physician refused to perform abortions for any of the plaintiff-clincs because of the reporting requirements and void of any evidence that plaintiff-clinics have not been able to sustain the apparent demand for the abortion services they provide. Because I conclude that the requirement that the performing physician be included on the abortion report is reasonably related to the Commonwealth's interest in promoting maternal health, and is narrowly tailored to serve that

interest,[54] I will reject plaintiffs' challenge to this specific reporting requirement.

The requirement that the referring physician, if any, be identified on the individual report does not add to the pool of scientific knowledge concerning abortion. Nor is it reasonably related to the Commonwealth's interest in promoting maternal health. See Casey I, 686 F. Supp. at 1130. The evidence of

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54. Plaintiffs suggest that the performing physician could be identified by license number, instead of by name, and the Commonwealth could easily cross-reference the number to obtain the physician's name if it needed to contact the physician directly. I assume that, if the physician's license number were to be disclosed in some manner, another party with sufficient interest could also determine the physician's name from the number. Similarly, requiring the Commonwealth to obtain the physician's name from hospital records would not be a less intrusive means for the Commonwealth to follow-up on individual abortion reports. Casey I, 686 F. Supp. at 1130-31.

record persuades me that, notwithstanding the provisions pertaining to confidentiality of reports submitted to PaDOH, many physicians, particularly those that previously discontinued performing abortions because of harassment, will refuse to refer patients to abortion clinics if their names will appear on these reports. This would result in the imposition of an undue burden on the woman's ability to obtain an abortion.

To the extent that the Commonwealth may seek missing information contained on the individual abortion report, the ability and responsibility to provide that information rests with the abortion facility and the performing physician, not the referring physician. The Commonwealth also asserts that disclosure of the referring physician's

identity is necessary because "[t]he referring physician is capable of giving informed consent required by § 3205 and making a determination of gestational age required by § 3210." See Defendants' Pretrial Brief at 40. This argument is without merit. The abortion provider, especially an abortion clinic, will review informed consent information with the patient prior to performing the procedure, regardless of what the referring physician may or may not have done. The same holds true for a determination of gestational age. Failure to do so would be tantamount to inviting a malpractice suit. Therefore, the performing physician or abortion facility will have all information the Commonwealth might seek in either of these two areas at their disposal. Finally, to the extent that the

referring physician is involved in the post-abortion care of the patient, he is required to make an appropriate report of any complications under section 3214(h).

Plaintiffs also challenge the requirement that the facility report any medical complications arising out of pregnancy or from the abortion procedure, 18 Pa. Con. Stat. Ann. § 3207(a)(7),[55] and that any treating physician file a report of complications arising from the abortion procedure.

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55. Previously, plaintiffs challenged the section of the Report of Induced Terminations of Pregnancy, relating to medical complications of pregnancy. I concluded that this section was "unartfully drafted" but refrained from ruling on the merits of plaintiffs' constitutional challenge to this portion of the form. See Casey I, 686 F. Supp. at 1133. Since that time, the Commonwealth amended the form to eliminate the problem. Plaintiffs no longer make this challenge. See Defendants' Exhibit 47B.

18 Pa. Con. Stat. Ann. § 3214(h). Plaintiffs argue that these reports will yield scientifically inaccurate data because of (1) a facility's unawareness of post-abortion complications in many cases; (2) the absence of uniform definitions for complications; and (3) the possibility that there may be double-reporting of complications (by the facility and a subsequent treating physician). Essentially for the reasons stated in my earlier opinion, I find this argument to be without merit. See Casey I, 686 F. Supp. at 1131. While the data gathered by these reports may not perfectly reflect all medical complications, I am not persuaded that the information is statistically meaningless. Because sections 3207(a)(7) and 3214(h) are reasonably related to the Commonwealth's

interest in protecting maternal health, I reject plaintiffs' challenge to these reporting requirements.

Next, the plaintiffs challenge the requirement that the physician report the basis for his medical judgment concerning viability (section 3214(a)(8)), the existence of a medical emergency (section 3214(a)(10)), and determining gestational age (section 3214(a)(11)). I will permanently enjoin the enforcement of these provisions for the reasons set forth in my ruling on plaintiffs' motion for a preliminary injunction. See Casey I, 686 F. Supp. at 1132 (for a "physician [to] justify his medical judgment by reporting the basis therefor in a written report impermissibly interferes with the woman's ability to effectuate her abortion decision" and has a chilling

effect upon the physician's exercise of his judgment).

Finally, plaintiffs challenge the Commonwealth's attempt to include inquiries concerning Hispanic origin, race, educational level, and date of last normal menses on the Report of Induced Termination of Pregnancy. While none of these items appear in the Act, the Commonwealth argues that PaDOH may legally go beyond the requirements of the statute and request this additional information.[56] PaDOH's stated purpose in requesting this information is to (1)

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56. Indeed, a reading of the applicable statutory provisions seems to support this argument. For example, section 3214(a) requires only that the forms "include" the information listed in the statute. Similarly, section 3214(h) provides that the form shall contain "such other information except the name of the patient as the department from time to time require[s]."

be consistent with the federal standards for the collection of data on induced terminations of pregnancy which were developed by the National Center for Health Statistics and (2) better study the three outcomes of pregnancy (live births, fetal deaths, and induced terminations of pregnancy) for which the Division of PaDOH collects data.

The Handbook on the Reporting of Induced Terminations of Pregnancy prepared by the federal government, through the National Center for Health Statistics, United States Department of Health and Human Services states:

> Data from reports of induced termination of pregnancy provide unique information on the characteristics of women having induced abortions. Uniform annual data of such quality are nowhere else available. Medical and health information is provided to evaluate risks associated with induced abortion at various lengths of gestation and by the

> type of abortion procedure used. Information on the characteristics of the women is used to evaluate the impact that induced abortion has on the birth rate, teenage pregnancy, and out-of-wedlock births. The data also help measure the role that induced abortion plays in birth prevention as compared with contraception. Because these abortion data provide information necessary to promote and monitor health, it is important that the forms be completed carefully.

See Defendants' Exhibit 43 at 2. The "Standard Report of Induced Termination of Pregnancy," intended to serve as a model for the states, is virtually identical to the Pennsylvania Report.

Moreover, abortion is another "pregnancy outcome," in addition to live births and fetal deaths, upon which the Division of PaDOH gathers information. The same information is collected on the Certificate for Fetal Death, which must be submitted to PaDOH on each instance of fetal death after 16 weeks of gestation, and on the Certificate of

Live Birth, which must be submitted to PaDOH upon each instance of live birth. Therefore, the Commonwealth maintains that it must be able to collect this information to supplement the information already received on these two forms to enable it to better study the three possible pregnancy outcomes -- specifically, through the examination of socio-economic information useful in examining fertility rates and for family planning purposes.

The Act, as originally enacted in 1982, required the individual abortion report to contain the same information regarding the woman's personal history.[57] In addition, the Act

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57. The demands for information regarding Hispanic origin and educational level did not appear in the original Act.

provided that each report "shall be made available for public inspection and copying within 15 days of receipt in a form which will not lead to the disclosure of the identity of any person filing a report." Similarly, the complications report was to be open for public inspection and copying. In respect to the individual reporting requirements and the availability of these reports for public inspection, the Supreme Court concluded:

> The scope of information required and its availability to the public belie any assertions by the Commonwealth that it is advancing any legitimate interest. . . .
>
> The required Pennsylvania reports[,] . . . while claimed not to be "public," are available nonetheless to the public for copying. Moreover, there is no limitation on the use to which the Commonwealth or the public copiers may put them. . . . The decision to terminate a pregnancy is an intensely private one that must be protected in a way that assures anonymity. . . .

A woman and her physician will

necessarily be more reluctant to choose an abortion if there exists a possibility that her decision and her identity will become known publicly. Although the statute does not specifically require the reporting of the woman's name, the amount of information about her and the circumstances under which she had an abortion are so detailed that identification is likely. Identification is the obvious purpose of these extreme reporting requirements. . . .
... Pennsylvania's reporting requirements raise the specter of public exposure and harassment of women who choose to exercise their personal, intensely private, right, with their physician, to end a pregnancy. Thus, they pose an unacceptable danger of deterring the exercise of that right, and must be invalidated.

Thornburgh, 476 U.S. at 765-68, 106 S.Ct. at 2181-82.

While the Commonwealth removed many of these same reporting requirements from the Act, PaDOH still seeks to collect information in these areas for the reasons expressed above. Based upon the record before me, I do not find any

legally significant burden to a woman'sright to choose to terminate her pregnancy by these requirements. These reports are now secure from public disclosure. See 18 Pa. Con. Stat. Ann. § 3214(e)(2); see also 18 Pa. Con. Stat. Ann. § 3214(e)(1) (the annual statistical report shall not disclose any information which would lead to the disclosure of the identity of any person about whom a report is filed). Public disclosure of these reports was of substantial concern to the Supreme Court in Thornburgh. But the same danger of public exposure and harassment does not exist given the current restrictions contained in the Act. Further, no substantial additional burden would be imposed upon the plaintiff-clinics or other abortion providers to gather and report this information. As stated previously, these additional costs are

not legally significant. In fact, some, if not all, of this information is already collected on medical history forms by abortion providers.

Inasmuch as no legally significant burden has been demonstrated by plaintiffs, the Commonwealth need only demonstrate a rational basis for the reporting requirements. American College I, 552 F. Supp. at 796. Based upon the fully developed record before me, I find that the Commonwealth has sustained that burden. This information will permit the Commonwealth to assimilate data pertinent to all three possible pregnancy outcomes, and compile useful information concerning fertility rates, family planning, and, hence, maternal health. Because I conclude that compiling this information is rationally related to a legitimate

government interest and does not impose a legally significant burden on a woman's right to end her pregnancy, I reject plaintiffs' argument that I should permanently enjoin the Commonwealth from seeking to collect this data.[58]

In summary, except insofar as the Act requires the reporting of the name of the referring physician and the basis for the physician's medical judgment, I conclude that the reporting requirements of sections 3214(a) and 3214(h), including the additional information

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58. I recognize that I reached a contrary conclusion in my ruling on plaintiffs' motion for a preliminary injunction. Casey I, 686 F. Supp. at 1133. However, I am not bound by that ruling herein. After careful consideration of the more expansive record before me, I conclude that this situation is, in fact, distinguishable from that presented in Thornburgh.

sought by the Commonwealth but not required by the Act, are constitutionally valid.[59] I shall sever those two requirements and permit the Commonwealth to collect all other data required by the Act and approved of herein.

SEVERABILITY

During argument, defendants contend that the Act's "very liberal severance provision" permits this court to strike "any word, phrase or provision" found to

59. Of course, the Commonwealth may not require the reporting of information relating to the husband notification and parental consent sections because those sections have been permanently enjoined by other sections of this opinion.

be unconstitutional.[60] See Trial Transcript, Vol. IV at 49. However, it is not my function to surgically repair legislation to bring it within constitutional limits, if such surgical reconstruction would result in a statute which would be virtually unrecognizable to the legislative body responsible for enacting the legislation in the first place. See Thornburgh, 476 U.S. at 764-65, 106 S.Ct. at 2181 (radical dissection of the Act which would leave it with little resemblance to that intended by the legislature is improper);

60. The severability clause states as follows:

> The provisions of this Act are severable. If any word, phrase or provision of this Act or its application to any person or circumstance is held invalid, the invalidity shall not affect any other word, phrase or provision or application of this Act which can be given effect without the invalid word, phrase, provision or application.

See 1989 Pa. Laws 592, 603, § 6.

Akron, 462 U.S. at 445 n.37, 103 S.Ct. at 2501 n.37 (rejecting invitation to sever subsections of informed consent provision despite presence of broad severability clause); Carter v. Carter Coal, 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 2d 1160 (1936) (severability clause does not authorize court to give statute meaning entirely different than that intended by legislature); Roe v. Casey, 623 F.2d at 837 (court may not substitute its judgment for that of elected officials to rescue otherwise invalid statute). For this reason, I have exercised extreme caution in my determinations of whether to sever certain requirements of the Act.

While I have elected to sever certain of the reporting requirements from the Act, I decline the

Commonwealth's invitation to engage in more substantial dissections of the Act. For example, I will not strike the word "informed" from section 3206, relating to the requirement of informed parental consent as suggested by the Commonwealth. See Trial Transcript, Vol. IV at 49. Because "consent" and "informed consent" have radically different meanings, striking the word "informed" from section 3206 would give the section a radically different meaning than that intended by the legislature and, therefore, be improper. The same is true for the language contained in the Act's definition of "medical emergency."

IV.

CONCLUSIONS OF LAW

Inasmuch as I find that I have subject jurisdiction over this action

pursuant to 28 U.S.C. §§ 1331, 1343(a)(3),(4) and based upon the foregoing findings of fact and discussion, I conclude that portions of the Act are unconstitutional and, therefore, the defendants must be permanently enjoined from enforcing those portions of the Act. Other portions of the Act, in my opinion based upon the record before me, are constitutional, and plaintiffs' challenges to those sections are rejected. My conclusions can be summarized as follows:

a. The definition of "medical emergency" contained in section 3203 is unconstitutional, and all sections of the Act containing the term must be permanently enjoined. This includes, but is not limited to, the following sections: section 3205 (informed

consent), section 3206 (informed parental consent or judicial by-pass), section 3209 (spousal notification), section 3210 (determination of gestational age), and section 3211 (performance of abortions after 24 weeks of gestation).

b. Because any attempt to severe the constitutionally offensive aspects of the definition of "medical emergency" would result in language contrary to the intention of the legislature, I cannot utilize the Act's savings clause to prevent the permanent injunction of these sections.

c. The 24-hour waiting period, physician-only disclosure requirement, and the content-based informed consent requirements contained in section 3205 are constitutionally invalid and must be permanently enjoined. Any attempt to

sever the constitutionally offensive language from these sections would be improper.

d. The requirement of informed parental consent, in and of itself, is unconstitutional, notwithstanding the existence of a judicial by-pass procedure, because it unduly burdens a minor woman's right to elect to end her pregnancy and is not narrowly drawn to serve the state's interest. Hence, section 3206 must be permanently enjoined for this reason. In addition, because of the absence of a constitutionally valid definition of "medical emergency" and "informed consent," section 3206 must be permanently enjoined for these reasons as well.

e. The requirement of husband notification contained in section 3209

is unconstitutional and, therefore, must be permanently enjoined in its own right.

f. Section 3210 which requires the physician to make such inquiries and perform or cause to be performed such tests to make an accurate diagnosis of gestational age is constitutional.

g. The requirement under sections 3207(b) and 3214(f) that certain forms be made available for public disclosure creates an unconstitutional burden upon the woman's abortion decision, and I shall enjoin the enforcement of these sections.

h. Except insofar as section 3214(a) requires the reporting of the name of the referring physician (section 3214(a)(1)) and the basis of the physician's medical judgment (section 3214(a)(8),(10), and (11)), I find the balance of section 3214(a) is

constitutional. In addition, section 3214(h) requiring the submission of reports on complications is constitutional.

i. Because a woman's abortion decision is not unduly burdened by the reporting of information of marital status, Hispanic origin, date of last menses, race, and educational background and this information is reasonably related to the state's interest in protecting maternal health, I conclude that requiring these items to be reported are constitutional.

V.

CONCLUSION

For now, at least, the law of abortion remains undisturbed, because only the United States Supreme Court has

the power to change it.[61] But those individuals who have felt secure over the past seventeen years with the fundamental right, and the protections which flow therefrom, guaranteed by Roe v. Wade would be wise to heed Justice Blackmun's admonition -- "the signs are evident and very ominous, and a chill wind blows."[62]

What the future holds is not certain. But one thing must be evident. Individuals can no longer feel as secure with the protections provided by the judiciary in this area. Instead, a woman's privacy rights and individual autonomy may soon be subjected to the

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61. This, of course, does not preclude the Third Circuit from disagreeing with the findings and conclusions reached herein.

62. Webster, ___ U.S. at ____, 109 S.Ct. at 3079 (Blackmun, J., dissenting).

vicissitudes of the legislative process. Therefore, the protection afforded will depend on the ballot box, and the nature of the protection, if any, could vary from term-to-term depending on the composition of the legislature. If unprotected by their vote and the votes of other pro-choice advocates, many women will be forced to seek abortion services elsewhere. For those that can afford it, this may only mean traveling to another jurisdiction. For those that cannot, the result may well be disastrous and tragic. But for now, at least, the law of abortion remains undisturbed.

An appropriate order follows.

/s/
Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, REPRODUCTIVE HEALTH AND ACTION COUNSELLING CENTER, WOMEN'S HEALTH SERVICES, INC., WOMEN'S SUBURBAN CLINIC, ALLENTOWN WOMEN'S CENTER and THOMAS ALLEN, M.D. on behalf of himself and all others similarly situated, Plaintiffs,	: CIVIL : ACTION NO. : 88-3228
v.	
ROBERT P. CASEY, N. MARK RICHARDS, ERNEST PREATE, personally and in their official capacities, and MICHAEL D. MARINO, personally and in his official capacity, together with all others similarly situated, Defendants.	

ORDER

HUYETT, J. August 24, 1990

Upon consideration of evidence submitted by the parties during the trial, the evidence presented during the preliminary injunction hearing admitted for the purpose of trial, the pretrial memoranda and submissions of plaintiffs

and defendants, the arguments of counsel, and the post-trial memoranda and submissions of the parties, and based upon the attached findings of fact, discussion and conclusions of law, it is ORDERED that

Judgment is entered in FAVOR of plaintiffs and AGAINST defendants in a manner consistent with the attached opinion.

IT IS FURTHER ORDERED that:

1. Defendants are hereby permanently enjoined from implementing and enforcing all provisions of the Pennsylvania Abortion Control Act of 1982, as amended by Act 31 and Act 64, that contain the term "medical emergency" as defined in section 3203 of the Act.

2. Defendants are hereby permanently enjoined from implementing

and enforcing any and all provisions of section 3205 of the Pennsylvania Abortion Control Act of 1982, as amended by Act 31 and Act 64.

3. Defendants are hereby permanently enjoined from implementing and enforcing any and all provisions of section 3206 of the Pennsylvania Abortion Control Act of 1982, as amended by Act 31 and Act 64.

4. Defendants are hereby permanently enjoined from implementing and enforcing any and all provisions of section 3209 of the Pennsylvania Abortion Control Act of 1982, as amended by Act 31 and Act 64.

5. Defendants are hereby permanently enjoined from disclosing or otherwise making available for public inspection and copying any report that has been filed or that may be filed

pursuant to sections 3207(b) or 3214(f) of the Pennsylvania Abortion Control Act. of 1982, as amended by Act 31 and Act 64.

6. Defendants are hereby permanently enjoined from implementing or enforcing the provisions of section 3214(a)(1), insofar as it requires the identification of the referring physician, and sections 3214(a)(8), 3214(a)(10), and 3214(a)(11), insofar as they require the identification of the basis for the physician's medical judgment, of the Pennsylvania Abortion Control Act of 1982, as amended by Act 31 and Act 64.

7. Defendants are hereby enjoined from distributing or utilizing the Pennsylvania "Report of Induced Termination of Pregnancy" except in an appropriate form consistent with the

discussion and conclusions of law contained in the foregoing opinion.

IT IS SO ORDERED.

/s/
Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, REPRODUCTIVE HEALTH AND ACTION COUNSELLING CENTER, WOMEN'S HEALTH SERVICES, INC., WOMEN'S SUBURBAN CLINIC, ALLENTOWN WOMEN'S CENTER and THOMAS ALLEN, M.D. on behalf of himself and all others similarly situated, Plaintiffs,	: CIVIL ACTION NO. 88-3228
v.	
ROBERT P. CASEY, N. MARK RICHARDS, ERNEST PREATE, personally and in their their official capacities, and MICHAEL D. MARINO, personally and in his official capacity, together with all others similarly situated, Defendants.	

ORDER

HUYETT, J. August 24, 1990

Upon consideration of plaintiffs' motion for partial summary judgment and supporting memoranda, defendants' response, and for the reasons stated in my opinion issued this date, Plaintiff's

motion is DENIED.

IT IS SO ORDERED.

/s/
Daniel H. Huyett, 3rd, Judge

(3)

No. 91-902

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT P. CASEY, ALLAN S. NOONAN, and ERNEST PREATE, JR., personally and in their official capacities,

Cross-Petitioners,

—v.—

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, REPRODUCTIVE HEALTH AND COUNSELING CENTER, WOMEN'S HEALTH SERVICES, INC., WOMEN'S SUBURBAN CLINIC, ALLENTOWN WOMEN'S CENTER, and THOMAS ALLEN, M.D., on behalf of himself and all others similarly situated,

Cross-Respondents.

BRIEF FOR CROSS-RESPONDENTS ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Does *Roe v. Wade*, 410 U.S. 113 (1973), remain the law of the land, thereby requiring this Court to hold that Pennsylvania's husband notification requirement violates a woman's right of privacy?

2. Is the husband notification requirement unconstitutional on alternative grounds?

PARTIES TO THE PROCEEDING

The parties to the instant proceeding are set forth in the caption on the cover of this response.

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iv
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
ARGUMENT	4
CONCLUSION	13

TABLE OF AUTHORITIES

Cases: PAGE

City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) 4, 7

Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632 (1974) 9

Craig v. Boren, 429 U.S. 190 (1976) 11

Griswold v. Connecticut, 381 U.S. 479 (1965) . 9

Hodgson v. Minnesota, 110 S. Ct. 2926 (1990) ..... *passim*

King v. Palmer, No. 89-7027 (D.C. Cir. Dec. 13, 1991) (*en banc*) 5-6

Marks v. United States, 430 U.S. 188 (1977).. 5

Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) 11, 12

Moore v. City of East Cleveland, 431 U.S. 494 (1977) 9

Ohio v. Akron Center for Reproductive Health, Inc., 110 S. Ct. 2972 (1990) 7

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) 12

Plyler v. Doe, 457 U.S. 202 (1982) 11

Roe v. Wade, 410 U.S. 113 (1973) ..... i, 5, 7

Rust v. Sullivan, 111 S. Ct. 1759 (1991) 5, 7

Skinner ex rel. Williamson v. Oklahoma, 316 U.S. 535 (1944) 11

PAGE

Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) 5, 7, 13

Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) 4, 5, 7

Whalen v. Roe, 429 U.S. 589 (1977) 9

Zablocki v. Redhail, 434 U.S. 374 (1978) 9, 11

Constitutional Provisions:

U.S. Const. amend. XIV, § 1 2

Statutes and Rules:

18 Pa. Cons. Stat. Ann. § 3209 (1983 and Supp. 1991) ..... *passim*

Sup. Ct. R. 10.1(c) 9

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions listed in the instant Petition for Certiorari at 3, the Fourteenth Amendment's Equal Protection Clause provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE[1]

The husband notification provision in Section 3209 of the Act[2] is the only provision of the 1988 and 1989 amendments to the Pennsylvania Abortion Control Act that the Court of Appeals for the Third Circuit held unconstitutional. This harsh provision, which requires that a married woman notify her husband of her abortion decision prior to obtaining the procedure, is unparalleled in Pennsylvania law.[3] By

1 Cross-Respondents incorporate the statement of the case presented in their Petition for a Writ of Certiorari at 2-5, *Planned Parenthood v. Casey*, No. 91-744 (filed Nov. 7, 1991) [hereinafter "Cert. Pet."]. Citations to the Appendix to the Cert. Pet. will be cited as "(____a)." To avoid confusion, the Commonwealth's Petition for Certiorari in *Casey v. Planned Parenthood*, No. 91-902 (filed Dec. 9, 1991), will be referred to as the "Cross-Petition for Certiorari" [hereinafter "Cross-Pet."]. Citations to the Appendix to the Cross-Pet. will be cited as "(CA ____a)."

2 18 Pa. Cons. Stat. Ann. § 3209 (1983 and Supp. 1991) appears in full at (300a-302a).

3 As the District Court found, Pennsylvania law does not require a husband to notify his wife about any of the many medical procedures that affect his capacity to have children within marriage. (CA 298a-299a). Similarly, the Commonwealth does not require a woman to notify her husband of other surgical procedures, such as a hysterectomy, which would affect her capacity to have children. (CA 299a).

express operation of the statute, a woman whose husband threatens to publicize her intent to have an abortion, inflicts psychological or economic intimidation on her or her children, or punishes her children with repeated and extreme physical violence must nevertheless involve him in her private decision to have an abortion.

Although the Act purports to exempt battered women and survivors of marital rape from the notification requirement, insurmountable procedural obstacles prevent women from taking advantage of its limited exceptions. As the District Court found, only rarely will a woman who has been physically abused be prepared to admit that her husband has abused her, discuss the abuse with others, and acknowledge the abuse on a written form, or in the case of marital rape, report the abuse to law enforcement officials. (CA 292a-302a). Yet Pennsylvania requires a woman to do just that in order to qualify for a waiver of notification under the law's narrow exemptions. As a result, even a battered woman or survivor of marital rape may be forced to notify her husband of her abortion choice.

Relying on the extensive trial testimony and factual findings[4] detailing the economic pressure, psychological coercion, and often terrifying physical

4 The Commonwealth has not challenged any of the 387 factual findings of the District Court, including those findings that highlight the harmful effects of the husband notification provision.

force to which some husbands will resort in order to interfere with their wives' reproductive decisions, (CA 66a-68a), the Court of Appeals held that the husband notification requirement imposes an "undue burden" on a woman's abortion decision. (CA 70a).

The Court of Appeals then held unconstitutional the husband notification requirement because none of the state's asserted interests—promoting the integrity of the marital relationship, protecting the husband's interest in the fetus, or protecting his interest in having children within marriage—are sufficiently compelling to justify this onerous and punitive restriction on a woman's right to choose abortion.[5]

ARGUMENT

Although this Court must affirm the Court of Appeals' judgment that the husband notification provision is unconstitutional, Cross-Respondents join the Commonwealth in seeking this Court's review of the judgment. The appellate court erred in choosing to apply Justice O'Connor's "undue burden" test, *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 453 (1983) (O'Connor, J., dissenting), to measure the constitutionality of the statute. Had it properly read this Court's recent decisions in *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989), and *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990), the Court of

5 Although fully briefed by the parties, the Court of Appeals did not address whether mandated husband notification violates a woman's rights to marital privacy and equal protection guaranteed by the Fourteenth Amendment. *See* discussion *infra* at 8-12.

Appeals would have concluded that this Court upheld as constitutional the challenged restrictions without making any substantial change in the law of abortion. (CA 364a-371a). In *Webster*, Justice O'Connor measured and upheld Missouri's viability testing requirement under the strict scrutiny standard of *Roe v. Wade*, 410 U.S. 113 (1973), *Akron*, and *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986). *Webster*, 492 U.S. at 530 (O'Connor, J., concurring). Although the parental notification with bypass provision at issue in *Hodgson* was upheld as constitutional under a less protective standard long applicable to young women,[6] even Justice O'Connor recognized that when similar provisions interfere with the rights of mature women, they are unconstitutional. *Hodgson*, 110 S. Ct. at 2944 n.35 (Stevens, J., and O'Connor, J., concurring). *See also Rust v. Sullivan*, 111 S. Ct. 1759, 1777 (1991).

Equally important, the Court of Appeals' reliance on *Marks v. United States*, 430 U.S. 188 (1977), is misplaced. As the Court of Appeals for the District of Columbia Circuit *en banc* recently found:

> When . . . one opinion supporting the judgment does not fit entirely within the broader circle drawn by the others, *Marks* is problematic. If applied in situations where the various opinions supporting the judgment are mutually exclusive, *Marks* will turn a single opinion that lacks majority support into national law. When eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be

6 In contrast, Minnesota's two-parent notification requirement was invalidated as an unwarranted interference with marital privacy. *Hodgson*, 110 S. Ct. at 2946.

proper to endow that approach with controlling force, no matter how persuasive it may be.

King v. Palmer, No. 89-7027, slip op. at 20 (D.C. Cir. Dec. 13, 1991)(*en banc*). *King v. Palmer* makes plain that the Court of Appeals' application of *Marks* is anything but "straightforward" or "routine." *See* Brief in Opposition to Petition for Writ of Certiorari at 22-23, *Planned Parenthood v. Casey*, No. 91-744 (filed Dec. 9, 1991).

Accordingly, this Court must reaffirm that the strict scrutiny standard of *Roe v. Wade* remains the law of the land, Cert. Pet. at 5-13, and conclude that, under that test, the husband notification provision as well as the other challenged provisions of the Act—the 24-hour mandated delay, biased patient counseling, parental informed consent, onerous reporting mandates, and restrictive definition of medical emergency (289a-304a)—are unconstitutional.[7]

In *Roe v. Wade*, this Court found unconstitutional a Texas statute banning abortion. In that decision, however, this Court did far more than prohibit states from sending women to the back alleys for their medical care: it established that the government may not interfere with a woman's fundamental right to make private decisions about abortion or childbirth. Requiring more than mere "rationality"

7 Cross-Respondents seek review of the Court of Appeals' judgment on the husband notification provision, despite the favorable ruling, because the legal issue—whether this Court continues to adhere to the strict scrutiny standard of *Roe v. Wade*—is the same as that raised in the Cert. Pet. at i. This Court will be best able to resolve this essential question with all of the challenged provisions and the complete record of the case before it.

or the absence of an "undue burden," this Court found that state laws that intrude upon private childbearing decisions must be examined under the most exacting standard of scrutiny. Thus, only laws that are necessary and narrowly tailored to serve the most compelling state interests pass constitutional muster. 410 U.S. at 155.[8] Applying this stringent standard, this Court found unconstitutional provisions nearly identical to some of those at issue in this case. *See, e.g., Akron*, 462 U.S. at 449-51 (24-hour mandatory delay); *Thornburgh*, 476 U.S. at 759-68 (biased patient counseling, reporting requirements). Indeed, the Court of Appeals acknowledged, and the District Court found, that the Pennsylvania law is unconstitutional under the strict scrutiny standard of *Roe v. Wade*.[9]

Moreover, as the Commonwealth concedes, this Court's recent and fragmented opinions regarding abortion[10] have given conflicting signals regarding the appropriate standard of review, engendering con-

8 This Court also found that the state's interest in maternal health becomes compelling at the beginning of the second trimester of pregnancy. After the point of fetal viability, the state's interest in the potential life of a fetus is also sufficiently compelling to meet these high standards, but only so long as a woman remains free to protect her own life or health. *Roe*, 410 U.S. at 163-64.

9 *See* (CA 30a); (CA 305a). A majority of the Court of Appeals correctly held that the husband notification provision was not justified by a "compelling state interest." (CA 71a-74a). Even Judge Alito, in his dissenting opinion, acknowledged that this provision could not survive strict scrutiny. (CA 87a).

10 *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989); *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990); *Ohio v. Akron Center for Reproductive Health, Inc.*, 110 S. Ct. 2972 (1990); *Rust v. Sullivan*, 111 S. Ct. 1759 (1991).

fusion not only among the lower federal courts, but also in state legislatures and Congress. *See* Cross-Pet. at 24. The parties therefore agree that this Court must expeditiously take this case and decide whether women's reproductive decisions are worthy of the highest level of constitutional protection.

Reaffirmation of *Roe*'s strict scrutiny analysis remains the best course for this Court to protect women's rights to liberty and equality guaranteed by the Bill of Rights. By adopting a new, less protective standard—as advocated by the Commonwealth—this Court would not only overrule *Roe*,[11] but would also jeopardize the lives and health of millions of American women who rely on these fundamental constitutional guarantees.

However, should this Court overrule *Roe v. Wade* and uphold the husband notification provision under a new, diluted doctrine of reproductive privacy,[12] it must still affirm the Court of Appeals' judgment on two alternative grounds. Section 3209 violates both

11 In both its Response and Cross-Petition, the Commonwealth seeks to reframe the questions presented so that it does not overtly question the continuing validity of *Roe v. Wade*. Nevertheless, by urging this Court to replace *Roe*'s standard of strict scrutiny with the less protective "undue burden" or "rational basis" tests, *see* Cross-Pet. at 24-25, the Commonwealth seeks the overruling of *Roe v. Wade*. Cross-Petitioners cannot avoid the import of their request by obfuscating or reframing the question to satisfy their political agenda.

12 Because Cross-Petitioners ask this Court to reaffirm as fundamental the right to choose abortion or childbirth, they do not address herein why the husband notification provision also fails to pass constitutional review under the "undue burden" and "rational basis" tests. These issues will be fully addressed in the briefs on the merits should this Court accept the cases for review.

the Fourteenth Amendment's right to marital privacy and its equal protection guarantees. The presence of these important federal questions—which have not been, but should be, settled by this Court, *see* Sup. Ct. R. 10.1(c)—warrants the granting of certiorari.[13]

This Court has held that the marital relationship is protected by a "right of privacy older than the Bill of Rights." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). It is well settled that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Bd. of Educ. v. La Fleur*, 414 U.S. 632, 639-40 (1974); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (plurality). *See also Zablocki v. Redhail*, 434 U.S. 374, 383-85 (1978). Moreover, it is undisputed that "the married couple has a well-recognized interest in protecting the sanctity of their communications from undue interference by the State." *Hodgson*, 110 S. Ct. at 2944 n.33 (Stevens, J.).

Section 3209 flies in the face of these long-established principles. The Act injects government into the private discussions between a husband and wife, compelling a married woman to reveal intimate information that she has chosen to keep private.[14] This disclosure is mandated even when a husband

13 By including consideration of these alternatives, the questions presented by Cross-Respondents more fully articulate the questions that must be addressed by this Court.

14 The intrusion is particularly deplorable in light of this Court's recognition of the strong "individual interest in avoiding disclosure of personal matters." *Whalen v. Roe*, 429 U.S. 589, 599 (1977). *See also* (CA 67a-68a).

would publicize his wife's intent to have an abortion, psychologically abuse her, use economic pressure to intimidate her, or inflict physical as well as psychological harm on their children. As the District Court found, "[f]orced husband notification . . . would foster negative and abusive communication and increase the likelihood that a woman would be seriously battered." (CA 302a).[15]

Although "full communication among all members of a family" may be desirable,

> such communication may not be decreed by the State. The State has no more interest in requiring all family members to talk with one another than it has in requiring certain of them to live together . . . [A] state interest in . . . making the "private realm of family life" conform to some state-designed ideal is not a legitimate state interest at all.

Hodgson, 110 S. Ct. at 2946 (citations omitted). The Constitution must not sanction this egregious state

15 Finding that "the number of different situations in which women may reasonably fear dire consequences from notifying their husbands is potentially limitless," the Court of Appeals enumerated some of the women who are are likely to suffer from mandated notification:

> women who reasonably fear retaliatory psychological abuse; women who reasonably fear retaliatory physical or psychological abuse of their children; women who are separated following a failed marriage relationship and for whom renewal of contact may produce severe emotional distress; women whose husbands have serious health problems and who reasonably fear that notification will be health threatening; and women whose marriages are severely troubled and who reasonably fear that notice will precipitate the demise of the marital relationship.

(CA 70a).

intrusion in the name of "marital integrity." Open and caring dialogue between a husband and wife must arise out of free choice—it cannot be compelled by the government.

In addition, Section 3209 violates the Fourteenth Amendment's equal protection guarantee by discriminating between married women and men. Pennsylvania law requires a married woman to notify her husband of her abortion choice, but does not require a married man to notify his wife before undergoing a medical procedure, such as sterilization, prostate operations, or chemotherapy, that would "affect the capacity of males to have children within the marriage." (CA 298a-299a). Unlike a married woman, a married man is free to exercise his right of reproductive choice without compelled notification of his wife.

Since Section 3209 imposes obligations only on married women, while conferring rights only to married men, the Commonwealth must at least demonstrate an "exceedingly persuasive justification" for this gender-based classification. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (citations omitted). *See also Craig v. Boren*, 429 U.S. 190, 197 (1976). Yet, because the husband notification provision also intrudes on the fundamental rights to marital and informational privacy protected by the Fourteenth Amendment, *see supra* at 8-11, the highest standard of scrutiny is required. Therefore, the Commonwealth must demonstrate that the forced notification provision is narrowly tailored to serve a compelling state interest. *See Plyler v. Doe*, 457 U.S. 202, 216-17 & n.15 (1982); *Zablocki*, 434 U.S. at 388; *Skinner ex rel. Williamson v. Oklahoma*, 316 U.S. 535, 541 (1944).

The Commonwealth is unable to demonstrate that its interest in marital integrity, or in protecting a husband's interest in the fetus, or his interest in having children within marriage, is a persuasive, let alone compelling, justification for imposing these restrictions on women alone. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 67-72 (1976); (CA 420a-421a). Rather, as the record in this case so powerfully demonstrates, the statute merely places the Commonwealth's imprimatur on the discriminatory and stereotypical view that a woman cannot be trusted to make independent life choices without the involvement, and often coercive influence, of her husband. Section 3209 therefore violates the Equal Protection Clause. *See Hogan*, 458 U.S. at 725.

CONCLUSION

In 1986, when reviewing a prior version of Pennsylvania's Abortion Control Act, this Court reaffirmed *Roe v. Wade* and found the Act's onerous provisions unconstitutional. *Thornburgh*, 476 U.S. at 759. Now, this nearly identical case presents this Court with the opportunity once again to profess its commitment to women's fundamental constitutional rights. Cross-Respondents therefore ask that the writ of certiorari be granted: only then will American women know whether they continue to be guaranteed this Court's promise of liberty, dignity, and equality.

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Nos. 91-744 and 91-902

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX
VOLUME I

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PETITION FOR CERTIORARI (NO. 91-902) FILED DECEMBER 9, 1991
CERTIORARI GRANTED JANUARY 21, 1992

TABLE OF CONTENTS

Page

Relevant Docket Entries 1

Excerpts from Transcript of Hearing on Plaintiffs' Motion for a Temporary Restraining Order, April 21, 1988 23

Excerpts from Transcript of Hearing on Plaintiffs' Motion for a Preliminary Injunction, May 9, 1988 27

Order Granting Plaintiffs' Request for Class Certification (Oct. 25, 1988) 42

Plaintiffs' Amended Complaint for Declaratory and Injunction Relief 44

Order Clarifying May 23, 1988, Preliminary Injunction (Jan. 11, 1990) 72

Defendants' Answer 74

Stipulation of Uncontested Facts 86

Supplemental Stipulation of Uncontested Facts 102

Stipulation of Voluntary Dismissal 112

Excerpts from Trial Transcript, July 30 through August 1, 1990 113

Non-Jury Trial - Day 1 113

Non-Jury Trial - Day 2 204

Non-Jury Trial - Day 3 315

Excerpts from Defendants' Trial Exhibits 393

Defendants' Exhibit 1: Excerpts from Magee-Womens Hospital Informed Consent for Termination of Pregnancy Form 393

Defendants' Exhibit 2: Excerpts from Women's Health Services (WHS) Individual Counseling Guidelines/ Post Abortion Group Guidelines/ Personal Counseling Guideline 396

Defendants' Exhibit 3: WHS Consent for Abortion Form 410

Defendants' Exhibit 4: WHS November 20, 1986 Memo Re Parental Notification 415

Defendants' Exhibit 5: Excerpts from WHS Patient Record Form 418

Defendants' Exhibit 8: WHS Advertisements 441

Defendants' Exhibit 9: Excerpts from Planned Parenthood of Southeastern Pennsylvania (PPSP) Center Policy and Procedure Manual 444

Defendants' Exhibit 10: Excerpts from PPSP Request for Abortion Form 451

Defendants' Exhibit 11: Excerpts from PPSP Fact Sheet 453

Defendants' Exhibit 13: Excerpts from Guidelines of Women's Suburban Clinic (WSC) 457

Defendants' Exhibit 14: WSC Disclosure of Risk, Benefits and Alternatives Form 461

Defendants' Exhibit 17: WSC Information Prior to Consent/Certification by Patient Form 464

Defendants' Exhibit 18: WSC Parental Involvement Form 465

Defendants' Exhibit 19: WSC Physician's Certification Form 466

Defendants' Exhibit 20: WSC Protocol Regarding Minors 467

Defendants' Exhibit 26: Excerpts from Reproductive Health and Counseling Center (RHCC) Consent Forms 469

Defendants' Exhibit 30: RHCC Advertisements 473

Defendants' Exhibit 32: Allentown Women's Center (AWC) Counseling Checklist 474

Defendants' Exhibit 33: Excerpts from AWC Confidential Patient Record Form 477

Defendants' Exhibit 35: AWC Advertisements 484

Defendants' Exhibit 36: AWC Consent Form 486

Defendants' Exhibit 37: Northeast Women's Center Guidelines for Informed Consent 487

Defendants' Exhibit 39: Summary Compilation of Quarterly Reports 488

Defendants' Exhibit 45: Commonwealth of Pennsylvania Department of Health (DOH) Abortion Facility Registration Form 489

Defendants' Exhibit 46: DOH Abortion Quarterly Facilities Report Form 491

Defendants' Exhibit 47A: DOH Report of Induced Termination of Pregnancy Form (version no. 1) 493

Defendants' Exhibit 47B: DOH Report of Induced Termination of Pregnancy Form (version no. 2) 497

Defendants' Exhibit 47C: DOH Report of Induced Termination of Pregnancy Form (version no. 3) 500

Defendants' Exhibit 48: DOH Certification Regarding Spousal Notice Form 504

Defendants' Exhibit 49: Excerpts from DOH Directory of Social Service Organizations for Referrals for Pregnant Women 506

Defendants' Exhibit 50: Excerpts from DOH Printed Information on Medical Assistance Benefits 508

Defendants' Exhibit 51: DOH Notices Required by Abortion Control Act 518

Defendants' Exhibit 54: Deposition Excerpts of Thomas E. Allen, M.D 519

Defendants' Exhibit 55: Deposition Excerpts of Sue Roselle 522

Defendants' Exhibit 56: Deposition Excerpts of Carol C. Wall 527

Defendants' Exhibit 57: Deposition
Excerpts of Sherley Hollos 532

Defendants' Exhibit 58: Deposition
Excerpts of Jane S. Green 538

Defendants' Exhibit 59: Deposition
Excerpts of Sylvia Stengle 541

Defendants' Exhibit 60:
Discovery Excerpts 552

Excerpts from Plaintiffs' Trial Exhibits 556

Plaintiffs' Exhibit 49: DOH Instructions
and Definitions for Report of
Induced Termination of
Pregnancy Form (July 1988) 556

Plaintiffs' Exhibit 60: Veto Message
to the Pennsylvania Senate on
S.B. 742 of Governor Dick Thornburgh
(Dec. 23, 1981) 572

Plaintiffs' Exhibit 61: Message
to Pennsylvania Senate on Signing
of 1982 Pennsylvania Abortion
Control Act of
Governor Dick Thornburgh
(June 11, 1982) 583

Plaintiffs' Exhibit 62: Veto Message
to Pennsylvania House of Representatives
on H.B. 1130 of Governor
Robert Casey (Dec. 17, 1987) 592

Plaintiffs' Exhibit 67: Excerpts from
The Federal Role in Determining the
Medical and Psychological
Impact of Abortion on Women,
H.R. Rep. No. 392,
101st Cong., 1st Sess. (1989) 599

Plaintiffs' Exhibit 89:
Diagnostic Criteria for
Post-Traumatic Stress Disorder 606

Excerpts from Verifications Filed
in Support of Plaintiffs'
Preliminary Injunction Motion 608

Excerpts from Verification
of Sue Roselle (Apr. 19, 1988) 608

Excerpts from Verification
of Sylvia Stengle (Apr. 18, 1988) 615

The following opinions and orders have been omitted in printing this Joint Appendix because they appear on the following pages in the Appendix to the Petition for a Writ of Certiorari in No. 91-744.

Planned Parenthood v. Casey, 947 F.2d 682
(3d Cir. 1991) 1a

Planned Parenthood v. Casey, 744 F. Supp. 1323
(E.D. Pa. 1990) 104a

Order of the United States District Court
for the Eastern District of Pennsylvania,
filed August 24, 1990 .....285a

RELEVANT DOCKET ENTRIES
United States District Court for the Eastern District of Pennsylvania (No. 88-3228)

No.	Date		Discription of Entry
	1988 Apr		
1	"	18	Complaint, filed.
"	"	18	Summons exit (given to counsel).
2	"	18	MOTION AND ORDER APPOINTING NICK VINCI TO SERVE SUMMONS AND COMPLAINT UPON DEFT MICHAEL MARINO, FILED. 4/18/88: Entered and copy given
3	"	18	MOTION AND ORDER APPOINTING TOM SPEAKER TO SERVE SUMMONS AND COMPLAINT UPON DEFTS CASEY, RICHARDS & ZIMMERMAN, FILED. 4/18/88: Entered and copy given
4	"	20	PLFFS' MOTION FOR TEMPORARY RESTRAINING ORDER, MEMO., CERT OF SERVICE, FILED.
5	"	20	Summons returned with Affidavit of Tom Speaker re: served Dee Lynch, receptionist, Office of the Governor on 4/19/88; Jonathan Neipris, Chief Counsel, PA Dept of Health on 4/19/88; Naida Huber, receptionist, Office of Attorney General on 4/19/88; and affidavit of Nicholas Vinci re: served Ann Fleer, Secretary to Michael e. Marino, on 4/18/88, filed.

6	"	21	Verification of James M. Bucci, Esq. and Barry Steinhardt, filed.
7	"	21	TEMPORARY RESTRAINING ORDER THAT DEFTS ARE ENJOINED & RESTRAINED FROM ENFORCING THE PROVISIONS OF SEC.3206 OF PA ABORTION CONTROL ACT OF 1982 UNTIL FURTHER ORDER OF COURT AND FROM PUBLICLY DISCLOSING, ETC., ANY REPORT FILED PURSUANT TO SEC. 3207(b) OR 3214(f) OF PA ABORTION CONTROL ACT OF 1982 UNTIL JURTHER ORDER OFTHIS COURT; THIS T.R.O. SHALL REMAIN IN EFFECT UNTIL 5/9/88. filed. 4/21/88: Entered and copies mailed.
8	"	21	ORDER THAT A PRELIMINARY INJUNCTION HEARING BE HELD 5/9/88 AT 10:00 A.M. ETC., FILED. 4/21/88: Entered and copies mailed.
9	"	22	Appearance of Gregory R. Neuhauser and Kate L. Mershimer on behalf of defts Robert P. Casey, N. Mark Richards & LeRoy Zimmerman, filed.
10	"	22	PLFFS' MOTION FOR PERLIMINARY INJUNCTION, MEMO., CERT OF SERVICE, FILED.
11	"	26	Hearing 4/21/88 re: application for T.R.O., filed.
12	"	27	DEFT'S MOTION FOR LEAVE TO APPEAR PRO HAC VICE, CERT OF SERVICE, FILED.
13	"	27	Plffs' Witness List, filed.

14	"	27	Plffs' Proposed Findings of Fact and Conclusions of Law for Determination of Motion for Preliminary Injunction, filed.
(12)	"	28	ORDER THAT GREGORY R. NEUHAUSER, ESQ. IS GRANTED LEAVE TO APPEAR AS COUNSEL FOR DEFTS PRO HAC VICE, FILED.
	May		
15	"	05	Stipulation of Uncontested Facts for Determination of Motion for Preliminary Injunction, filed.
16	"	05	Plff's Supplemental Memo in support of its motion for preliminary injunction, filed.
17	"	06	Ltr. from Deft's conusel for Judge Huyett, dtd 5/4/88, re: corrected table of content to Defts' memo in opposition to plffs' motion for preliminary injunction, filed.
18	"	09	ORDER THAT T.R.O. ISSUED 4/21/88 SHALL REMAIN IN EFFECT UNTIL RULING ON MOTION FOR PRELIMINARY INJUNCTION, ETC., FILED. 5/10/88: Entered and copies mailed.
19	"	09	Ltr. from Frederic Wentz, Counsel to M. Marino, to Judge Huyett, dtd 5/3/88, re: does not plan to participate in this matter, filed.
20	"	10	Answer of Defts Casey, Richards and Zimmerman, filed.
--	"	10	ISSUE JOINED.
21	"	11	Plffs' Exhibits to Plffs' Motion for Preliminary Injunction, filed.
22	"	11	Supplemental Declaration of Patricia Potrzebowski, Ph.D., filed.
23	"	13	Preliminary Injunc. Hearing 5/9/88, witnesses sworn, Court rules C.A.V., filed.

24	"	23	FINDINGS OF FACTS, DIXCUSSION, CONCLUSIONS OF LAW AND PRELIMINARY INJUNCTION THAT DEFTS. ARE HEREBY ENJOINED FROM IMPLEMENTING OR ENFORCING ANY AND ALL PROVISIONS OF THE PENNA. ABORTION CONTROL ACT OF 1982 ETC., FILED. 5/23/88 entered & copies mailed
25	"	25	DEFTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PLFFS' MOTION FOR PRELIMINARY INJUNCTION, CERTIFICATE, FILED.
26	"	25	Defts' memo of law in opposition to Plffs' motion for preliminary injunction, certificate, filed.
	Jun		
27	"	06	DEFTS' MOTION FOR CODIFICATION AND CLARIFICATION, CERTIFICATE, FILED.
28	"	14	ORDER THAT IN RESPECT TO FINDINGS OF FACT, DISCUSSION, CONCLUSIONS OF LAW & PRELIMINARY INJUNCTION ISSUED 5/23/88, THE DISCUSSION & PRELIMINARY INJUNCTION ORDER ARE AMENDED, NUNC PRO TUNC, ETC., FILED. 6/14/88: Entered and copies mailed.
29	"	22	Ltr. To Judge Huyett, dtd 6/13/88, from plff's Counsel, requesting para. 4 & 5 of Court's 5/23/88 Order be modified & amended, etc., filed.

30	"	22	ORDER THAT DEFTS' MOTION FOR MODIFICATION & CLARIFICATION OF THE PRELIMINARY INJUNCTION ISSUED 5/23/88 IS DENIED, FILED. 6/22/88: Entered and copies mailed.
	Jul		
31	"	22	DEFTS' MOTION FOR MODIFICATION OF PRELIMINARY INJUNCTION, CERT OF SERVICE, FILED.
32	"	27	ORDER THAT A STATUS CONFERENCE IS SCHEDULED FOR 8/9/88 AT 2 P.M., FILED. 7/28/88: Entered and copies mailed.
	Aug		
33	"	02	Plffs' Memo in response to Deft's Motion for modification of Preliminary Injunction, Cert of service, filed.
34	"	09	ORDER THAT THE STATUS CONF. SCHEDULED FOR 8/9/88 IS CANCELLED & RESCHEDULED FOR 8/22/88 AT 2 P.M., FILED. 8/9/88: Entered and copies mailed.
33	"	09	ORDER THAT THE PA DEPT OF HEALTH MAY DISTRIBUTE & UTILIZE ITS REVISED "REPORT OF INDUCED TERMINATION OF PREGNANCY" FORM FOR COLLECTION OF INFORMATION, ETC., FILED. 8/10/88: Entered and copies mailed
35	"	23	ORDER THAT ALL DISCOVERY BE COMPLETED BY 12/23/88 ETC., FILED. 8/23/88: Entered & copies mailed.

	Oct		
36	"	24	Withdrawal of appearance of Kathryn Kolbert, Esq. on behalf of plff, filed.
37	"	27	ORDER THAT THIS ACTION WILL BE MAINTAINED AS A CLASS ACTION ON BEHALF OF A CLASS OF PHYSICIAN PLFFS AS DEFINED, ETC.; PLFF THOMAS ALLEN, M.D. IS DESIGNATED CLASS REPRESENTATIVE & COUNSEL OF RECORD FOR PLFFS IN THIS ACTION ARE DESIGNATED AS COUNSEL FOR THE CLASS, FILED. 10/28/88: Entered and copies mailed.
	Dec		
38	"	07	Transcript of Hearing of 4-21-88, filed.
39	"	07	Transcript of hearing of 5-9-88, filed.
40	"	22	STIPULATION AND ORDER EXTENDING DISCOVERY TIME TO 2/23/89, ETC., FILED. 12/27/88 ENTERED AND COPIES MAILED
41	"	23	STIPULATION AND ORDER RE: CONFIDENTIAL MATERIAL; CONFIDENTIAL MATERIAL SHALL BE SUBMITTED & FILED IN A SEALED ENVELOPE, ETC., FILED. 12/27/88: Entered and copies mailed.
	1989		
	Feb		
42	"	01	DEFTS' MOTION TO FILE AMENDED RESPONSES TO PLFFS' REQUESTS FOR ADMISSION, BRIEF, CERT OF SERVICE, FILED.
43	"	06	Withdrawal of appearance of Gregory R. Neuhauser, Sr.Dpty, and appearance of John G. Knorr, III on behalf of defts, filed.

(42)	"	24	ORDER THAT DEFTS' MOTION TO FILE AMENDED RESPONSES TO PLFF'S REQUEST FOR ADMISSION IS GRANTED, ETC., FILED. 2/24/89: Entered and copies mailed.
	Mar		
44	"	03	ORDER THAT A TELEPHONE CONFERENCE IS SCHEDULED FOR 3/10/89 AT 3 P.M.; FILED. 3/3/89: Entered and copies mailed.
45	"	09	ORDER THAT THE TELEPHONE CONFERENCE SCHEDULED FOR 3/10/89 IS CONTINUED FOR 3/14/89 AT 3:00 P.M., FILED. 3/9/89: Entered and copies mailed
46	"	30	ORDER THAT ALL PROCEEDINGS ARE STAYED PENDING ISSUANCE OF THE DECISION OF THE U.S. SUPREME COURT IN WEBSTER ET AL VS. REPRODUCTIVE HEALTH SERVICES ET AL, NO. 88-605; FURTHER ORDER THAT ALL DISCOVERY SHALL BE COMPLETED WITHIN 30 DAYS OF PUBLICATION OF THE WEBSTER DECISION IN U.S. LAW WEEK, FILED. 3/30/89: Entered and copies mailed.
47	"	31	ORDER THAT THE CLERK MARK THIS ACTION CLOSED FOR STATISTICAL PURPOSES AND PLACE MATTER IN THE CIVIL SUSPENSE FILE, FILED. 4/3/89: Entered and copies mailed.

1990

Jan

48 " 11 Consent to file amended complaint, filed.
49 " 11 Amended complaint, filed.
50 " 12 ORDER THAT COURTS PRELIMINARY INJUNCTION OF 5/23/88 IS CLARIFIED ETC., FILED1/12/90 ENTERED AND COPIES MAILED
51 " 19 ORDER OF TRANSFER CASE OUT OF CIVIL SUSPENSE, FILED. 1/22/90 ENTERED AND COPIES MAILED
52 " 22 STIPULATION AND ORDER THAT DISCOVERY BE COMPLETED BY 3/27/90, ETC., FILED. 1/22/90 ENTERED AND COPIES MAILED
53 " 26 Answer of defts. Casey et al to amended complaint, filed.
54 " 26 DEPTS JOHN F. WHITE, JR. ET AL MOTION FOR A STAY, CERTIFICATE, FILED.

Mar

55 " 16 STIPULATION AND ORDER THAT DISCOVERY SHALL BE COMPLETED BY 4/30/90, FILED. 3/16/90 ENTERED AND COPIES MAILED
56 " 16 ORDER THAT THE STIPULATION OF COUNSEL SHALL BE SUPPLEMENTED AS FOLLOWS: THE PARTIES SHALL SUBMIT PROPOSED FINDINGS OF FACT ON ALL FACTS IN DISPUTE AND, IN ADDITION, CONCLUSIONS OF LAW ON OR BEFORE 5/31/90, ETC. FILED. 3/19/90 ENTERED AND COPIES MAILED

57 " 21 Notice of change of address of Thomas E. Zemaitis, esq, filed

May

58 " 10 JOINT MOTION FOR EXTENSION OF TIME, CERT. OF COUNSEL, CERT. OF SERVICE, FILED.
59 " 23 ORDER THAT THE PARTIES JOINT MOTION FOR EXTENSION OF TIME IS GRANTED IN PART AND DENIED IN PART. ALL DISCOVERY SHALL BE COMPLETED NOT LATER THAN JUNE 22, 1990, ETC., TRIAL SHALL TAKE PLACE ON JULY 30, 1990, ETC., FILED. 5/23/90 Entered and copies mailed.

Jun

60 " 25 DEFTS' MOTION TO COMPEL DISCOVERY, CERTIFICATE OF SERVICE, FILED.

Jul

61 " 03 Defts' praecipe to withdraw defts' motion to compel discovery, cert of service, filed.
62 " 06 Deft Casey, Richards, & Preate's proposed findings of fact and conclusions of law
63 " 06 Deft Casey, Richards, & Preate's Pretrial Brief, filed.
64 " 06 Plff's Stipulation of Uncontested Facts, filed.
65 " 06 Plffs' Proposed Findings of Fact & Conclusions of law, filed.
66 " 06 Plffs' Pretrial memo, filed.
67 " 16 ORDER THAT DEFTS' MOTION TO COMPEL DISCOVERY IS WITHDRAWN, FILED. 7-17-90 ENTERED & COPIES MAILED

68	"	16	Plffs' Pretrial memo of law, cert of service, filed.
69	"	18	ORDER OF UNCONTESTED FACTS, FILED. 7-19-90 ENTERED & COPIES MAILED
70	"	23	DEFTS' Casey, Richards & Preate's memo of law, filed.
71	"	24	Stipulation of Voluntary Dismissal of MICHAEL D. MARINO, FILED.
72	"	24	PLFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT RESPECTING SECTION 3210, MEMO, & CERT OF SERVICE, FILED.
73	"	25	Supplemental Stipulation of Uncontested Facts, filed. 8-3-90 ENTERED & COPIES MAILED.
74	"	31	Defts' Brief in opposition to plffs' motion for partial summary judgment, filed.
	Aug		
75	"	02	Trial resumes 7/31/90, filed.
76	"	02	ORDER THAT WITHIN 4 DAYS OF THE CLOSE OF EVIDENCE, PLFFS SHALL FILE REVISED OR SUPPLEMENTAL PROPOSED FINDINGS OF FACT & CONCLUSIONS OF LAW & A MEMO OF LAW IN REPLY TO DEFTS' MEMO OF LAW ON OR ABOUT 7-20-90 ETC., FILED. 8/3/90 ENTERED AND COPIES MAILED
77	"	02	ORDER THAT DEFTS' ORAL MOTION IN LIME TO EXCLUDE THE TESTIMONY OF MS. DILLON IS DENIED, FILED.
78	"	03	Trial 8/1/90; Witnesses sworn, filed.
79	"	06	Trial resumes 8/2/90, filed.

80	"	07	Plffs' revised proposed findings of fact & conclusions of law, filed.
81	"	07	Plffs' Post-trial memorandum of law, filed.
82	"	10	Transcript of Status Conference 7/30/90, filed.
83	"	10	Transcript of non-jury trial 7/30/90 filed.
84	"	10	Transcript of non-jury trial 7/31/90, filed.
85	"	10	Transcript of non-jury trial 8/1/90, filed.
86	"	10	Transcript of non-jury trial 8/2/90 filed.
87	"	17	Defts revised proposed finds of fact and conclusions of law, filed.
88	"	17	DEFTS' SURREPLY BRIEF, FILED
89	"	24	OPINION AND ORDER THAT JUDGMENT IS ENTERED IN FAVOR OF PLFFS AND AGAINST DEFTS. DEFTS ARE PERMANENTLY ENJOINED FROM IMPLEMENTING AND ENFORCING ALL PROVISIONS OF THE PA. ABORTION CONTROL ACT OF 1982, AS EMENDED BY ACT 31 AND ACT 64, THAT CONTAIN THE TERM "MEDICAL EMERGENCY" AS DEFINED IN SECTION 3202 OF THE ACT. DEFTS ARE PERMANENTLY ENJOINED FROM IMPLEMENTING AND ENFORCING ANY AND ALL PROVISIONS OF SEC. 3205, 3206, 3209 OF THE PA. ABORTION CONTROL ACT OF 1982, AS AMENDED BY ACT 31 AND ACT 64. DEFTS ARE HEREBY PERMANENTLY ENJOINED FROM DISCLOSING OR OTHERWISE MAKING AVAILABLE FOR PUBLIC INSPECTION ANY REPORT THAT HAS BEEN FILED OR THAT MAY BE FILED PURSUANT TO SEC. 3207(b)

OR 3214(f) OF THE PA. ABORTION CONTROL ACT OF 1982, AS AMENDED BY ACT 31 AND 64. DEFTS ARE PERMANENTLY ENJOINED FROM IMPLEMENTING OR ENFORCING THE PROVISION OF SEC. 3214(a)(1), INSOFAR AS IT REQUIRES THE IDENTIFICATION OF THE REFERRING PHYSICIAN, ETC., DEFTS ARE HEREBY ENJOINED FROM DISTRIBUTING OR UTILIZING THE PA. REPORT OF INDUCED TERMINATION OF PREGNANCY EXCEPT IN A APPROPRIATE FORM CONSISTENT WITH THE DISCUSSION AND CONCLUSIONS OF LAW CONTAINED IN THE FOREGOING OPINION, FILED. 8/24/90 Entered and Copies mailed

90 " 24 ORDER THAT PLFFS MOTION FOR PARTIAL SUMMARY JUDGMENT IS DENIED, FILED. 8/24/90 Entered and copies mailed.

Sept

91 " 07 Defts' Notice of Appeal, filed. (USCA 901662) 9/7/90 copies to: Clerk, USCA Appeals Clerk, Judge Huyett, Susan Harrison, Esq.

92 " 07 Copy of Clerk's notice to USCA, filed.

93 " 17 Appellant's copy of TPO, filed.

-- " 18 RECORD COMPLETE FOR PURPOSES OF APPEAL-TRANSCRIPT ALREADY ON FILE

United States Court of Appeals
for the Third Circuit (No. 90-1662)

1990
Sept

94 " 11 CIVIL CASE DOCKETED. Notice filed by Robert P. Casey, N. Mark Richards & Ernest D. Preate, Jr. (ghb)

95 " 11 TRANSCRIPT (Clk), already on file in the District Court Clerk's Office. (ghb)

96 " 11 BRIEFING NOTICE ISSUED. Appellant brief and appendix due 10/22/90. (ghb)

97 " 13 LETTER MOTION dated: 9/12/90 by Appellants for extension of time to file brief and appendix, Certificate of Service dated 9/12/90. (dlr)

98 " 14 ORDER (Clerk) An extension to file appellants' brief until 11/1/90 is granted. No further extensions will be granted for any reason, filed. (dlr)

99 " 17 TRANSCRIPT PURCHASE ORDER (Part I), already on file in the District Court Clerk's Office, filed. (sdt)

100 " 18 CERTIFIED LIST filed. (ghb)

101 " 18 APPEARANCE from Attorney Thomas E. Zemaitis on behalf of Appellees Planned Parenthood, Reproductive Health & Counseling Center, Women's Health Services, Women's Suburban Clinc, Allentown Women's Center & Thomas E. Allen, M.D., filed. (ghb)

102 " 18 DISCLOSURE STATEMENT on behalf of Appellees Planned Parenthood, Reproductive Health & Counseling Center, Women's Health Services, Women's Suburban Clinic, Allentown

Women's Center & Thomas E. Allen, M.D., filed. (ghb)

103 " 21 APPEARANCE from Attorney Kate L. Mershimer on behalf of Appellants, filed.

104 " 21 INFORMATION STATEMENT on behalf of Appellants, RECEIVED. (ghb)

Oct

105 " 02 LETTER TO Attorney Roger K. Evans, Kathryn Kolbert, Susan Cary Nicholas, Linda J. Wharton requesting the following documents: **Appearance Form** Disclosure Statement. (ghb)

106 " 11 MOTION by Appellees to hold case in abeyance pending the U.S. Supreme Court's decision in Rust v. Sullivan, Nos. 89-1391 and 89-1392 (oral argument scheduled for 10-30-90) Second Circuit, 889 F.2d 401, filed. Certificate of Service dated 10/11/90. (emd)

107 " 22 RESPONSE by Appellants Robert P. Casey, N. Mark Richards, and Ernest D. Preate in opposition to Appellees' Motion to hold case in abeyance, filed. Certificate of service dated 10/19/90. (emd)

Nov

108 " 01 BRIEF on behalf of Appellant Robert P. Casey, Appellant N. Mark Richards, Appellant Ernest D. Preate, Pages: 50, Copies: 10, Delivered by mail, filed. Certificate of service date 11.1.90. (wab)

109 " 01 APPENDIX on behalf of Appellant Robert P. Casey, Appellant N. Mark Richards, Appellant Ernest D. Preate, Copies: 4 Volumes: 8, Delivered by mail, filed. Certificate of service dated 11/1/90. (wab)

110 " 05 MOTION filed by John E. McKeever, Esq., counsel for American Academy of Medical Ethics for leave to file an amicus curiae brief in support of Appellants and for leave to file instanter (out of time). Certificate of service dated 11/5/90. (emd)

111 " '06 ORDER filed (Becker and Greenberg, Circuit Judges) denying motion to hold case in abeyance by Appellee Thomas Allen, Allentown Womens Ctr, Womens Suburban, Womens Health Ser, Reproductive Health, Planned Parenthood. (rmg)

112 " 27 ORDER filed (Becker, Circuit Judge) granting motion by American Academy of Medical Ethics for leave to file an amicus curiae brief in support of Appellants and for leave to file instanter (out of time). (rmg)

113 " 27 AMICUS BRIEF on behalf of American Academy of Medical Ethics. Pages: 29, Copies: 10, Delivered by mail, filed. Certificate of service date 11/5/90 (see 11/27/90 order). (rfl)

114 " 27 APPEARANCE from Attorney John E. McKeever on behalf of Amicus-appellant American Academy of Medical Ethics, filed. (ghb)

115 " 27 DISCLOSURE STATEMENT on behalf of Amicus-appellant American Academy of Medical Ethics, filed. (ghb)

Dec

116 " 04 BRIEF on behalf of Appellee Planned Parenthood, Appellee Reproductive Health, Appellee Womens Health Ser,

Appellee Womens Suburban, Appellee Allentown Womens Ctr, Appellee Thomas Allen, Pages: 48, Copies: 10, Delivered by mail, filed. Certificate of Service dated 12/4/90. (rfl)

117 " 04 AMICUS BRIEF on behalf of The Pennsylvania Chapter of the American College of Emergency Physicians. Pages: 13, Copies: 10, Delivered by mail, filed. Certificate of service date 12/4/90. (rfl)

118 " 04 MOTION filed by PA Coalition, PA Coalition Against, Domestic Violence, Natl Woman Abuse, Natl Coalition, CT Coalition Against, NJ Coalition For, Clinton Cty Womens, Hospitality House, Laurel House, Tioga Cty Womens, Women Against, Women Against Abuse, Womens Center for leave to proceed as amicus curiae on behalf of appellees with consent. Certificate of Service dated 12/14/90. [No order necessary has written consent] (dlr)

119 " 07 MOTION filed by Amici Curiae-Appellees PA Coalition, PA Coalition Against, Domestic Violence, Natl Woman Abuse, Natl Coalition, CT Coalition Against, NJ Coalition For, Clinton Cty Womens, Hospitality House, Laurel House, Tioga Cty Womens, Women Against, Women Against Abuse, Womens Center for extension of time to file brief until 12/11/90. Certificate of service dated 12/4/90. (dlr)

120 " 10 ORDER (Clerk) granting motion by Amici Curiae, PA Coalition Against, et al., for extension to file amici brief until

12/11/90. Appellants are granted a three day extension to file their reply brief beyond the normal 14 day period, filed. (dlr)

121 " 11 AMICUS BRIEF on behalf of PA Coalition Against Domestic Violence, et al. Pages: 42, Copies: 10, Delivered by mail, filed. Certificate of service date 12/11/90. [See 12/10/90 order] [FILED BY CONSENT IN MOTION] (wab)

122 " 14 APPEARANCE from Attorney Phyllis Gelman on behalf of Amicus-appellees Pennsylvania Coalition Against Domestic Violence, Pennsylvania Coalition Against Rape, Domestic Violence Research and Resources, National Woman Abuse Prevention Project, National Coalition Against Domestic Violence, Connecticut Coalition Against Domestic Violence, New Jersey Coalition For Battered Women, Clinton County Women's Center, Hospitality House Services for Women, Inc., Laurel House Survivors, Inc., Tioga County Women's Coalition, Women Against Abuse, Inc., Women Against Abuse Legal Center, Inc. & Women's Center and Shelter of Greater Pittsburgh, filed. (ghb)

123 " 14 DISCLOSURE STATEMENT on behalf of Amicus-appellees Pennsylvania Coalition Against Domestic Violence, Pennsylvania Coalition Against Rape, Domestic Violence Research and Resources, National Woman Abuse Prevention Project, National Coalition Against Domestic Violence, Connecticut

Coalition Against Domestic Violence, New Jersey Coalition For Battered Women; Clinton County Women's Center, Hospitality House Services For Women, Inc., Laurel House Survivors, Inc., Tioga County Women's Coalition, Women Against Abuse, Inc., Women Against Abuse Legal Services, Inc. & Women's Center and Shelter of Greater Pittsburgh, filed. (ghb)

124 " 14 APPEARANCE from Attorney James Eiseman on behalf of Amicus-appellee Pennsylvania Chapter of the American College of Emergency Physicians, filed. (ghb)

125 " 14 DISCLOSURE STATEMENT on behalf of Amicus-appellee Pennsylvania Chapter of the American College of Emergency Physicians, filed. (ghb)

126 " 21 REPLY BRIEF on behalf of Appellant Robert P. Casey, Appellant N. Mark, Richards, Appellant Ernest D. Preate, Copies: 10, Delivered by mail, filed. Certificate of Service date 12/21/90. (rfl)

127 " 27 CALENDARED for Monday, February 25, 1991. (agb)

1991
Feb

128 " 20 Clerk's letter, written at the direction of the Court, requesting counsel be prepared at oral argument to comment on Marks v. United States, 430 U.S. 188 (1977), in the context of the question listed as Issue I at page 1 of Appellant's brief, etc. (sdt)

129 " 20 APPEARANCE from Attorney Kathryn Kolbert on behalf of Appellees Planned

Parenthood, Reproductive Health & Counseling Center, Women's Health Services, Women's Suburban Clinic, Allentown Women's Center & Thomas E. Allen, M.D., filed. (ghb)

130 " 25 ARGUED 2/25/91 Panel: Stapleton, Alito, Seitz, Circuit Judges. At oral argument Court directed counsel to have transcript of oral argument prepared. (agb)

Mar

131 " 13 Copy of transcript of tape of oral argument on 2/25/91 prepared at the direction of the Court. (sdt)

Jul

132 " 09 LETTER dated 7/9/91 pursuant to Rule 28(j) from Thomas E. Zemaitis, Esq., counsel for Appellee, with service, with enclosure, received. (emd)

133 " 26 LETTER dated 7/25/91 pursuant to Rule 28(j) from Kate L. Mershimer, Esq., counsel for Appellants, with service, received. (emd)

Oct

134 " 21 OPINION (Stapleton, Authoring Judge, Alito and Seitz, Circuit Judges), with a concurring and dissenting opinion by Judge Alito, filed. (bj)

135 " 21 JUDGMENT: AFFIRMED in part and REVERSED in part in accordance with the opinion of this Court, filed. (bj)

Nov

136 " 07 MOTION filed by Appellees, Planned Parenthood et al., to stay mandate. Certificate of Service dated 11/7/91. (bj)

137 " 12 Supreme Court of U.S. notice filed advising petition for writ of certiorari filed by Appellees, Planned Parenthood, et al., filed in the Supreme Court on 11/7/91 at Supreme Court, case number: 91-744. (anh)

138 " 19 RESPONSE by Appellants Robert P. Casey, et al. in opposition to Appellees' motion to stay mandate, received. Certificate of service dated 11/18/91. (bj)

139 " 20 APPELLEES' APPLICATION for Attorney's fees together with Memorandum in Support Thereof. Certificate of service dated 11/20/91, filed. (bj)

140 " 26 ORDER filed, (Stapleton, Circuit Judge) granting motion to stay mandate by Appellee Planned Parenthood. Mandate Stayed to 12/12/91. (bj)

141 " 26 APPELLANTS' MOTION TO STAY APPELLEES' APPLICATION FOR ATTORNEYS FEES, filed. Certificate of Service dated 11/25/91. (bj)

Dec

142 " 05 Appellants' Brief in Opposition to Appellees' Application for Attorney's Fees, received. Certificate of service dated 12/4/91. (bj)

143 " 16 Supreme Court of U.S. notice filed advising petition for writ of certiorari filed by Appellants, Robert P. Casey et al. Filed in the Supreme Court on 12/11/91 at Supreme Court. case 91-902. (bj)

144 " 30 ORDER filed (Stapleton, Authoring Judge, Alito and Seitz, Circuit Judges) granting motion to stay Application for

Attorneys Fees by Appellant, Ernest D. Preate, Jr., pending final disposition by the Supreme Court of the matter before it. (bj)

1992

Jan

145 " 16 REPORTER at 947 F2d: 682 (kot)

146 " 24 U.S. Supreme Court order dated 1/21/92 at S.C. number: 91-744, granting LIMITED petition for writ of certiorari by Appellee Planned Parenthood, Reproductive Health, Womens Health Ser, Womens Suburban, Allentown Womens Ctr, Thomas Allen, limited to following questions, definition of medical emergency, informed consent, spousal notice. This case is consolidated with S.C. No. 91-902, Casey, et al. (bj)

147 " 24 U.S. Supreme COurt order dated 1/21/92 at S.C. number: 91-902, granting LIMITED petition for writ of certiorari by Appellant Robert P. Casey, LIMITED as to definition of medical emergency, informed consent, parental consent, reporting requirements, spousal notice, etc. This case is consolidated with S.C. No. 91-744, Planned Parenthood of Southeastern Pennsylvania et al., filed. (bj)

Feb

148 " 03 Letter dated January 31, 1992 from the U.S. Supreme Court requesting that the record be certified and transmitted to them, received. (bj)

149 " 06 WITHDRAW OF APPEARANCE: Thomas E. Zemaitis for Allentown

Women's Center, for Women's Suburban Clinic, for Women's Health Services, Inc., for Reproductive Health Services & for Planned Parenthood of Southeastern PA, withdrawing appearance. (ghb)

150 " 06 APPEARANCE from Attorneys Linda J. Wharton & Andrew R. Rogoff on behalf of Appellees, filed.

151 " 10 Certified copy of briefs, appendices and partial proceedings in this Court sent to Clerk of Supreme Court of the United States. (anh)

EXCERPTS FROM TRANSCRIPT OF HEARING ON PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER, APRIL 21, 1988

* * *

[13] THE COURT: Mr. Neuhauser, is the Pennsylvania Court system totally unprepared to proceed as required by the amended act?

MR. NEUHAUSER: I can't answer that, your Honor.

[14] THE COURT: I assume you have read the affidavits which are attached to the motion for a temporary restraining order?

MR. NEUHAUSER: I have, your Honor.

THE COURT: As well as the two presented today?

MR. NEUHAUSER: That's right.

THE COURT: They would seem to tell us that the Pennsylvania Court system simply is totally unprepared, that many courts are unaware of the situation and that on a county-to-county basis there has been simply nothing done to implement and execute the provisions of the amended act, as required by my earlier opinions and by the Court of Appeals as pointed out by Mr. Zemaitis.

MR. NEUHAUSER: Well, assuming for the moment the admissibility of the hearsay statements in those affidavits, I would argue nevertheless, your Honor, that as the case law firmly establishes from this Court and other courts that all the Commonwealth has to do is to establish an alternative procedure to parental consent that's prompt, clear, simple and assures confidentiality.

Now, as Mr. Zemaitis has himself conceded, the statute is self-executing. We would submit to the Court that that self-executing statute passes the Constitutional test set by this Court and the Third Circuit in its

previous decisions. I think that Mr. Zemaitis' argument amounts to a [15] statement that the President Judges of the various Courts of Common Pleas either cannot or will not implement a statute that goes into effect, and I don't think that's a proper assumption to make.

The Supreme Court many times has said that state courts are equally capable of enforcing the law and there is no evidence in the cases to suggest that they would not properly implement a statute.

THE COURT: Well, the act goes into effect on Sunday. The language, as cited by Mr. Zemaitis, which is the Third Circuit opinion and which I cite in my opinion last year refers to the fact that the judicial procedure must be an established and practical avenue and may not rely solely on generally stated principles of availability, confidentiality and form.

In other words, the key words, of course, would be established and practical avenue. Now --

MR. NEUHAUSER: And I would submit -- I'm sorry.

THE COURT: -- do we have that here?

MR. NEUHAUSER: I would submit, your Honor --

THE COURT: At this time.

MR. NEUHAUSER: That the statute on its face satisfies that test. It's very explicit, it has very explicit rules contained in it that all proceedings are confidential, the Court must rule within three business [16] days. The record is sealed, the name of the applicant is not on the docket at any place. All persons are excluded from hearings except the applicant and those persons that the applicant wishes to attend. There is an expedited, confidential appeal within five days of either the Court of Common Pleas failure to rule or the Court of Common Pleas denial of the application and that would satisfy the test, in our view, of a clear, concise and simple means to effectuate the judicial bypass procedure.

THE COURT: But at this time if there is a total unawareness, if there is a total unawareness of the provisions in the act and the entire Pennsylvania Court system, by Sunday how can the court system possibly gear itself up to do what is required by the act, the amended act?

MR. NEUHAUSER: Well, your Honor, again, I would indicate that assuming for the purposes of this proceeding that those hearsay statements are admissible, all that amounts to in our view is that there's an argument that the Judges of the Courts of Common Pleas will not see that the law is implemented and I don't think that's a proper presumption to make.

THE COURT: Well, I think you have to come up with some evidence. You've had these affidavits for a few days, I suppose?

[17] MR. NEUHAUSER: No, your Honor, we've had them since yesterday afternoon.

THE COURT: Since yesterday. Well, you've had since yesterday to put yourself together on this. I am reluctant to intrude in this area as a Federal Judge intruding into the State Court system; I'm really reluctant to do it.

MR. NEUHAUSER: I understand, your Honor.

THE COURT: And it seems to me the ideal thing to do would be to have some agreement to maintain the status quo until we can go into this carefully in a preliminary injunction hearing. And I think Mr. Zemaitis suggests and I think there is some merit to what he suggests is that the affidavits do shift the burden to the Commonwealth. In other words, you have these affidavits, they should be accepted on their face. There is no reason to believe that they're not accurate and correct. Considering that, then, the Commonwealth has to come up with something and you've come up with nothing. I'm not criticizing you for it, you've had no

time. But it seems to me it's something you have to look into immediately and, ideally, an agreement to maintain the status quo would give you time to do that.

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EXCERPTS FROM TRANSCRIPT OF HEARING ON PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION, MAY 9, 1988

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[10] BY MR. ZEMAITIS:

Q What is there about Section 3206(A) that prompts you to believe you're required to have the parent make a visit to the clinic?

[11] A I'd like to quote from the law that's in front of me, it just is a line. "He first obtains the informed consent both of the pregnant woman and of one of her parents" and it's the use of the term "informed consent."

Q What is it about the use of that term?

A I've been in health care administration for -- since -- in and out since 1970 and know that there's certain expectations of informed consent that are different from consent and it requires the parents to come in to receive informed consent.

Q If you were told that the parent need not come to the clinic in order to receive informed consent, are there any other reasons why you would nevertheless require parents to come to the clinic?

A Yes. We would still require the parents to come in for identification purposes.

Q Any other reasons that would suggest to you that you require the parent to attend?

A Well, the parents would need to come in for identification and for informed consent because the penalties are severe that are associated with this law, the violation of informed consent rule.

Q When you say the penalties are several, what do you mean by that?

A I consider a three-month revocation of our physician's [12] license to practice medicine a severe penalty, especially for physicians who practice within our

clinic. But the decisions as to what patients we serve are not their own.
Q Are there any other reasons that you believe that the parent would be required to come into the clinic?
A They -- to protect the clinic as well.
Q What do you mean by that?
A Well, we would not be able to function for six months.
Q What's the basis for that statement?
A Well, within the law, that we would not be able to function, with that, that's the risk, that we could have our permission to function revoked by the Department of Health and that our -- that we could -- this failure to obtain informed consent from the parents could be used as evidence in a civil suit against us as well.
Q Do you have any reason to believe you might be subject to such civil actions?
A Well, Women's Health Services is under scrutiny a great deal of the time. We have women who come in who pretend to be patients when they are not, they're just seeking information. We've been asked questions or tested about every possible aspect of the rules and regulations.
Q Who are these people that pretend to be patients?
A Well, primarily the women who pretend to be patients are either themselves or representing groups that are in [13] opposition to abortion.
Q Are you saying that you've had women prior to now pretend to be patients?
A Oh, sure, that happens on a regular basis that they come in and have a pregnancy test or sometimes they'll come in, not being pregnant, and come in with urine that tests pregnant and they'll get as far as the examining table.

• • •

[14] Q Ms. Roselle, given your experience as director, Executive Director of Women's Health Services, what do you think the impact on minor women who seek abortions at Women's Health Service will be if parents are required to come to the clinic for informed consent?
A Well, we're going to have -- we're going to see delays and those delays are going to mean increased risks to health and increased economic forces, increased economic problems for these minors.
Q Why do you expect there to be delay?
A Well, teenagers having a hard time overcoming denial when they make a decision, when they even recognize the fact that they're pregnant. To -- like now they're going to have to overcome the denial, recognize they're pregnant and approach parents to inform them of the pregnancy and to discuss with them their decision and their desire to have an abortion.
Q Any other reasons why there might be additional delay, in your experience?
A Well, once we have a parent involved then we're going to be experiencing some delays in terms of transportation, [15] logistics, other child care, transportation and additional expense relating to that whole logistical issue.
Q You said also that there would be increased risks to minor women, increased health risks. What's your basis for that statement?
A The health risk is associated with the need for more second trimester procedures. There are -- the longer they delay, the more likelihood they're going to be pushed into that category.
Q You also mentioned increased expense to minor women. What's the basis for that statement?
A Well, the increased expenses, the increased logistics and then the increased costs, the increased fee associated with a second trimester procedure.

* * *

[18] Q Have you determined whether the reporting requirements in the new statute will have any financial impact on Women's Health Services?
A At this point I know that I will have to hire one full-time clerical staff person with salaries and benefits. That will cost about $14,000 and then we'll have to hire -- buy some additional office equipment at a cost of another 5,000.
Q Why do you believe you'll need to add a clerical person to your staff?
A I simply don't have -- I'm not staffed at the level to report on -- at this detail on every procedure we do. We don't do that kind of staffing, we don't have extra people. And we have to have it accurate. It just must be [19] accurate. The penalty is too severe.
Q Directing your attention to the form which is Exhibit V?
A Mm-hmm.
Q And specifically to Item 18 of that form which states "Referring physician, agency or service," do you see that?
A Yes.
THE COURT: What exhibit is this?
MR. ZEMAITIS: This is Exhibit V, your Honor.
THE COURT: V.
MR. ZEMAITIS: V as in victor.
THE COURT: Thank you.
MR. ZEMAITIS: And it's Item 18.
THE COURT: Thank you.
BY MR. ZEMAITIS:
Q That item, do you believe that item will have any impact on referring physicians that are currently referring patients to Women's Health Services?
MR. NEUHAUSER: Your Honor, I'm going to object at this point as to what effect it would have on

referring physicians. I think the witness could be competent to testify as to what effect it would have on the clinic, but not on referring physicians.
THE COURT: Overruled. Can this be rephrased?
MR. ZEMAITIS: Yes, your Honor.
BY MR. ZEMAITIS:
[20] Q What do you anticipate the impact on the referral of patients to Women's Health Services will be as a result of requiring the recording of the name of the referring physician, agents to your service?
MR. NEUHAUSER: For the record, your Honor, the same objection.
THE COURT: Overruled.
THE WITNESS: Could you repeat the question, Mr. Zemaitis, please? I'm sorry.
MR. ZEMAITIS: That's all right.
BY MR. ZEMAITIS:
Q What impact do you think the requiring of the naming of the referring physician, service or agency will have on the referral of patients to Women's Health Services?
A Thank you. The naming of the referring physician will guarantee that fewer physicians will refer women to abortion clinics.
Q What's the basis for that statement, Ms. Roselle?
A Referring physicians, especially in areas outside urban areas, are under intense pressure from certain elements, from people opposed to abortion who reside in their community not to make referrals for abortions. And once this becomes known that these physicians are making these referrals they face loss of practice, loss of referral, referrals within their practice, to some extent they may even lose their privileges [21] at a hospital.
MR. NEUHAUSER: Your Honor, for the record I'd like a continuing objection to this testimony.
THE COURT: Yes, you may do that.

Shall we move along?
BY MR. ZEMAITIS:
Q Do you have any personal experience that supports the statement you just made?
A Yes, I do. I approached a group of physicians from a rural area who I know currently make referrals to Women's Health Services. I was hoping I could get them here today or at least to participate in this. Not only would they not do that, they told me that once we had to start reporting this information, they absolutely would never make another referral to us.
Q Did you explain to those gentlemen that the form as filed with the Commonwealth would be maintained in confidence?
A Yes.
Q Did that change their reaction in any way?
A No.

• • •

[27] Q Can you briefly describe the process at Allentown Women's Center for counseling abortion patients?
A The counselor's function is to ensure that the decision to have an abortion is the patient's own decision, that she is not coerced by either a parent or a husband or boyfriend, to explain the medical risks, to assuage fear, to teach birth control, to prepare the patient for the procedure.
Q Is this counseling customarily provided on the day the abortion is performed?
A That's correct.

• • •

[30] Q What is your understanding of the meaning of the term "informed consent," as it applies to Allentown

Women's Center's responsibilities under this act?
A The informed consent for a medical procedure implies a careful explanation of the risks of the procedure and in some cases in the options to the procedure by the physician or his appointee for someone who is anticipating surgery, or in this case whose child is anticipating surgery.
Q Does Allentown Women's Center currently require parents to come to the clinic to provide consent for abortions for their minor children?
A No, we have not and do not.
Q Is it your understanding that under Section 3206(A) that the parent will need to attend to provide consent?
A Informed consent for any medical procedure implies presence.
Q Do you then intend to change your practice of not requiring parental accompaniment should the act go into effect?
A If the act goes into effect we will require parental [31] accompaniment to the clinic when the patient comes for her procedure. In difficult situations of which I anticipate there will be many, a visit at a separate time to the clinic with the minor would be possible, but parental presence at the clinic would be required absolutely.

• • •

[35] Q What effect, if any, do you anticipate that the requirement of informed parental consent, in other words as you've testified, the accompaniment by a parent to provide consent will have on the ability of your minor patients to obtain abortions at the center?
A If the parent needs to come physically to the clinic, that is burdensome. The rigors of just struggling with a service that must be kept confidential, sometimes even from another parent, are hard to imagine. There is a

great deal of intensity around keeping privacy and there's a great deal of intensity around conflict within a family at a crisis moment like this.

Most of our patients come, more than half of our patients come a great distance to get to us; they travel more than an hour. So working out all of those logistics for two people that must both be given, it has to be one parent and the minor instead of a support person to come with the minor will cause additional delays, delays beyond the delays already caused by requiring parental involvement or bypass. Those delays will be great, these delays will be additional.

Q Do you foresee an impact on the emotional state of some of your minor patients through this requirement?

A Yes.

MR. NEUHAUSER: Objection, your Honor, speculation.

THE COURT: Can the question be rephrased?

[36] BY MS. NICHOLAS:

Q In your experience as a counselor are you able to predict an impact on the emotional state of minor patients through this provision?

MR. NEUHAUSER: I'm sorry, your Honor, same objection.

THE COURT: Overruled.

THE WITNESS: In my experience as a counselor I can speak to the 54 percent of our minors who do have parental consent and have sought that voluntarily. Even in that situation, the anguish in a family and the intensity in a family around an abortion service is considerable and when there is dysfunction or hostility in the family unit and the parent is physically present, it is sometimes physically dangerous for the minor. It certainly causes us great concern when there is intensity and upset that they will have an automobile accident as they leave the clinic. These are extremely human, extremely intense and

difficult situations even without the Commonwealth coercing communication in families where there is not support from the parents.

BY MS. NICHOLAS:

Q You've testified about your view that delay will be occasioned in at least some cases by this requirement. Will there be harmful medical effects for minor patients that would result from the delay you've described?

[37] MR. NEUHAUSER: Objection, your Honor, speculation and no foundation.

THE COURT: Overruled. I'm sure you can rephrase that to overcome the objection.

BY MS. NICHOLAS:

Q In your experience as Director and as counselor at Allentown Women's Center is it your view that delay in obtaining abortion can result in adverse medical consequences for patients?

MR. NEUHAUSER: Same objection, your Honor.

THE COURT: Overruled.

THE WITNESS: Delay is grave. Delay after the twelfth week of gestation increases the possibility of a medical complication from the abortion at a very steep incline. There are other problems that don't show up immediately that are caused by delay. The cervix needs to be dilated mechanically for an abortion. We don't really know each week that goes by how much worse it is in terms of impairment of future childbearing ability, but certainly for young women future childbearing ability is extremely important. And as those weeks go by it's worse and worse on many levels. It's also very serious in terms of the expense and the psychological impact on that young woman if she has a later abortion. Each week that goes by is a difference in degree. But many of these minors who are required to either [38] cope with the court system which is a frightening and overwhelming prospect or with their parents which is a frightening and

overwhelming prospect for many of them will delay right past the second trimester abortion situation and have a child as a child for the sole reason that they can't cope with the burdens of these requirements. That's, I think, you know, very sobering.

BY MS. NICHOLAS:

Q I'd like to turn briefly to the reporting sections of the act and in particular direct your attention to Section 3214(A) which requires filing a report to the Department of Health for each abortion performed. Are you familiar with this section?

A Yes.

Q And I would like to further direction your attention to Subsection 1 which requires identification in the individual abortion report of the physician performing the abortion and of the referring physician, service or agency. Are you familiar with this section?

A I'm extremely familiar with this.

Q What effect do you believe this reporting subsection will have on the operations of Allentown Women's Center?

MR. NEUHAUSER: Objection, your Honor, speculation.

THE COURT: Overruled.

THE WITNESS: I was devastated when I read this. [39] I think that this is going to make it more difficult for us to recruit the kinds of physicians we want working for us providing abortion services. I have already been told by a physician who formerly worked for us that whether or not this law goes into effect, whether or not these reports are made public, he would never darken our door again because of his fear of the possibility of harassment that might ensue from these reporting requirements.

It will have a chilling effect on the number of physicians and the quality of physicians willing to provide

abortion services.

* * *

[42] BY MR. ZEMAITIS:

Q Dr. Dratman, let me just confirm for the record that you are a licensed physician?

A Yes, I am.

Q In what states are you licensed?

A I'm licensed in Pennsylvania and New Jersey.

Q And where did you receive your medical degree?

A From Hahnemann Medical College in Philadelphia.

Q Are you a member of any professional organizations?

A Yes, I am.

Q And what are those?

A I am a member of the American College of Obstetrics and Gynecology, I am a Fellow of that college. I am a member of the American Fertility Society and the American Medical [43] Women's Association.

Q Have you received any certification in a specialty?

A Yes, I have. I am Board Certified in the practice of obstetrics and gynecology.

Q What is your current position, Dr. Dratman?

A Since 1986 I have been the Medical Director for Planned Parenthood, Southeastern Pennsylvania.

Q What are your responsibilities as Medical Director of Planned Parenthood?

A As Medical Director I oversee medical policy for our contraceptive and abortion services. I assist in the training of physicians in the abortion service and of mid-level practitioners in the contraceptive service.

* * *

[45] Q Dr. Dratman, do you have an opinion as to the

first point in a pregnancy that a fetus is likely to be viable?
A Yes, I do.
Q And what is your opinion in that respect?
A A fetus is -- it's impossible for a fetus to be viable, that is to sustain extrauterine life, even with the best available technological supports, before 23 to 24 menstrual weeks gestation.
Q What is the basis for your opinion in that respect?
A A fetus needs lung matrix in order to breathe on the outside, whether mechanically ventilated or not, and alveoli do not develop in the human fetus until 23 to 24 weeks gestation.
Q Are you aware of any literature that contradicts your opinion with respect to 23 or 24 weeks?
A There have been sporadic reports in the medical literature of survivals of fetae of 22 weeks gestation. But most of those reported before the use of ultrasound for data and it's possible that the data may have been off by a week or so.
Q Are you aware of medical literature that supports your conclusion with respect to 23 or 24 weeks?
A Yes. There are considerable numbers, both in the obstetrical and the neonatology literature. It's also possible to find descriptions of fetal womb development in [46] pathology textbooks.
Q In your opinion, Dr. Dratman, is there any possibility that a 19 or 20 or 21 week old fetus would be viable?
A Not if properly dated, no.
Q Is that also true for a 22 week old fetus?
A Yes.

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[57] Q Now, directing your attention to Item 17 on the form Report of Induced Termination of Pregnancy, there

are a series of questions that are asked in that item and the direction is to explain the answers on the back. Are you aware of any other procedure, Dr. Dratman, where a physician is required to report his or her basis for certain medical judgments made during the treatment of a patient?
[58] A No, sir, I am not.
Q What is your reaction, as a practicing physician, to a requirement that you report the basis for certain medical judgments on this form?
A I find them confusing at best, intrusive at worst. In the face of a medical emergency which is not very well defined in this act, although an attempt is made at it, the difficulties that a physician and his or her patient face must take precedence over anything else. Were the statute to be upheld, the statute itself would get in the way of these treatments. The way the statute is written, and that is Section ...
Q Are you referring to the definition of medical emergency, Dr. Dratman?
A Yes, I am.
Q That's Section 3203, if you'll find that section.
A Okay. Yes, here it is. On the face of it --
Q Before you comment on the medical emergency section, the question I had asked you was whether you had any reaction to all of Item 17, that is to say all of the requests by the reporting form to report your basis for a medical judgment?
MR. NEUHAUSER: Asked and answered, your Honor, I believe.
THE COURT: Overruled.
THE WITNESS: I find that this has nothing to do [59] with medical practice and it's causing me to make artificial judgments and therefore reports.
BY MR. ZEMAITIS:
Q Specifically referring to the definition of medical

emergency and you now have that before you, I believe, don't you?

A Yes.

MR. ZEMAITIS: That's Section 3203, your Honor.

BY MR. ZEMAITIS:

Q Do you have an opinion as to whether that section would or may cause physicians to practice in emergency situations different than they otherwise would?

A Oh, absolutely.

Q It would, that's your opinion is that it would have that effect?

A Certainly.

Q Now, can you explain the basis for your opinion in that respect?

A Let me give you an example. There is in the body of this statute the requirement for parental consent or judicial bypass, including some reasonable time in which such judgments can be made. I think three days is in the statute. Let's say a 16 year old woman comes into the emergency room, she is pregnant, she's about 18 weeks pregnant, she is swollen, her blood pressure is 210 over 160, normal being [60] between 100 and 120 over 60 to 80 in that age range, and her urinalysis shows a considerable amount of protein in the urine and her reflexes are very brisk. This is a clinical syndrome known as preeclampsia or toxemia of pregnancy. This is in obstetrical terms a medical emergency. However, under this statute, before I could operate as if this were a medical emergency, I would have to prove that irreversible major bodily harm would come to this patient if I were not to wait for a judicial bypass to go through.

Now, preeclampsia is a very serious condition. It can lead to eclampsia, which means that the woman would have a seizure. However, most of these women don't die as a result of the seizure, they don't have any long-term

effects from it, but she could certainly be terribly ill, she could certainly sustain a concussion or other injury from the seizure. She could develop a condition known as DIC, disseminated intravascular coagulation in which all of the blood clotting products in her body are used up; this is part of the syndrome. And what the statute is asking me to do in effect is to guarantee that this woman is going to be okay for the up to three days it's going to take to get judicial bypass for me to abort here because the only treatment that there is for this condition is emptying the uterus and ending the pregnancy. And there are medications that can be used in an attempt to stabilize her, drugs to bring down her blood [61] pressure, magnesium sulfate to attempt to keep her from having a seizure, but those are only temporizing medications in this situation.

I can't guarantee that she's going to have any lasting or non-lasting effects from this. She may have an underlying kidney problem that caused her to become so severely ill at this point in the pregnancy, but I can't diagnose that until afterwards. So there is no way that I, using my good medical judgment and with concern for the safety of my patient, can comply with this.

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, et al.	:	**CIVIL ACTION NO. 88-3228**
v.	:	
ROBERT P. CASEY, et al.	:	

ORDER

AND NOW, this 25th day of October, 1988, upon consideration of plaintiffs' request for class certification and of the Stipulation of the parties with respect thereto, the Court hereby finds as follows:

1. The class of physician plaintiffs is so numerous that the joinder of all members is impracticable. At the end of 1986, there were at least 1,578 gynecologists practicing in Pennsylvania, and there were at least 144 facilities in Pennsylvania where abortions are performed, each of which has one or more physicians on its staff.

2. There are questions of law and fact common to the class of physician plaintiffs including the constitutionality of provisions of 1988 Amendments to the 1982 Pennsylvania Abortion Control Act, Act of March 25, 1988, No. 31, §§ 3-10, amending 18 Pa. C.S.A. §§ 3201-20 (the "Act").

3. The claims of plaintiff Thomas Allen, M.D. as the representative of the class of physician plaintiffs are typical of those of the class as a whole.

4. Plaintiff Thomas Allen, M.D. will fairly and

adequately represent the interests of the class of physician plaintiffs because he possesses the requisite personal interest in the subject matter of the lawsuit and because he is represented by lawyers with substantial experience in civil rights and class action litigation, particularly cases involving the reproductive rights of women seeking abortion and the rights of physicians to provide such care.

5. Plaintiff Thomas Allen, M.D. possesses no known interests that are antagonistic to those of the class of physician plaintiffs.

6. The defendants have acted on grounds generally applicable to the class of physician plaintiffs.

7. The prosecution of separate actions by the individual members of the class of physician plaintiffs would create a risk of inconsistent or varying adjudications with respect to the constitutionality of the Act or the particular provisions thereof that could establish incompatible standards of conduct for the defendants who are charged with enforcing the Act's provisions.

WHEREFORE, it is hereby ORDERED and DECREED that this action will be maintained as a class action pursuant to Rules 23(B)(1)(A) and 23(B)(2) of the Federal Rules of Civil Procedure on behalf of a class of physician plaintiffs defined as follows: "All licensed physicians in Pennsylvania who provide abortions at locations in Pennsylvania." Plaintiff Thomas Allen, M.D. is designated class representative, and counsel of record for plaintiffs in this action are designated as counsel for the class.

BY THE COURT:

/s/_____
DANIEL H. HUYETT, 3rd

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA; REPRODUCTIVE HEALTH AND COUNSELING CENTER; WOMEN'S HEALTH SERVICES, INC.; WOMEN'S SUBURBAN CLINIC; ALLENTOWN WOMEN'S CENTER; AND THOMAS ALLEN, M.D., on behalf of himself and all others similarly situated;	:	**CIVIL ACTION**
Plaintiffs,	:	
v.	:	**CLASS ACTION**
ROBERT P. CASEY, N. MARK RICHARDS, ERNEST PREATE, personally and in their official capacities, and MICHAEL D. MARINO, personally and in his official capacity, together with all others similarly situated,	:	**NO. 88-3228**
Defendants.	:	

AMENDED COMPLAINT

Plaintiffs, by their undersigned attorneys, bring this Amended Complaint against the defendants, their employees, agents and successors and in support thereof aver the following:

I. *Preliminary Statement*

1. This civil rights action challenges the 1988 and the 1989 amendments to the Pennsylvania Abortion Control Act of 1982, Act of March 25, 1988, No. 31 §§ 3-10, amending 18 Pa. Cons. Stat. Ann. §§ 3201-20, and Act of November 17, 1989, No. 64, amending 18 Pa. Cons. Stat. Ann. §§ 3201-20, (collectively "the Act") as violating the United States Constitution, 42 U.S.C. § 1983 and the Pennsylvania Constitution. (Copies of each amending enactment are attached as Exhibits "A" and "B," respectively.)

2. Plaintiffs seek declaratory and injunctive relief on the ground that the Act unduly restricts the availability of abortions and women's access to necessary medical care and counseling, as well as the rights of physicians and facilities providing abortions in violation of the right of privacy to make personal decisions, the right of informational privacy, the right to free speech, the right to equal protection under the law, the right to equality of rights under the law, the right to due process of law, and the right to freedom of association, all as guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution, 42 U.S.C. § 1983, and Article I §§ 1, 26 and 28 of the Pennsylvania Constitution.

II. *Jurisdiction*

3. Jurisdiction is conferred on the Court by 28

U.S.C. §§ 1331, 1343(a)(3), 1343(a)(4), the Fourteenth Amendment to the United States Constitution, and, because plaintiffs' state law claims are inextricably tied to plaintiffs' federal claims, the doctrine of pendant jurisdiction.

4. Plaintiffs' claim for declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201 and 2202 and by Rules 57 and 65 of the Federal Rules of Civil Procedure.

III. *Parties*

A. *Plaintiffs*

5. Plaintiff Planned Parenthood of Southeastern Pennsylvania is a non-profit corporation organized under the laws of the Commonwealth of Pennsylvania that operates a facility where abortion counseling services and abortions are provided at a location in Pennsylvania.

6. Plaintiff Women's Suburban Clinic is a non-profit corporation organized under the laws of the Commonwealth of Pennsylvania that operates a facility where abortion counseling services and abortions are provided at a location in Pennsylvania.

7. Plaintiff Reproductive Health and Counseling Center is a for-profit corporation organized under the laws of the Commonwealth of Pennsylvania that operates a facility where abortion counseling services and abortions are provided at a location in Pennsylvania.

8. Plaintiff Women's Health Services, Inc. is a non-profit corporation organized under the laws of the Commonwealth of Pennsylvania that operates a facility where abortion counseling services and abortions are provided at a location in Pennsylvania.

9. Plaintiff Allentown Women's Center is a for-profit corporation organized under the laws of Pennsylvania that operates a facility where abortion counseling services and abortions are provided at a

location in Pennsylvania.

10. Each of the corporate plaintiffs (hereinafter collectively referred to as "medical providers") sues on its own behalf, on behalf of the physicians, counselors and staff that each employs at its facility, and on behalf of the women who receive abortions and other obstetrical, gynecological, family planning, or counseling services at its facility.

11. Plaintiff Thomas Allen is a physician licensed to practice medicine in Pennsylvania who specializes in the practice of obstetrics and gynecology. Dr. Allen performs abortions during the first and second trimesters of pregnancy at locations in Pennsylvania.

12. Plaintiff Allen sues on his own behalf and on behalf of his patients and seeks to represent a class of all other physicians similarly situated.

B. *Defendants*

13. Defendant Robert P. Casey is the Governor of the Commonwealth of Pennsylvania. He is the chief executive officer of the Commonwealth, and he is constitutionally mandated to ensure that the laws of the Commonwealth, including the Act, are faithfully executed.

14. Defendant N. Mark Richards is the Secretary of Health for the Commonwealth of Pennsylvania. As such, he is responsible for the implementation and enforcement of those provisions of the Act which pertain to the Department of Health.

15. Defendant Ernest Preate is the Attorney General of Pennsylvania. As such, he is responsible for the enforcement of all laws of the Commonwealth, including the Act.

16. Defendant Michael D. Marino is the District Attorney for Montgomery County, Pennsylvania. As such, he is responsible for the enforcement of the Act and the criminal prosecutions of persons charged with

violating it in his county.

17. Upon information and belief, unless restrained by order of the Court, all defendants will perform their official duties to ensure the Act is enforced, and will cause criminal prosecutions or license suspension or revocation hearings to be instituted against the physician or medical provider plaintiffs or others who may aid or assist the physician or medical provider for failure to comply with the Act, and against married women who provide false statements in violation of Section 3209 of the Act.

IV. *Class Action Allegations*

A. *Plaintiff Allegations*

18. Plaintiff Allen is a physician licensed to practice medicine in Pennsylvania who provides abortions at locations in Pennsylvania.

19. Dr. Allen sues on behalf of all other physicians similarly situated and seeks, pursuant to Fed. R. Civ. P. 23(b)(1)(A) and (2), to represent a class composed of all licensed physicians in Pennsylvania who provide abortions at locations in Pennsylvania.

20. The prerequisites to class certification are met in that:

(a) At the end of 1988, there were at least 1,567 gynecologists practicing in Pennsylvania, and there were at least 140 facilities in Pennsylvania where abortions are performed, each of which has one or more physicians on its staff; consequently the class is so numerous that joinder of all members is impracticable;

(b) The provisions of the Act apply with equal force to all members of the class, such that questions of law and of fact relating to the constitutionality of the provisions of the Act

that seek to regulate abortions are common to all members of the class;

(c) The claims of the representative party as to the unconstitutionality of the provisions of the Act are typical of those in the class; and

(d) The representative party has the requisite personal interest in the outcome of this action and will fairly and adequately protect the interests of the class.

21. The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to the constitutionality of the Act or the particular provisions thereof that would establish incompatible standards of conduct for the defendants who are charged with enforcing the Act's provisions.

B. *Defendant Allegations*

22. Defendant Michael D. Marino is sued in his capacity as the District Attorney of Montgomery County, Pennsylvania and, pursuant to Fed. R. Civ. P. 23(b)(1)(A), as the representative of the class of all district attorneys of the various counties of the Commonwealth of Pennsylvania.

23. The prerequisites to certification of a defendant class are met in that:

(a) There are 67 counties in Pennsylvania each of which has a district attorney and many of which have a substantial number of assistant district attorneys rendering the class so numerous that joinder is impracticable;

(b) Because each member of the class is charged with enforcing the Act in a particular county, questions of law and of fact relating to the constitutionality of the Act's provisions are common to the class;

(c) The defenses of defendant Marino will be

typical of the defenses of the class; and

(d) Defendant Marino will fairly and adequately represent the interest of the class.

24. The prosecution of separate actions against individual members of the defendant class could create a risk of inconsistent adjudications with respect to members of the defendant class which would establish incompatible standards of conduct for physicians presently performing abortions, desiring to perform abortions, or referring patients for abortions in Pennsylvania.

V. *Factual Allegations*

25. In 1988, 50,786 abortions were performed in Pennsylvania and reported to the Pennsylvania Department of Health. Many of the women who sought abortions did so because they suffer from diseases or conditions including, but not limited to: diabetes, cancer, essential hypertension, cardiac disease, kidney disease, history of post partum hemorrhaging, or sickle cell anemia and, therefore, carrying a pregnancy to term would endanger their health or life. Others sought abortions because their age, their psychological, familial or financial condition or their religious or conscientious beliefs mandated the procedure or because they were infected with the AIDS virus or because fetal anomalies had been discovered.

26. 47,548 (or 93.6%) of all reported abortions in 1988 in Pennsylvania were performed during the first trimester of pregnancy; 3,122 (or 6.2%) were performed during the second trimester. 127 abortions were performed between 23 and 26 weeks from the woman's last menstrual period and one abortion was performed at 27 weeks or beyond.

27. Abortion at any stage of pregnancy is considered an extremely safe surgical procedure, eleven times safer

from the standpoint of mortality than carrying a pregnancy to full term. Early abortion is safer than later abortion.

28. Delay in performance of abortion increases the health risk that women face in connection with the procedure. Nevertheless, second trimester abortions are safer than carrying the pregnancy to full term.

29. Physicians practicing at clinics operated by the medical provider plaintiffs regularly treat women patients who need abortion services. The physicians either perform the abortions or they refer patients to other physicians or clinics for abortions, and thus are subject to the criminal and civil penalties contained in the Act.

30. Physicians and medical providers who refer patients for abortions normally provide medical services for those patients before and/or after the procedure is performed.

31. Physicians and medical providers desire to provide comprehensive and confidential medical care of the highest quality to their patients.

32. Some or all of the plaintiffs provide abortion services to women including: women who need immediate abortions due to a medical emergency, women who need immediate abortions because of danger to their health but whose health problems do not fall within the definition of "medical emergency" as contained in the Act, women who travel long distances to obtain abortions, women for whom a waiting period of twenty-four hours would greatly increase the cost of and delay in obtaining an abortion, emancipated minors, mature minors, immature minors for whom an abortion would be in their best interest, immature minors for whom consent of one parent would be in their best interest, immature minors for whom parental involvement would not be in their best interest and married women who for varied reasons are unable or

unwilling to notify their husbands of their decision to have an abortion.

33. The purpose, intent and effect of the Act is to impose burdens upon women attempting to obtain abortions in Pennsylvania, to restrict the availability of abortion services, and to exact medical, psychological and financial penalties upon women who seek abortions.

34. The Act is the only provision of law enacted by the Pennsylvania General Assembly that provides detailed regulation of a particular surgical procedure. This regulation embodies legislative determinations that are inconsistent with currently accepted medical practice, and that require physicians to violate medical, ethical and professional standards.

35. If the Act is permitted to take effect, the cumulative impact of its provisions will be to burden unduly the constitutionally protected rights of plaintiffs and their patients with respect to the abortion decision, as more fully described in paragraphs 36 through 104 of this Amended Complaint.

A. *Definition of "medical emergency" (Section 3203).*

36. Section 3203 defines the term "medical emergency" in a way that does not make clear to the practicing physician when s/he will risk incurring license suspension or revocation or other liability by terminating a pregnancy because s/he may interpret the definition differently from the prosecuting attorney.

37. The definition of "medical emergency" is unduly narrow and, as such, does not comport with either generally accepted medical definitions and usage or with Pennsylvania statutory and common law definitions of the term.

38. The Act's definition of "medical emergency" may cause the physician to practice medicine in a manner contrary to the physician's best medical judgment in instances where a delay in the abortion procedure will

have significant adverse effect on a woman's health but where an immediate abortion is not necessary to avert the death of the woman or to prevent substantial and irreversible loss of a major bodily function.

39. The Act's definition of "medical emergency" may cause the physician to refuse to perform an abortion when, in the exercise of judgment and in the absence of the provision, s/he would do so, thereby interfering with the patient's ability to obtain an abortion.

B. *Informed Consent (Sections 3205 and 3208).*

40. Except in a "medical emergency" as defined in Section 3203, Section 3205 requires that a doctor wait twenty-four hours between the time a woman is supplied information which the Act declares to be necessary for informed consent and the performance of the abortion, under penalty of license suspension or revocation or criminal liability.

41. Of 67 counties of Pennsylvania, 10 have no practicing obstetricians/gynecologists. In 22 counties, 5 or fewer obstetricians/gynecologists practice and in many of these locations no physicians perform abortions. 97.8% of all abortions in the state are performed in only 8 counties: Allegheny, Dauphin, York, Lehigh, Philadelphia, Delaware, Chester and Montgomery Counties. Women from every county in the Commonwealth, as well at 2975 women from other states and territories, obtained abortions in Pennsylvania in 1988.

42. Because of the scarcity of providers and a desire for privacy, many women travel long distances at considerable expense to obtain abortions. Many women are forced to travel in excess of 50 miles, or 2 hours travel time, to reach a provider. For women in remote, rural counties of the state, this distance can exceed 100 miles and 4 hours travel time, each way.

43. Because of shortages of medical personnel and

other resources, plaintiff physicians and medical providers do not provide abortion services every day. The twenty-four hour waiting period will therefore create delays in excess of twenty-four hours, endangering women's health. Conflicts with patients' personal schedules will compound these delays.

44. The 24-hour waiting period will require that women make two or more, often long-distance, roundtrips to their physicians or medical providers, thereby increasing their travel and lodging costs, child care expenses, time lost from work for themselves and others wishing to accompany them on the visit and physical and emotional strain.

45. Prior to seeking medical treatment, women who seek abortions have given thought and moral deliberation to the matter and have concluded in accordance with their own life circumstances that an abortion is in their best interest. Therefore, the 24-hour delay mandated by the statute serves no legitimate state interest.

46. In some circumstances, delaying an abortion for twenty-four hours will jeopardize a woman's health but not so severely as to fall within the medical emergency exception, thereby requiring the physician to postpone the abortion procedure contrary to his or her best medical judgment and to the woman's interest in health and personal security.

47. The 24-hour waiting period imposes additional trauma upon women who seek abortions because they are the victims of rape or incest, and upon young women who generally delay seeking medical care longer than adult women and who are subject to other delays as a result of the operation of Section 3206 of the Act.

48. The 24-hour waiting period constitutes a direct and unwarranted interference with the physician-patient relationship in that it prevents the physician and patient

from deciding that an abortion after a delay of less than twenty-four hours is in the patient's best interest.

49. Section 3205(a)(1) requires the attending or referring physician orally to supply certain information to the woman. By prohibiting the delegation of this task to another qualified professional, this requirement interferes with a woman's abortion decision, by increasing costs, constricting medical judgment, and preventing the proper allocation of scarce medical resources, while serving no legitimate interest.

50. Section 3205(a) also requires that specific categories of information, declared to be necessary for "informed consent," be provided to each woman seeking an abortion.

51. Sound medical practice requires that a physician or other provider carefully tailor the information communicated to each patient in the informed consent dialogue. Section 3205 eliminates the exercise of discretion and may cause a physician to provide information contrary to his or her best medical judgment in his or her explanation of the procedure and its attendant risks.

52. Pennsylvania law governing informed consent for surgical procedures other than abortions allows the physician to exercise sound medical discretion in determining the nature and extent of the information provided to the patient consistent with the patient's particular needs.

53. Section 3205(a)(2) requires that the physician or the physician's designated agent supply legal advice concerning the potential availability of medical assistance benefits and liability for child support which is not the physician's, or his or her agent's, area of expertise.

54. Sections 3205(a)(2) and 3208 require that a physician or his or her designated agent inform a woman that she has a right to printed materials that describe the

fetus at two week gestational increments, contain "pictures" of a fetus at two week gestational increments, and list agencies that offer alternatives to abortion.

55. Such a requirement will compel physicians and medical providers to act contrary to their best medical judgment by furnishing information which in some cases will cause substantial psychological harm to their patients.

56. Sections 3205(2) and 3208 severely and unduly interfere with the quality of the physician-patient relationship by calling into question the integrity of the physician and undermining his or her ability or the ability of the physician's agent to counsel the patient on an individualized basis.

57. These sections violate the right of free speech of physicians or their agents by compelling them to furnish information prepared and provided by the Commonwealth, even when contrary to their own religious or conscientious beliefs, or even when provisions of the information may violate professional standards.

C. *Parental Consent/Judicial Bypass (Section 3206).*

58. 11.6% of all women having abortions in Pennsylvania in 1988 were under the age of 18.

59. Except in the case of a "medical emergency" as defined by Section 3203 of the Act, Section 3206 establishes a requirement that one parent give his or her informed consent to an abortion for any minor daughter who is less than 18 years of age and who is not emancipated, unless a court determines that she is mature and capable of making her own decisions or, if immature, that an abortion is in her best interest.

60. This section does not set forth what procedures and documentation are necessary for obtaining legally valid parental informed consent. Physicians and facilities, therefore, will be subject to professional

sanction and criminal liability for acts or omissions a prosecutor or court may later deem proscribed by the Act.

61. Because of its vague and ambiguous language, Section 3206 has the purpose and effect of discouraging physicians and facilities from providing abortions for unemancipated minors, or causing unnecessary and possibly dangerous delay in performing such abortions.

62. Under Section 3205, obtaining the "informed consent" of a woman seeking an abortion requires that the performing or referring physician, a qualified physician assistant, health care practitioner, or a technician to whom the responsibility has been delegated, orally convey information regarding the procedure, the risks and alternatives to the procedure and other information a reasonable patient would consider material to the abortion decision. Additionally, section 3205 provides that the woman certify in writing prior to the abortion that she has been provided such information.

63. Because the provisions of Section 3205 regarding "informed consent" also apply to Section 3206's provision for parental informed consent, physicians and facilities will be required to comply fully with Section 3205's provisions, including the requirements of separate personal counseling with, and certified proof of, a parent's consent to an abortion for a minor daughter.

64. Particularly where a parent is prepared to consent but, because of work schedules, illness or other circumstances finds it difficult to receive personal counseling, Section 3206 is unduly burdensome and is likely to cause dangerous and expensive delay in the abortion procedure and dramatically to increase the cost of obtaining the medical service.

65. Some parents, although willing to consent to an abortion for their minor daughter, are not willing to

accompany her to the medical provider nor to provide assistance to her which creates an appearance that the parent supports the daughter's choice.

66. The operation of the informed consent provision in Section 3206 will interfere with family integrity in that it will force previously unwilling parents to consent and to papticipate in the minor's abortion decision.

67. Section 3206(f), sets forth the procedure by which an unemancipated minor may obtain judicial authorization for an abortion in the absence of parental consent ("the judicial bypass"). It provides that a minor woman may apply to the Court of Common Pleas for a determination of whether she is mature and capable of giving informed consent or, if she is immature and incapable of consent, whether having an abortion would be in her best interests.

68. This section, if implemented, will cause dangerous delays and will increase the risk of invasions of privacy of pregnant minors choosing the judicial bypass procedure. Neither the trial courts nor the appellate courts of the Commonwealth are prepared to effectuate this procedure and to assure expedition and confidentiality. No implementing rules have been issued by the Supreme Court of Pennsylvania. The common pleas courts of many counties are now straining under the burden of overloaded dockets and a shortage of judges and court personnel. Under these circumstances, pregnant minors availing themselves of the judicial bypass procedure cannot be assured that their rights to confidentiality and expedited consideration will be preserved. It is the Commonwealth's burden to demonstrate that its courts are prepared to implement this section to assure that the rights of minor women seeking abortions are protected.

D. *Husband Notification (Section 3209).*

69. Except in the case of a "medical emergency" as defined by Section 3203 of the Act, Section 3209 prohibits a physician from performing an abortion upon a woman if that woman has not provided him or her with a signed statement that she has notified her spouse that she intends to have the procedure performed, with the exceptions that no such statement is required if the spouse is not the father of the fetus, the spouse "after diligent effort" could not be found, the pregnancy is the result of spousal sexual abuse, or the woman has reason to believe that notifying the spouse is "likely" to result "in the infliction of bodily harm upon her by her spouse or by another." While the statement need not be notarized, it must "bear a notice that any false statements made therein are punishable by law." The woman making a false statement is thus subject to the criminal penalties of a misdemeanor of the third degree. The physician is subject to license suspension or revocation and civil or criminal penalties for violation of this provision.

70. This provision purports to further "the Commonwealth's interest in promoting the integrity of the marital relationship and to protect a spouse's interest in having children within the marriage and in protecting the prenatal life of that spouse's child . . . ."

71. None of these "interests" are sufficiently compelling to warrant a burden on the woman's right to an abortion. Further, this provision is not narrowly tailored to further the purported "interests" and is an unjustifiable governmental intrusion into the privacy of the marital relationship.

72. The vast majority of married woman consult with their husbands when deciding whether to terminate a pregnancy that is the product of that marriage. When they do not, it is for legitimate reasons many of which are not covered by the statutory exceptions including:

dysfunctional marital relationships, separations, the woman's fear of violence against her children, fear that her husband will physically prevent her from having an abortion or cut off financial support for her and her children and/or religious or ethical differences between spouse. In a healthy marital relationship, reproductive decisions can and will be made without the intrusion of the Commonwealth, and such intrusion is likely to damage the integrity of the marital relationship.

73. No third party, including the spouse, has an interest the Commonwealth may further as against the woman's right to decide to have an abortion.

74. The requirement of Section 3209 that a woman notify her husband is likely to cause delay in the scheduling of a woman's abortion when her husband may be unavailable for notification at the time she needs to have the abortion performed. If the spouse is living apart from the woman, she will be required to delay the medical procedure for additional time while she makes a diligent effort to locate him.

75. In some circumstances, the delay caused by the operation of Section 3209 will jeopardize a woman's health, but not so severely as to fall within the definition of "medical emergency" as defined by Section 3203 of the Act, thereby causing, the physician to postpone the abortion in violation of his ethical and professional standards.

76. Section 3209 allows an exception where the spouse cannot be located but only after "diligent effort" has been made to find him. The term "diligent effort" is undefined thus subjecting the woman who invokes the exception in a certified statement to her physician to criminal sanction for violating a vague and ambiguous provision.

77. Section 3209 provides for an exception where the woman "has reason to believe that the furnishing of

notice to her spouse is likely to result in the infliction of bodily harm upon her by her spouse or another individual."

78. This provision does not specify what factors the woman is authorized to consider in determining whether bodily harm is "likely." The provision therefore threatens women who invoke this exception by certified statement to their physicians with criminal sanction without providing any guidance as to what constitutes a reasonable belief she is likely to be harmed as a result of compliance with the spousal notice requirement.

79. Women who have been harmed are not always able to determine when and for what reason they will be harmed again. A woman who may not think it is "likely" that she will be physically harmed, may nonetheless choose not to subject herself to the risk.

80. A woman seeking an abortion is not necessarily in the best position to know all of the psychological factors that might trigger bodily harm to her. Section 3209 is an unjustifiable burden on the woman's right to have an abortion, an intrusion into the physician-patient relationship and into the marital relationship, and fails to further the asserted Commonwealth interests.

81. Section 3209 provides no exception for and, accordingly, no protection against non-physical coercion by husbands. Even if a husband opposed to a woman's attitudes regarding an abortion has threatened to publicize her choice, to retaliate economically, to retaliate in future child custody proceedings, or has threatened psychological intimidation or harm, the Commonwealth provides no exception to the husband notification requirement. In many circumstances, therefore, Section 3209 grants husbands an effective means of intimidation to burden unduly women's reproductive choices.

82. The fact that a woman is pregnant, the fact that

she is considering an abortion, and the fact that she has chosen to obtain an abortion are personal matters of the most intimate, sensitive and private nature. Such facts are protected by longstanding and powerful expectations of confidentiality. By forcing women to disclose those facts, Section 3209 offers no protection against arbitrary, irresponsible or malicious dissemination by husbands of personal information which their wives have been forced by the Commonwealth to disclose to them.

83. A variety of medical and surgical interventions, including, but not limited to, vasectomies, prostate operations and chemotherapy can affect the capacity of males to have children within marriage.

84. The Commonwealth places no limits on the ability of a husband to make choices that will or may affect his own reproductive capacity without notifying his wife.

85. The Commonwealth of Pennsylvania's husband notification requirement is based on an invidious, outmoded and stereotypical conception of women's roles within marriage as being responsible to their husbands for their reproductive status and choices.

86. Imposing a spousal notice requirement upon women's reproductive choices, but not upon men's abridges women's right to equality under the law and denies women equal protection of the law.

E. *Determination of Gestational Age (Section 3210).*

87. Except in the case of a medical emergency as defined by Section 3203 of the Act, Section 3210 requires that physicians performing an abortion must "perform or cause to be performed such medical examinations and tests as a prudent physician would consider necessary to make or perform in making an accurate diagnosis with respect to gestational age."

88. The physician must then make a report as to the tests conducted and the results thereof or be subject to

license suspension or revocation and criminal sanction. This requirement subjects physicians to harsh penalties without specifying the examinations to be performed and is an unjustified intrusion into the physician-patient relationship.

89. Although a physician is able through discussion and physical examination, to date a pregnancy for purposes of choosing an abortion technique, modern technology now enables physicians to determine with extreme accuracy gestational age of the fetus.

90. Rather than requiring the physician to make a determination of the gestational age of the fetus sufficient to perform his medical duties in accordance with ethical and professional standards, Section 3210 will require physicians to perform unnecessary tests, that typically cost $250 to $300, but that may cost far in excess of that amount, solely to comport with the Act's requirement. The use of these tests will not to promote patient health, in violation of the physician's right to due process and privacy rights and in violation of the privacy rights of his patient.

F. *Reporting requirements (Sections 3207 and 3214).*

91. Section 3207(b) requires, under threat of a daily fine of $500, that all facilities in the Commonwealth, including physician's offices, at which abortions are performed, file and update reports disclosing the name and address of the facility, affiliated or subsidiary facilities and other facilities having contemporaneous ownership or directorship. These reports will be open to public inspection if filed by facilities that received any state-appropriated funds for any purpose in the twelve months prior to the filing of the report.

92. Section 3214(f) requires each facility to file quarterly reports showing the total number of abortions performed per trimester of pregnancy, under threat of license suspension or revocation and criminal liability.

These reports will be open to public inspection if filed by facilities that received any state-appropriated funds for any purpose in the twelve months prior to the filing of the report.

93. This conditioning of confidentiality upon receipt of state-appropriated funds is unconstitutional and serves no legitimate Commonwealth interest.

94. It is reasonable to fear violent actions by abortion opponents because, in the Commonwealth and throughout the United States, there have been numerous incidents of violence and harassment directed at abortion providers. These incidents include picketing with intent to block the entrances of abortion facilities and prevent abortions, building takeovers, firebombing, kidnappings, written and telephones threats and malicious cancellation of telephone lines.

95. Disclosure of reports filed by facilities receiving state-appropriated funds has the purpose and effect of penalizing physicians who perform abortions or medical providers by exposing them to violent actions, harassment or interference with business relationships by persons who oppose abortion. Women who seek abortions from these facilities may also be exposed to violent actions or harassment, thereby penalizing them for exercising their constitutional right to choose to have an abortion.

96. This disclosure discourages others from associating with abortion providers for fear that disclosing their affiliation will subject them to an increased risk of violent actions, harassment, or interference with business relationships by persons who oppose abortion.

97. Section 3214(e)(3) requires that reports of individual abortions be made available to public officials for use in their enforcement of the Act. This provision has the purpose and effect of discouraging physicians

from providing abortions for fear that the physician will be subject to enforcement proceedings because enforcement officials disagree with the physician's best medical judgment as set forth in the report.

98. Sections 3214(a) and 3214(h) establish reporting requirements for individual abortions and abortion complications. The definition of "medical complication" in 3214(h) is vague and overbroad, and the matters required to be reported in connection with a complication report serve no public health-related purposes.

99. Section 3214(a) requires that a report of each abortion performed be filed containing, among other things, identification of the referring and performing physicians. Such information serves no public health purpose and serves only to intimidate and deter physicians from referring or performing abortions for fear of public exposure and harassment.

100. Section 3214(a) requires a physician who has performed an abortion pursuant to Section 3211 to report the basis for his medical judgment that the abortion was necessary to prevent either the death of the woman or to prevent the substantial and irreversible impairment of a major bodily function. Under this section, a physician who has been excused from compliance from any provision because the abortion was performed due to medical emergency must report the basis of his or her medical judgment that a medical emergency existed. Further, this provision requires that all physicians report the tests performed and the results of those tests to determine gestational age, and that each physician report whether the abortion was performed on a married woman, if so, whether the woman informed her spouse, and if she did not, the reason she did not. This provision serves no public health purpose, is an unjustified intrusion into the physician-patient

relationship, interferes with the physician's exercise of his or her best medical judgment, and will result in increased costs, thereby creating an undue burden on women who seek abortions.

101. Section 3214(h), requiring that a physician's report of all complications resulting from an abortion be filed with the Department of Health, provides that the name and address of the facility where the abortion was performed must be listed. This provision exposes abortion facilities to harassment and unfair treatment by Commonwealth officials as well as persons opposed to the performance of abortions.

102. Section 3214(e)(1) states that the Department of Health shall prepare a comprehensive annual statistical report of the non-public information provided under sections 3214(a) and 3214(h). However, section 3214(e) states only that the Department's report shall not lead to the disclosure of the identity of any person filing a report or about whom a report is filed.

103. The language of this section, taken together with sections 3214(a) and 3214(h), could be interpreted to permit the Department in its annual report to identify performing and referring physicians of abortions, as well as the facilities in which the abortions were performed, exposing those identified to harassment or violence and, in the case of physicians, loss of hospital and other professional privileges.

104. Identification of physicians and facilities in connection with reports filed pursuant to sections 3214(a) and 3214(h) may result in heightened harassment and abusive treatment. Much of the information sought in these sections serves no health-related goal, is vaguely defined and is intended to discourage the performance of abortions.

VI. *First Cause of Action*

105. Plaintiffs hereby incorporate by reference Paragraphs 1 through 104 above.

106. The Act denies the right of privacy guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution in that it:

(a) imposes direct, substantial, and undue burdens on the exercise by women in Pennsylvania of their right to choose to terminate a pregnancy by means of abortion; and

(b) imposes direct, substantial and undue burdens on the right of a physician to practice medicine and to provide counseling, education and other services in accordance with that physician's medical judgment and with currently accepted medical standards.

VII. *Second Cause of Action*

107. Plaintiffs hereby incorporate by reference paragraphs 1 through 106 above.

108. The criminal and other penalty provisions of the Act fail to provide adequate notice as to the precise nature of conduct prohibited, thereby inhibiting the exercise of constitutionally-protected rights and inviting selective prosecution. They are, therefore, void for vagueness because they deprive plaintiffs and their patients of the due process of law, in violation of the Fourteenth Amendment to the United States Constitution.

VIII. *Third Cause of Action*

109. Plaintiffs hereby incorporate by reference paragraphs 1 through 108 above.

110. The Act denies the right of informational

privacy guaranteed by the United States Constitution and by the Pennsylvania Constitution in that it requires plaintiffs and their patients to disclose personal matters of the most intimate, sensitive and private nature which are protected by longstanding and powerful expectations of confidentiality.

IX. *Fourth Cause of Action*

111. Plaintiffs hereby incorporate by reference paragraphs 1 through 110 above.

112. Section 3209 of the Act deprives plaintiffs' patients of equal protection under the law guaranteed by the Fourteenth Amendment to the United States Constitution and Article I §§ 1 and 26 of the Pennsylvania Constitution and abridges equality of rights under the law in violation of Article I §§ 28 of the Pennsylvania Constitution because it imposes burdens upon women's reproductive choices that are not imposed upon the reproductive choices of men.

X. *Fifth Cause of Action*

113. Plaintiffs hereby incorporate by reference paragraphs 1 through 112 above.

114. Sections 3206 and 3209 of the Act deprive plaintiffs of their rights to familial and marital integrity by forcing family members -- parents, children or spouses -- to participate in decisions in a manner contrary to their own moral judgments and best interests in violation of the First and Fourteenth Amendments to the United States Constitution.

XI. *Sixth Cause of Action*

115. Plaintiffs hereby incorporate by reference paragraphs 1 through 114 above.

116. The Act violates plaintiffs' rights under the First and Fourteenth Amendments to the United States

Constitution by compelling medical providers to communicate the Commonwealth's ideology and by requiring women seeking abortions to receive information setting forth the Commonwealth's view regarding abortion.

XII. *Irreparable Harm*

117. If the Act is allowed to take effect, plaintiffs and their patients will be subjected to immediate and irreparable injury for which no adequate remedy at law exists in the following respects:

(a) Plaintiffs will face criminal prosecution, license suspension or revocation and civil liability if they do not comply with the Act;

(b) Patients whose interests the plaintiffs represent will be discouraged, impeded and possibly prevented from obtaining the abortions they desire, and thus suffer physical, emotional, and other harm;

(c) The right of privacy accorded by the United States Constitution to a woman's decision whether to terminate a pregnancy will be violated for women seeking abortions in Pennsylvania;

(d) The right to equal protection under the law guaranteed to women by the United States Constitution and the Pennsylvania Constitution and the right to equality of rights under law guaranteed by the Pennsylvania Constitution will be violated;

(e) The rights of familial integrity, marital integrity and free speech accorded by the United States Constitution will be violated by operation of the Act;

(f) Minors in Pennsylvania will suffer emotional and physical harm to themselves and irreparable

damage to their families because of the parental consent provisions in the challenged statutes; and

(g) The right of plaintiff physicians to practice medicine and communicate with their patients in accordance with their best medical judgment and the right of their patients to receive complete, confidential and unbiased information will be violated.

WHEREFORE, plaintiffs ask this Court:

A. To issue a temporary restraining order or preliminary injunction restraining defendants, their employees, agents and successors from enforcing the Abortion Control Act;
B. To enter an order certifying this action as a class action for each class described herein and naming the respective parties as class representatives;
C. To enter judgment declaring the amendments to the Abortion Control Act to be in violation of the United States Constitution and permanently enjoining the enforcement of its provisions;
D. To enter judgment declaring the amendments to the Abortion Control Act to be in violation of the Pennsylvania Constitution;
E. To award plaintiffs their costs and attorneys' fees pursuant to 42 U.S.C. §§ 1988; and
F. To grant such other and further relief as this Court shall find just and proper.

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, et al.	:	**CIVIL ACTION NO. 88-3228**
v.	:	
ROBERT P. CASEY, et al.	:	

ORDER

HUYETT, J. JANUARY 11, 1990

Upon consideration of the parties' respective positions as expressed at the conference on this date attended by Thomas E. Zemaitis, Esquire, and Kathryn Kolbert, Esquire, attorneys for plaintiffs, and Kate L. Mershimer, Esquire, attorney for defendants, IT IS ORDERED that this court's preliminary injunction of May 23, 1988 in this action is clarified as follows:

Paragraph 3 of the preliminary injunction, enjoining the enforcement of certain provisions of Section 3214(a) of the Act applies and will continue to apply to Section 3214(a) as amended by the 1989 amendments to the Act. Act of November 17, 1989, No. 64, amending 18 Pa. Cons. Stat. Ann. §§ 3201-20.

Paragraph 6 of the preliminary injunction, enjoining defendants from implementing or enforcing any provision of the Pennsylvania Abortion Control Act of 1982 that contains the term "medical emergency" as defined in Section 3203 of the Act applies and will continue to apply to all provisions of the Act that contain the term "medical emergency," including, but not limited to, the

following provisions amended or added by the 1989 amendments to the Act: Sections 3205, 3206, 3209, 3210 and 3211(c).

IT IS SO ORDERED.

/s/ _____
Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA; REPRODUCTIVE HEALTH AND COUNSELING CENTER; WOMEN'S HEALTH SERVICES, INC.; WOMEN'S SUBURBAN CLINIC; ALLENTOWN WOMEN'S CENTER; AND THOMAS ALLEN, M.D., on behalf of himself and all others similarly situated;	:	**CIVIL ACTION**
Plaintiffs,	:	
v.	:	**CLASS ACTION**
ROBERT P. CASEY, N. MARK RICHARDS, ERNEST PREATE, JR., personally and in their official capacities, and MICHAEL D. MARINO, personally and in his official capacity, together with all others similarly situated,	:	
Defendants.	:	

DEFENDANTS CASEY, RICHARDS, AND PREATE'S ANSWER TO THE AMENDED COMPLAINT

Defendants, Governor Robert P. Casey, Secretary of Health N. Mark Richards, and Attorney General Ernest Preate, by their counsel, submit the following Answer to the Amended Complaint in the above-captioned matter:

1-4. Paragraphs 1 through 4 contain conclusions of law that require no response; to the extent they are deemed factual, however, they are DENIED.

5-9. Paragraphs 5 through 9 are ADMITTED.

10. Paragraph 10 states a conclusion of law that requires no response.

11. Paragraph 11 is ADMITTED.

12. Paragraph 12 states a conclusion of law that requires no response.

13. It is ADMITTED that Robert P. Casey is the Governor of Pennsylvania. The remainder of Paragraph 13 states conclusions of law that require no response.

14. It is ADMITTED that N. Mark Richards is the Secretary of Health for the Commonwealth of Pennsylvania. The remainder of Paragraph 14 states conclusions of law that require no response.

15. It is ADMITTED that Ernest Preate, Jr. is the Attorney General of Pennsylvania. The remainder of Paragraph 15 states conclusions of law that require no response.

15. It is ADMITTED that Michael D. Marino is the District Attorney for Montgomery County, Pennsylvania. The remainder of Paragraph 16 states conclusions of law that require no response.

17. Paragraph 17 states conclusions of law that require no response.

18. Paragraph 18 is ADMITTED.

19-21. Paragraphs 19 through 21 state conclusions

of law that require no response; to the extent they are deemed factual, however, they are DENIED.

22-24. Paragraphs 22 through 24 state conclusions of law that require no response; to the extent they are deemed factual, however, they are DENIED.

25. It is ADMITTED that in 1988, 50,786 abortions were performed in Pennsylvania and reported to the Pennsylvania Department of Health. As to the remainder of the averments in Paragraph 25, defendants, after reasonable investigation, lack sufficient knowledge or information to form a belief as to the truth of the averments.

26. Paragraph 26 is ADMITTED with the exception that 6.1%, rather than 6.2%, of the abortions performed in Pennsylvania in 1988 were during the second trimester.

27. It is ADMITTED that an abortion performed earlier in a pregnant woman's term is safer than an abortion performed later in the term from the standpoint of mortality. As to the remainder of Paragraph 27, defendants, after reasonable investigation, lack sufficient knowledge or information to form a belief as to the truth of the averments because of the vagueness of the term "extremely safe".

28. Paragraph 28 is ADMITTED in part. It is ADMITTED that delay in performance of an abortion generally increases the health risk that women face in connection with the procedure to some degree, but it is further ADMITTED that such increased risks are not necessarily significant. As to the remainder of this paragraph, defendants lack sufficient knowledge to form a belief as to the truth of the averments.

29. As to the averment that physicians practicing at clinics operated by the plaintiffs are subject to the criminal and civil penalties contained in the Abortion Control Act of 1982, as amended, [hereinafter the "Act"],

such averments state conclusions of law that require no response. As to whether such physicians refer women to other physicians for abortions, defendants lack sufficient knowledge or information to form a belief as to the truth of the averment. The remainder of paragraph 29 is ADMITTED.

30-31. Defendants, after reasonable investigation, lack sufficient knowledge or information to form a belief as to the truth of the averments in Paragraphs 30 and 31.

32. It is DENIED that plaintiffs provide abortion services to women who need immediate abortions due to a medical emergency. As to whether the plaintiffs provide abortion services to women who travel long distances to obtain such abortions, defendants are unable to respond due to the vagueness of the term "long distances." As to the remainder of the averments in Paragraph 32, defendants, after reasonable investigation, lack sufficient knowledge or information to form a belief as to the truth of the averments.

33. Paragraph 33 states a conclusion of law that requires no response; to the extent it is deemed factual, however, it is DENIED.

34. As to the averment that the Act is the only provision of law enacted by the General Assembly that provides detailed regulation of a particular surgical procedure, such averment states a conclusion of law that requires no response. The remainder of Paragraph 34 is DENIED.

35-39. Paragraphs 35-39 state conclusions of law that require no response; to the extent they are deemed factual, however, they are DENIED.

40. Paragraph 40 states a conclusion of law that requires no response.

41. Paragraph 41 is ADMITTED to the extent that plaintiffs have provided statistical information concerning M.D.s. Nevertheless, plaintiffs have not provided

information about D.O.s who are also obstetricians/ gynecologists.

42. It is ADMITTED that some women who seek to obtain an abortion in Pennsylvania may have to travel distances that could range between 50 to 100 miles. Otherwise, defendants, after reasonable investigation, lack sufficient knowledge or information to form a belief as to the truth of the averments.

43. Defendants, after reasonable investigation, lack sufficient knowledge or information to form a belief as to the truth of the averments and, therefore, they are DENIED.

44. It is DENIED that women necessarily will be required to take two trips to plaintiff providers or other medical providers due to the 24-hour waiting period. Otherwise, as to the remainder of the averments in Paragraph 44, defendants, after reasonable investigation, lack sufficient knowledge or information to form a belief as to the truth of the averments.

45. As to the allegation that the 24-hour waiting period mandated by the Act serves no legitimate state interest, such averment states a conclusion of law that requires no response. To the extent it is deemed factual, however, it is DENIED. As to the remainder of the averments in Paragraph 45, defendants, after reasonable investigation, lack sufficient knowledge or information to form a belief as to the truth of the averments.

46-47. Defendants, after reasonable investigation, lack sufficient knowledge or information to form a belief as to the truth of the averments and, therefore, they are DENIED.

48. Paragraph 48 is DENIED.

49. Paragraph 49 states a conclusion of law that requires no response. To the extent the averments are deemed factual, however, they are DENIED.

50. Paragraph 50 states conclusions of law that

require no response.

51. It is ADMITTED that sound medical practice requires a physician to have an informed consent dialogue with each patient. As to the remainder of the averments in Paragraph 51, these averments state conclusions of law that require no response; to the extent they are deemed factual, however, they are DENIED.

52. Paragraph 52 is ADMITTED with the exception that it is DENIED that the Pennsylvania law governing abortions prohibits a physician from exercising his or her sound medical discretion.

53-54. Paragraphs 53 and 54 state conclusions of law that require no response.

55. Paragraph 55 is DENIED.

56-57. Paragraphs 56 and 57 state conclusions of law that require no response; to the extent they are deemed factual however, they are DENIED.

58. Paragraph 58 is ADMITTED.

59. Paragraph 59 states conclusions of law that require no response.

60-61. Paragraphs 60 and 61 state conclusions of law that require no response; to the extent they are deemed factual, however, they are DENIED.

62. Paragraph 62 states conclusions of law that require no response.

63-64. Paragraph 63 and 64 state conclusions of law that require no response; to the extent they are deemed factual, however, they are DENIED.

65. Defendants, after reasonable investigation, lack sufficient knowledge or information to form a belief as to the truth of the averments.

66. Paragraph 66 states a conclusion of law that requires no response; to the extent it is deemed factual, however, it is DENIED.

67. Paragraph 67 states a conclusion of law that requires no response.

68. It is ADMITTED that the Supreme Court of Pennsylvania has not issued implementing rules regarding Section 3206(f) of the Act. It is DENIED that pregnant minors availing themselves of the judicial bypass procedure cannot be sure that their rights to confidentiality and expedited consideration will be preserved. Defendants lack sufficient knowledge or information to form a belief as to whether the Common Pleas courts of "many" counties are now straining under the burden of overloaded dockets and a shortage of judges and court personnel. Defendants are unable to ADMIT or DENY whether the trial courts or the appellate courts of the Commonwealth of Pennsylvania are prepared to effecttuate Section 3206(f) to assure expedition and confidentiality due to the vagueness of the term "prepared to effectuate"; nevertheless, defendants maintain that the trial and appellate courts of the Commonwealth of Pennsylvania are required to obey all Commonwealth laws. As to the remainder of the averments in Paragraph 68, they state conclusions of law that require no response; to the extent they are deemed factual, however, they are DENIED.

69. Paragraph 69 states a conclusion of law that requires no response.

70. Paragraph 70 states a conclusion of law that requires no response.

71. Paragraph 71 states a conclusion of law that requires no response; to the extent the averments are deemed factual, however, they are DENIED.

72. Defendants, after reasonable investigation, lack sufficient knowledge or information to form a belief as to the truth of the averments in Paragraph 72, with the exception that it is DENIED that Section 3209 will damage the integrity of marital relationships.

73. Paragraph 73 states a conclusion of law that requires no response; to the extent it is deemed factual,

however, it is DENIED.

74. As to plaintiffs' averments regarding possible delay when spouses are living apart, defendants, after reasonable investigation, lack sufficient knowledge or information to form a belief as to the truth of the averment. The remainder of Paragraph 74 is DENIED.

75. Defendants, after reasonable investigation, lack sufficient knowledge or information to form a belief as to the truth of the averment and, therefore, they are DENIED.

76. Paragraph 76 states a conclusion of law that requires no response. To the extent it is deemed factual, however, it is DENIED.

77. Paragraph 77 states a conclusion of law that requires no response.

78. Paragraph 78 states conclusions of law that require no response; to the extent they are deemed factual, however, they are DENIED.

79. Defendants, after reasonable investigation, lack sufficient knowledge or information to form a belief as to the truth of the averments in Paragraph 79.

80-82. Paragraphs 80 through 82 state conclusions of law that require no response. To the extent they are deemed factual, however, the averments are DENIED.

83. Paragraph 83 is ADMITTED.

84. Paragraph 84 states a conclusion of law that requires no response.

85. Paragraph 85 is DENIED.

86. Paragraph 86 states conclusions of law that require no response; to the extent they are deemed factual, however, they are DENIED.

87. Paragraph 87 states a conclusion of law that requires no response.

88. Paragraph 88 states a conclusion of law that requires no response. To the extent the averment is deemed factual, however, it is DENIED.

89. It is ADMITTED that modern technology now enables physicians to determine with extreme accuracy the gestational age of a fetus. The remainder of Paragraph 89 is DENIED is stated. It is ADMITTED that an experienced physician may be able, through discussion and physical examination, to generally determine the length of a pregnancy for purposes of choosing an abortion technique, but it is DENIED that all physicians will always be able to determine pregnancy lengths or gestational ages by such methods.

90. Paragraph 90 states conclusions of law that require no response; to the extent the averments are deemed factual, however, they are DENIED.

91-92. Paragraphs 91 and 92 state conclusions of law that require no response.

93. Paragraph 93 states a conclusion of law that requires no response. To the extent the averment is deemed factual, however, it is DENIED.

94. It is ADMITTED that abortion providers in the Commonwealth and the United States have experienced protests in various forms, including some of the methods identified in this paragraph. Otherwise, defendants, after reasonable investigation, lack sufficient knowledge or information to form a belief as to the truth of the averments in Paragraph 94.

95. It is DENIED that disclosure of reports filed by facilities receiving state-appropriated funds has the purpose and effect of penalizing physicians who perform abortions or medical providers by exposing them to violent actions, harassment, or interference with business relationships by persons who oppose abortion. As to the remainder of the averments in Paragraph 95, they state conclusions of law that require no response. To the extent such averments are deemed factual, however, they are DENIED.

96. Defendants, after reasonable investigation, lack

sufficient knowledge or information to form a belief as to the truth of the averments and, therefore, they are DENIED.

97-101. Paragraphs 97 through 101 state conclusions of law that require no response; to the extent they are deemed factual, however, they are DENIED.

102. Paragraph 102 states conclusions of law that require no response.

103-104. Paragraphs 103 and 104 state conclusions of law that require no response; to the extent they are deemed factual, however, the averments are DENIED.

105. Defendants hereby incorporate by reference their answers to Paragraphs 1 through 104 above.

106. Paragraph 106 states conclusions of law that require no response; to the extent the averments are deemed factual, however, they are DENIED.

107. Defendants hereby incorporate by reference their answers to Paragraphs 1 through 106 above.

108. Paragraph 108 states conclusions of law that require no response; to the extent the averments are deemed factual, however, they are DENIED.

109. Defendants hereby incorporate by reference their answers to Paragraphs 1 through 108 above.

110. Paragraph 110 states conclusions of law that require no response; to the extent the averments are deemed factual, however, they are DENIED.

111. Defendants hereby incorporate by reference their answers to Paragraphs 1 through 110 above.

112. Paragraph 112 states conclusions of law that require no response; to the extent the averments are deemed factual, however, they are DENIED.

113. Defendants hereby incorporate by reference their answers to Paragraphs 1 through 112 above.

114. Paragraph 114 states conclusions of law that require no response; to the extent the averments are

deemed factual, however, they are DENIED.

115. Defendants hereby incorporate by reference their answers to Paragraphs 1 through 114 above.

116. Paragraph 116 states conclusions of law that require no response; to the extent the averments are deemed factual, however, they are DENIED.

117. Paragraph 117 states conclusions of law that require no response; to the extent the averments are deemed factual, however, they are DENIED.

FIRST DEFENSE

The amended complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

The Abortion Control Act of 1982, as amended in 1988 and 1989, does not violate the Constitution of the United States.

THIRD DEFENSE

Plaintiffs cannot satisfy that prerequisite to preliminary or permanent injunctive relief.

FOURTH DEFENSE

The Complaint fails to state a case or controversy under Article III of the Constitution of the United States.

FIFTH DEFENSE

Suit against the defendants in their personal capacities is meritless, frivolous, or vexatious.

Respectfully submitted,

ERNEST D. PREATE, JR.
Attorney General

By: /s/_____
KATE L. MERSHIMER
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Date: January 25, 1990

STIPULATION OF UNCONTESTED FACTS

Plaintiffs and Defendants, by their respective undersigned counsel, hereby stipulate and agree that, solely for purposes of this litigation, the following facts are uncontested. This stipulation is made without prejudice to any party's right to challenge the relevance of any uncontested fact to the matters at issue in this litigation.

1. Plaintiff Thomas E. Allen is a physician licensed to practice medicine in Pennsylvania and is an Associate Clinical Professor in the Department of Obstetrics and Gynecology at the University of Pittsburgh. He graduated from the University of Pittsburgh School of Medicine. He is an emeritus staff member of Magee Women's Hospital, is on the Consulting Staff of Presbyterian University Hospital, and is Medical Director of Women's Health Services Incorporated. He has been a Diplomate of the American Board of Obstetrics and Gynecology since 1954, has been a Fellow of the American College of Obstetrics and Gynecology since 1955, and a Fellow of the Pittsburgh Obstetrical and Gynecological Society since 1974. From 1972 to the present, Dr. Allen has been active in planning, establishing and administering Women's Health Services, Pittsburgh's first free standing abortion clinic. From 1970 to 1979, he was active in establishing and contributing services to the Pittsburgh Free Clinic. Dr. Allen has a private obstetrical and gynecological practice with one other specialist.

2. Plaintiff Planned Parenthood of Southeastern Pennsylvania (PPSP) is non-profit corporation providing comprehensive family planning, medical and counseling services, including birth control education, pregnancy testing and counseling, gynecological care, first trimester

abortions and vasectomies at medical clinics in Philadelphia, Montgomery and Delaware counties. The Center City Philadelphia clinic offers these services Monday through Friday. Abortions are performed on Wednesdays, Thursdays, Fridays and Saturdays at PPSP's Center City Philadelphia Clinic.

3. PPSP performs approximately 2,800 first trimester abortions a year. The abortion procedure presently costs full-payment patients $240 if the woman is 12 weeks or less from her last menstrual period. All fees cover only the direct costs of the procedure, including personal counseling, medical testing and examination, the abortion procedure, medical supervision during the post-surgical recovery, and a post-abortion examination.

4. PPSP charges $180 for abortions for women who are on medical assistance but whose abortions are not reimbursable by the state.

5. PPSP accepts state medical assistance reimbursement in lieu of direct payment for abortions for victims of rape and incest, and for women with life-threatening conditions. In 1987, approximately 53 of the abortions performed at PPSP were reimbursed by the Commonwealth.

6. In 1987, PPSP performed 359 abortions for women under the age of 18.

7. When a woman believing she is pregnant presents herself at a PPSP clinic, she is given a pregnancy test and examined by a nurse practitioner or physician. Women who believe they have just recently become pregnant are offered early detection by means of a blood test or special urine test. Once it is determined that she is pregnant, the woman is encouraged to participate in an individual options counseling session with a PPSP counselor.

8. Options counselors are volunteers or staff

counselors who have completed a special training program under the supervision of PPSP counselors and other senior staff. This training program consists of 43 hours of group sessions that focus on factual information regarding adoption, abortion, contraception and referral resources. The course also gives participants the opportunity to evaluate, explore and share their attitude and feelings. The course is certified by Temple University. Participants receive four CEU credits for completion of the training.

9. Abortion counselors are members of PPSP's counseling staff or college student interns working under the supervision of a staff counselor. These counselors have college backgrounds and experience in a health or social services related field. All have had on-site training in pregnancy counseling and abortion care and are required to participate in ongoing in-service training.

10. Each PPSP client participates in an individual abortion counseling session on the day her procedure is scheduled. In this session, the counselor and the woman discuss the women's medical history, personal situation and feelings about abortion. The counselor explains the abortion procedure and its risks. Post-abortion care and contraceptive plans are also explored. If the client has been accompanied to the clinic by a person she wishes to involve in the counseling, that person will be included in part of this session. In some cases the abortion counselor will serve as the support person and accompany the woman through the procedure.

11. PPSP counseling sessions for minors are more extensive, to assure that minors are informed of all options, and are making a free and informed choice. In the course of the counseling session, minors are given detailed information on the procedure and its risks. Minor women are also counseled on future contraceptive care. When a minor does choose to involve a parent or

other supportive adult such as an aunt, guardian or older sibling, the counselor will first meet privately with the minor. Then, at the counselor's discretion and with the minor's consent, the parent or adult will be brought in for joint counseling.

12. Plaintiff Reproductive Health and Counseling Center (RHCC) is a for-profit corporation in Chester, Pennsylvania, which operates a clinic that performs approximately 2,900 first and early second trimester abortions annually.

13. RHCC employs a staff of approximately four physicians, one nurse practitioner, and two full-time and two part-time counselors. Abortions are performed on Tuesday, Wednesday and Friday afternoons. Additional counseling services are available by appointment.

14. First trimester abortions (up to 12 weeks from the last menstrual period) with local anesthesia cost RHCC clients $220. For abortions from 12 to 16 weeks from the last menstrual period the cost is $375, plus an additional $70 for a required ultrasound.

15. If RHCC's clients are eligible for medical assistance reimbursement, RHCC seeks reimbursement from the Commonwealth. In 1987, RHCC was reimbursed for no more than 20 such abortions. The reimbursement rate was $59.50 to the clinic and $81.50 to the physician.

16. Where a client receives medical assistance from the state but is not eligible for medical assistance for an abortion, RHCC provides a $50 cost reduction for first trimester abortions with local anesthesia.

17. While RHCC's clients come primarily from Delaware, Philadelphia, Chester and Bucks counties, approximately 3-4% of its clients come from areas in excess of three hours travelling time.

18. In 1987, RHCC performed abortions on 349 minors. Approximately 60% of these minors were

accompanied by a parent. All minors who choose not to be accompanied by a parent are required to bring a responsible adult with them to RHCC who will stay in the building as long as the minor is there and will accompany the minor home.

19. A women's first contact with RHCC is usually by telephone. Women who call RHCC may or may not have had a pregnancy test prior to calling. Before any appointment is made, she must have had a positive pregnancy test. Telephone counselors refer the woman to RHCC or to the agency closest to her home or place of work for the test.

20. If a woman has a positive pregnancy test and wants to terminate the pregnancy, RHCC will schedule an abortion appointment, usually within one week's time. If the woman indicates uncertainty about her decision, the telephone counselor will recommend her making an appointment to talk further with an options counselor about her decision.

21. RHCC strongly urges options counseling for all minors who have not involved their parents in the decision.

22. In an options counseling session, an RHCC counselor talks with the woman about her feelings about her pregnancy. The purpose of the session is to let the woman know about each of the three options available to her: carrying to term and keeping the child, carrying to term and giving the child up for adoption, and abortion. Where appropriate, the woman is urged to talk about these options with supporting family members and friends. The role of the counselor in these sessions is to support the decision of the woman and to provide information that would be necessary as she acts on her decision.

23. Pre-abortion counseling at RHCC, which each woman must participate in on the day of her abortion

and which is different from options counseling, involves a discussion of the woman's decision, a review of her medical history and a description of the risks and complications of the abortion procedure. The informed consent part of the session is done with groups of four women. The counselor describes the medical procedure, reviews the risks and complications, and answers questions or addresses concerns. RHCC also provides counseling to the person or persons who accompany women for abortions.

24. Pre-abortion and options counselors are trained and supervised by RHCC's head counselor who has nine years counseling experience.

25. Plaintiff Women's Health Services, Inc. (WHS) in Pittsburgh, Pennsylvania, is a non-profit health center providing fertility control education, pregnancy counseling, general counseling for individuals and couples, PMS counseling and treatment, contraceptive and gynecological care, public education and first and early second trimester abortions. WHS has a staff of approximately 75 people (including 8 physicians, 14 nurses and 33 counselors) and offers ongoing programs which are inclusive of approximately 2,700 client contacts a month.

26. Free pregnancy testing and counseling are available at WHS daily, Monday through Saturday. Abortions are performed Tuesdays, Fridays and Saturdays. Gynecology clinics are held on Wednesdays and Thursdays and any other day a patient's condition dictates. Once their pregnancy is diagnosed, clients usually schedule their abortions by telephone.

27. WHS provides approximately 12,900 free pregnancy tests and 7,000 first and early second trimester abortions each year. The abortion procedure as WHS costs as follows: $330 if twelve weeks or less from the last menstrual period; $430 if thirteen to fourteen weeks

from the last menstrual period; and $650 if fifteen to sixteen weeks from the last menstrual period. The fee includes the abortion procedure, laboratory testing, personal counseling, contraceptive care, pathological examination and medical supervision during the post-surgical recovery period.

28. If clients are eligible for medical assistance, WHS takes the necessary information and seeks reimbursement from the Commonwealth. Medical assistance is available only where the abortion is necessary because of life-threatening condition, or because the patient was a victim of rape or incest. In 1989, WHS was reimbursed for 46 such abortions.

29. Where a client receives medical assistance from the state, but is not eligible for medical assistance for an abortion, WHS nevertheless will discount the cost of the abortion. Last year WHS accommodated 1,170 clients who were unable to pay the full amount. WHS has never turned away any client seeking an abortion merely because of inability to pay.

30. WHS's clients come primarily from Allegheny County. In 1989, however, 909 of their abortion patients came from areas in excess of two hours traveling time (100 miles) from the clinic.

31. In 1989, 703 of WHS's abortion patients were under the age of 18. WHS presently encourages minors to bring a parent or other adult with them. Because WHS believes that parental involvement should be encouraged, clinic counselors are instructed to offer to speak with a minor's parents if the minor would prefer that to making direct contact herself. When minors refuse to inform their parents under any circumstances, their wishes are currently respected.

32. When a patient presents herself at the WHS clinic, she receives a pregnancy test and blood tests.

33. All women are required to have an individual

interview with a counselor on the day their abortion is to be performed. During this interview, a woman is counseled with respect to her options and her decision to have an abortion. Information regarding the risks and benefits of the abortion procedure and the patients' medical history is provided to her. In that connection, the counselor seeks to ensure that the woman is not unduly ambivalent about her decision and that she is not being coerced. In addition, the counselor discusses future contraceptive use with the patient.

34. If the client appears ambivalent about her decision, the counselor will refer her to one of the staff therapists and the abortion will be rescheduled to give the patient more time to consider her options. On occasion, the clinic will refuse to perform the abortion if convinced of a patient's continued ambivalence. This is rare.

35. When a parent accompanies a minor seeking an abortion, WHS first counsels the minor with respect to her options and her decision to have an abortion, and also provides her with information on future contraceptive use. The parent is then asked to join the minor, at which time the abortion procedure and possible complications are described. The counselor also answers any questions they might have. An informed consent form is then read out loud to the parent and minor while they follow along with their own copies. Each then signs the form in the medical record.

36. Options counseling is provided on the day of the procedure by WHS paraprofessional counselors who are selected on the basis of personal qualifications and maturity.

37. Extensive and intensive problem pregnancy counseling is available at WHS at no charge to clients either before or after a decision with respect to an abortion has been made, regardless of what that decision

may be. Personal counseling is also available after the abortion procedure and clients are encouraged to take advantage of the service.

38. At present, WHS's director of personal counseling holds a Ph.D.

39. Personal counselors at WHS are professional therapists who have at least five years of clinically supervised experience at the master's degree level or above.

40. Both paraprofessional and professional counselors at WHS are required to begin their employment with a week of classroom preparation, consisting of approximately 35 hours of medical and counseling orientation to the abortion clinic. This instruction is provided by the associate medical director, director of counseling, and director of clinic services.

41. The medical information to be presented is developed under the supervision of a physician, the WHS associate medical director. The counseling protocols are developed and presented under the supervision of the director of counseling who holds a Ph.D. from the University of Pittsburgh. WHS also has an ongoing training module comprised of monthly in-services and quarterly individual supervision.

42. Plaintiff Women's Suburban Clinic (WSC) is a non-profit corporation in Paoli, Pennsylvania which operates a health care facility providing abortions, ongoing gynecological services, mini-laparoscopies, pregnancy testing, community education and counseling.

43. WSC performs approximately 3,350 first trimester abortions a year. Abortions are performed Tuesdays, Wednesdays and Thursdays.

44. Of the approximately 3,350 abortions WSC performed in 1987, 410 (12.25%) were performed on minors.

45. The fee for an abortion at WSC is $275. At

present WSC accepts state medical assistance reimbursement for abortions for cases of rape, incest and life endangerment. Approximately 40 such claims per year are reimbursed by the Commonwealth.

46. Appointments for counseling and abortions are made through WSC telephone counselors. A positive pregnancy test is required before an abortion is scheduled.

47. Depending upon patient interest and availability, appointments are made at WSC in one of the following ways:

a. If a woman requests counseling and the abortion on the same day, the first available appointment is given. There is often a one to two week wait in obtaining such an appointment. Approximately 70% of the abortion appointments are scheduled this way.

b. If a woman wants to see a counselor prior to the day of her abortion, a pre-abortion counseling session is made. Approximately 30% of the abortion appointments are scheduled this way.

48. All minors who have not informed a parent about their decision to have an abortion are asked to come to WSC for pre-counseling before the abortion appointment. This is done to give adolescents the opportunity to explore with a counselor their reasons for not involving their parents and affords them the time and opportunity to reevaluate that decision prior to the abortion.

49. A woman who calls WSC and expresses concern and confusion over an unwanted pregnancy is offered an opportunity to see a counselor to discuss her options. Resource information is available for options including keeping the child, foster care and adoption. Information concerning maternity homes is also available for those women who wish to carry their pregnancy to term.

50. All counseling at WSC is provided on an

individual basis by a trained counselor. All but one member of WSC's counseling staff have master's degrees; the other has a bachelor's degree with several years experience in counseling and family planning. All have backgrounds in various fields of human services.

51. It is WSC's policy that in order to counsel effectively, without becoming overstressed by the emotional demands of the job, counselors are not permitted to provide counseling for more than 20 hours a week.

52. WSC encourages that partners and/or parents be seen by the counselor during or after the counseling session. However, all clients are first seen alone by a WSC counselor.

53. Counseling at WSC is provided in an objective, nonjudgmental manner. The client's decision is reviewed and explored. The counselor also reviews the client's medical history, describes the abortion procedure, reviews birth control methods and goes over the informed consent form. Disclosure of medical risks and benefits is made as well. Also, post-abortion information, including what to do in the event of an emergency, is reviewed.

54. For women who express ambivalence over their abortion decision, the WSC counselor will further explore the issues. If the counselor feels that the woman is not sure of her decision, it is suggested that she take some time to reevaluate her choice. Additional counseling is available to assist the woman to come to a decision with which she feels comfortable.

55. Plaintiff Allentown Women's Center (AWC) is a for-profit corporation in Allentown, Pennsylvania which operates a clinic providing pregnancy testing and counseling, contraceptive and gynecological care and first trimester abortions.

56. AWC provides approximately 5,300 pregnancy

tests and 4,000 first trimester abortions each year.

57. Abortions are performed at AWC three to five days a week, depending on patient need.

58. The abortion procedure at AWC costs $280, with additional charges for services such RhoGam shots for women more than 12 weeks' pregnant, and general anesthesia. The fee includes personal counseling both before and after the abortion, the abortion procedure, laboratory testing, and medical supervision during the post-surgical period.

59. For patients who receive medical assistance from the Commonwealth, AWC's fee for an abortion is $225.

60. In the case of those medical assistance patients who require an abortion because of a life-threatening disease or because they were victims of rape or incest, AWC has received reimbursement from the state, so that no fee was charged directly to the patient. In 1987, AWC received less than $4,000 in medical assistance funds.

61. AWC's patients come primarily from an 18-county area in northeastern Pennsylvania encompassing the counties of Lehigh, Northampton, Carbon, Schuylkill, Luzerne, Lackawanna, Lebanon, Berks, Bucks, Pike, Chester, Lancaster, Susquehanna, Wayne, Monroe, Montgomery, Columbia and Wyoming. Many of these counties have no clinics or hospitals at which abortions are performed, AWC being the closest facility to which the women can come.

62. In 1987, 563 of AWC's abortion patients were 17 or under. Of these, 3 were age 13; 32 were age 14; 64 were age 15; 178 were age 16; and 286 were age 17.

63. AWC encourages its minor patients to involve their parents in the abortion decision and to bring a parent or other supporting adult with them at the time of counseling and the procedure. Clinic counselors are routinely available to speak with a minor's parents.

When a minor refuses to inform her parents under any circumstances, AWC respects those wishes.

64. In most cases, appointments for counseling and abortions at AWC are made through AWC's telephone counselors. A positive pregnancy test is required before an abortion will be scheduled. When a woman calls requesting an abortion, the telephone counselor collects personal data, menstrual history and medical history. If the caller is a minor, the telephone interview is more extended to assure that the minor fully understands what she must do and what the procedure will involve.

65. When a telephone counselor makes an appointment, pre-abortion instructions are given to the woman. These instructions include what the woman must do and what she must bring with her on the day of the appointment.

66. Any woman who calls AWC and expresses concern and confusion over an unwanted pregnancy is offered an opportunity to see a counselor to discuss her options. Resource information is available for options, including keeping the child, foster care and adoption. Information concerning prenatal care, welfare and support services is also available for those women who wish to carry their pregnancy to term.

67. A nurse practitioner or physician's assistant is available to examine all women and, where necessary, provide a pregnancy test and blood work-up. In addition, all women are required to have an individual interview with a counselor on the day their abortion is scheduled. In this interview, the abortion procedure and other alternatives are explained to the woman.

68. If the patient appears ambivalent about her decision to have an abortion, the AWC counselor will review options and suggest that the patient take more time to consider her decision before terminating the pregnancy. On occasion, the clinic has refused to permit

an abortion if, after consultation, the counselor and the clinic supervisor are convinced of the woman's extreme ambivalence, coercion, or that she is otherwise overly distraught. Sometimes, they will refer these women to outside counselors. Such instances are infrequent.

69. When a parent does accompany a minor to the AWC clinic, a counselor will first meet privately with the minor. After assuring that the minor has reached her decision to have an abortion freely and without coercion, the counselor will give the minor the option to continue the counseling session jointly with her parent, or to be counseled separately. In either case, the counselor will describe the procedure and possible complications as well as answer any questions they may have. The minor is then asked to sign an informed consent form.

70. When a minor chooses not to have a parent involved, AWC counselors explore and encourage the involvement of a supporting adult. Counseling of a minor who has not informed her parents is more extensive and includes a discussion of why she has chosen not to involve her parents.

71. The options counseling provided on the day of the procedure at AWC is conducted by paraprofessional staff counselors who are selected on the basis of personal qualifications. Most of the counseling staff have bachelor's degrees. Two are presently working on master's degrees. All have backgrounds in various fields of human services.

72. All of AWC's counselors are required to begin their employment with at least a week of orientation. Instruction is provided by the Director, the nurse practitioner, the Patient Services Coordinator and other counseling staff. During the first several months of work, the new staff has frequent meetings either on an individual basis or as a group with administrative staff to reinforce correct integration of medical information and

continued development of interviewing skills.

73. All medical information is developed and presented under the supervision of a physician who is AWC's medical director. The counseling protocols are developed under the supervision of the Patient Services Coordinator.

74. On March 25, 1988, Act. No. 31, amending the Pennsylvania Abortion Control Act of 1982, 18 Pa.C.S.A. §§ 3201-20, was enacted. Act 31 was scheduled to take effect thirty days after enactment, or April 24, 1988.

75. On November 17, 1990, Act No. 64, further amending the Pennsylvania Control Act of 1982 was enacted. Act 64 was scheduled to take effect sixty days after enactment, on January 16, 1990.

76. In 1988, 50,786 abortions were performed in Pennsylvania and reported to the Pennsylvania Department of Health.

77. Of the 50,786 abortions performed in Pennsylvania in 1988, 47,548 (93.6%) were performed within the first three months of pregnancy.

78. Patients under the age of 18 accounted for 11.6%, or 5,888 of the abortions reported in Pennsylvania in 1988.

79. Of the 50,786 abortions performed in Pennsylvania and reported to the Department of Health, 47,802 were performed on Pennsylvania residents. Residents of other states and territories accounted for 2,975 abortions, and residents of other countries accounted for 9. Of the 1988 abortion patients residing in Pennsylvania, 15,269 (30%) resided in Philadelphia; 7,337 (14%) resided in Allegheny County; 2,863 (6%) resided in Montgomery County, 2,270 (4%) resided in Delaware County; and 2,141 (4%) resided in Bucks County.

80. Of the 50,786 abortions performed in Pennsylvania and reported to the Department of Health

in 1988, 1 was performed on women age 11 or less; 20 were performed on women age 12; 113 were performed on women age 13; 377 were performed on women age 14; 855 were performed on women age 15; 1,702 were performed on women age 16; 2,820 were performed on women age 17.

81. Of all abortions performed in Pennsylvania in 1988 and reported to the Department of Health, 50,256 involved a dilation, evacuation, and curettage procedure. Intrauterine saline instillation accounted for 471 abortions. Intrauterine prostaglandin instillation was the procedure for 41. One abortion was performed by a hysterotomy procedure, and none was performed by hysterectomy.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, et al.,	:	
	:	**C.A. 88-3228**
Plaintiffs	:	
	:	**(Judge Huyett)**
v.	:	
	:	**(Class Action)**
ROBERT P. CASEY, et al.,	:	
	:	
Defendants	:	

. . . . . .

SUPPLEMENTAL STIPULATION OF UNCONTESTED FACTS

Plaintiffs and Defendants, by their respective undersigned counsel, hereby stipulate and agree that, solely for purposes of this litigation, the following facts are uncontested. This stipulation is made without prejudice to any party's right to challenge the relevance of any uncontested fact to the matters at issue in this litigation.[1]

82. During 1989, minor women received abortions at plaintiff clinics as follows:

RHCC:	14 years and under -	27
	15-17 years -	267

[1] The parties previously filed 81 stipulations of uncontested facts on July 6, 1990. Subsequently, the parties stipulated to additional uncontested facts. For ease in reference, these supplemental stipulations will commence with paragraph 82.

AWC:	13 years old -	4
	14 years old -	22
	15 years old -	71
	16 years old -	160
	17 years old -	257
WSC:	12 years -	1
	13 years -	6
	14 years -	15
	15 years -	27
	16 years -	66
	17 years -	119
PPSEP	12 years -	2
	13 years -	14
	14 years -	27
	15 years -	80
	16 years -	122
	17 years -	189
WHS	12 years -	2
	13 years -	11
	14 years -	33
	15 years -	117
	16 years -	226
	17 years -	314

83. The risk of death from an abortion is dependent upon numerous factors, which factors include length of gestation, the type of procedure used to perform the abortion, the medical condition of the patient, and the skill of the physician performing the abortion.

85. WHS does not perform abortions after 17 weeks gestation.

86. At Magee, an ultrasound or sonogram is used to determine gestational age for pregnancies beyond 12

weeks.

87. At WHS, an ultrasound or sonogram is used to determine gestational age for any pregnancies beyond 14 weeks.

88. None of the plaintiffs have physicians who perform abortions without the physicians talking to the women prior to the abortion procedure.

89. Dr. Allen always does some counseling with his patient prior to a procedure and goes over the informed consent form with them.

90. Both WHS and Magee take a patient's history prior to performing an abortion.

91. In Dr. Allen's private practice, a patient completes a history form, which is sort of a health questionnaire, which is then amplified by a nurse's questions and further amplified by the physician when he sees her.

92. At WHS, the patient completes the history form, which is gone over by a counselor, and then the physician reviews it prior to performing the abortion.

93. Dr. Allen signs the Department of Health reporting forms for Magee but WHS uses his signature stamp for such forms.

94. No abortion can be performed on a minor at Magee without a parent's written consent.

95. Approximately 30% of Dr. Allen's patients seeking abortions are minors.

96. If a parent comes with a minor for an abortion procedure at Magee, Dr. Allen will speak to the parent too. If a parent comes with a minor for an abortion procedure at WHS, a counselor speaks to the parent.

97. When a parent accompanies a minor at WHS, the parent is involved in the counseling session, and particularly as to informed consent. Fifty percent of the minors who go to WHS are accompanied by a parent.

98. If a patient is ambivalent about having an

abortion and decides to postpone the procedure to have additional counseling, that will cause a delay in the performance of an abortion.

99. Plaintiffs encourage minors to bring their parents with them to the clinics and plaintiffs further encourage parental involvement with a minor's decision concerning an abortion.

100. There can be delays in performing an abortion on a minor who chooses to wait for her parent to be able to come to the clinic, which delay can exceed 2 weeks.

101. If a parent accompanies a minor, WHS explains the abortion procedure and possible complications to the minor and the parent, reads the informed consent provisions out loud, and has both sign it.

102. At WHS the average counseling takes 20 minutes.

103. WHS has a hot-line for women to call if they have any unusual symptoms or problems after an abortion to make sure there is immediate treatment.

104. Abortion is another "pregnancy outcome", in addition to births and fetal deaths, upon which the Health Statistics Division gathers information.

105. WHS provides information to the National Abortion Federation and the Alan Guttmacher Institute, including information concerning complications and the frequency that WHS's patients report them or WHS observes them.

106. There are various methods for determining gestational age, including physical examination, patient medical history, and ultrasound.

107. All plaintiffs make a determination of gestational age prior to performing an abortion.

108. The plaintiff clinics utilize the following methods of determining gestational age at the following

charges:

RHCC: Pelvic examination $10.00
Ultrasound $70.00

AWC: Medical history and pelvic examination - cost included in $280 fee for abortion procedure

Sonogram - $50.00

WSC: (1) Date of last menstrual period as told to WSC by client; and (2) Pelvic examination by physician performing abortion just prior to starting the abortion.

Occasionally, when a client is unsure of her last menstrual period or is late in her first trimester, the physician will do a pelvic examination separate from the procedure of abortion.

PPSEP: Pelvic sizing is performed by the physician prior to each abortion procedure. This is included in the fee for the abortion. An ultrasound is performed on all patients in their last two weeks of the first trimester to determine gestational sizing. This is done by a staff RN or Medical Assistant whose pay per hour ranges from $8.60 to $13.60. Each ultrasound requires approximately fifteen minutes to perform. Other staff involvement would include telephone scheduling of appointment at $9 per hour and intake

procedure at $9.80 per hour. Cost to patient is $25 - $50. The clinic would incur additional costs for supplies and equipment.

WHS: Prior to the abortion, the length of the pregnancy during the first fourteen weeks is determined by the length of time since the first day of the last normal menstrual period. This is verified by pelvic examination prior to the performance of the abortion. No fee is charged for this examination. If the woman is uncertain of the date of her last menses or the date indicates the pregnancy is greater than fourteen weeks LMP, the length of pregnancy is determined by a pelvic examination at a fee of $30 and ultrasonography at a fee of $100.

109. Plaintiffs are unaware of any free standing abortion clinics in Pennsylvania that perform pregnancy termination procedures after the 18th week of gestation.

110. As to WHS, free pregnancy tests and counseling are available Monday through Saturday, but 95% of counseling services are provided on the same day of the abortion.

111. If a medical emergency resulting from an abortion performed at WHS occurs, an ambulance is called to take that person to a hospital.

112. Planned Parenthood performs sonograms if the gestational age is near the end of the first trimester.

113. Planned Parenthood refers women with medical problems that make them high-risk patients to hospitals.

114. Planned Parenthood encourages minors to bring a parent with them.

115. Many of Planned Parenthood's abortion patients come from referrals from the other clinics where they previously have received options counseling.

116. During options counseling at Planned Parenthood, the counselors discuss with the woman the option of keeping her baby or giving it up for adoption.

117. Approximately sixty-five percent of the minors bring a parent with them to the counseling session in Planned Parenthood's experience.

118. If the parental consent provision of the Act (§3206) goes into effect, Planned Parenthood will counsel parents who attend with their minor child at the same time they counsel the minor.

119. If the parental consent provision of the Act goes into effect, parents may receive counseling sessions at any of Planned Parenthood's clinics.

120. No physician has stopped performing abortions for Planned Parenthood because his/her identity was stated on the Individual Reporting Form to DOH.

121. Ms. Wall has no knowledge of any case where DOH released the identity of a physician who performs abortions.

122. Planned Parenthood collects information for its internal use concerning medical complications following an abortion.

123. It is typical for a woman to receive counseling about her options once she has her pregnancy diagnosed at one of Planned Parenthood's centers, and to receive counseling again at the surgical center in Center City.

124. Planned Parenthood advises minors (and others) that if anything unusual or any sort of complications occur to let Planned Parenthood know and

to come back for treatment or go to an emergency room.

125. The telephone counselors at WSC make appointments and receive clients but they do not counsel about pregnancy options.

126. Counselors at WSC start at $8.50 per hour and are all part-time employees.

127. WSC encourages minors to attend with a parent.

128. WSC does not perform abortions due to medical emergencies as defined by the Act or otherwise.

129. If an emergency occurs when performing an abortion at WSC, a crash cart is used to stabilize the woman and then, in all probability, the woman would be transferred to a hospital based upon the physician or medical director's decision.

130. If a parent comes in with a minor to WSC, the minor is first seen alone by the counselor and then the parent joins the counseling session.

131. Ms. Hollos, the Executive Director of WSC, knows of no physicians who have stopped performing abortions because their identity is on the Pennsylvania Individual Report of Termination of Pregnancy form.

132. WSC never uses a sonogram in determining gestational age; rather, that is determined by questioning the woman and a pelvic exam by a doctor. If an ultrasound is ordered, it is performed at another facility.

133. WSC maintains or collects internal data regarding complications that occur.

134. Telephone counselor's salaries at RHCC are between $6.00 and $6.30 an hour. For options counselors, they start at $6.30 an hour.

135. RHCC counselors are not required to have bachelor degrees.

136. If a woman receives options counseling and pre-abortion counseling at RHCC, such counseling occurs on different days, with options counseling being

available on Tuesdays and Thursday.

137. In general, RHCC supports and encourages parental involvement in the abortion decision where possible.

138. If a parent accompanies a minor to RHCC for the abortion procedure, the minor reviews the risks and informed consent provision in the group session while the waiting room counselor goes over that information, including possible complications, with the parent.

139. RHCC keeps statistics on complications.

140. No physician at RHCC has ceased performing abortions because their identity is listed on DOH pregnancy termination forms.

141. At RHCC, one physician works at a time during those hours of operation when abortions are performed.

142. The Abortion Medical History Form used by RHCC was being used prior io the 1988 amendments to the Act.

143. RHCC submits quarterly reports of complications to the National Abortion Federation.

144. Doctors at RHCC sign the individual reporting forms (Report of Induced Termination of Pregnancy) submitted to DOH immediately following the abortion procedure.

145. Approximately sixty percent of the minors that had abortions at RHCC in 1987 were accompanied by one or both of their parents. That percentage has decreased to approximately 50 percent.

146. There is no minimum education requirement for AWC's counselors.

147. AWC determines gestational age by a woman's menstrual history and pelvic examination and, if AWC is unclear of the length of the woman's pregnancy, it will do a sonogram. The fee for a sonogram is $50.00

and is frequently waived.

148. AWC does not accept state appropriated funds.

149. AWC provides information to the National Abortion Federation (NAF) regarding AWC's complication rate.

150. AWC, prior to 1988, advertised in the newspapers although it does not presently advertise there. AWC does advertise in telephone directories.

151. All of the plaintiff clinics advertise by one or more of the following methods: newspapers, radio, and telephone directories.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, et al.,	:	
	:	**C.A. 88-3228**
Plaintiffs	:	
	:	**(Judge Huyett)**
v.	:	
	:	**(Class Action)**
ROBERT P. CASEY; N-MARK RICHARDS; ERNEST PREATE, JR; and MICHAEL DL. MARINO,	:	
Defendants	:	

STIPULATION OF VOLUNTARY DISMISSAL

Pursuant to the provisions of Fed. R.Civ. P. 41(a)(1), plaintiffs and defendants stipulate to the voluntary dismissal of Michael D. Marino, who has not appeared in the above-captioned action, as a defendant.

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EXCERPTS FROM TRIAL TRANSCRIPT,
JULY 30 THROUGH AUGUST 1, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, et al.	:	**CIVIL ACTION NO. 88-3228**
v.	:	
ROBERT P. CASEY, N. MARK RICHARDS, et al.	:	**Reading, Pennsylvania July 30, 1990 10:20 o'clock a.m.**

. . . . . .

NON-JURY TRIAL - DAY 1

• • •

[10] MR. ZEMAITIS: Your Honor, Dr. Davidson is being tendered as an expert in the practice of emergency medicine in Pennsylvania. Consistent with your rules of practice, I will read a brief statement regarding his qualifications, follow up with a few questions on qualifications. Dr. Davidson received his A.B. from Temple University in 1971 with a major in chemistry and he received honors. He graduated from Temple University Medical School [11] in 1975 and he graduated from the Wharton School of the University of Pennsylvania with a Master's in Business Administration in 1989.

His internship took place at the Medical College of Pennsylvania in Philadelphia and his residency also took

place at MCP.

Your Honor, I neglected to say that Dr. Davidson's curriculum is Exhibit 77 which is in the binders that we submitted.

Sir, if you would like to have that in front of you, that might be helpful.

THE COURT: Very well.

MR. ZEMAITIS: Dr. Davidson is licensed in Pennsylvania and in California to practice medicine. His residency was in the emergency medicine program at MCP. He is a diplomat of the American Board of Emergency Medicine, having become so in 1980, and he was re-certified by that board in 1990.

His hospital appointments include attending physician at the Hospital of the Medical College of Pennsylvania, associate at the Mercy Catholic Medical Center, Department of Emergency Medicine, and at the Jefferson Park Hospital affiliate staff, ICU attending staff.

Dr. Davidson is teaching, has academic appointments at the Medical College of Pennsylvania. I'll let him [12] describe those in more detail, but he currently has an academic appointment there.

DIRECT EXAMINATION

BY MR. ZEMAITIS:

Q Dr. Davidson, are you currently treating patients in emergency medicine?

A Yes, sir.

Q Where do you treat patients?

A Primarily in the Emergency Department at the Hospital of the Medical College of Pennsylvania in Philadelphia.

Q Approximately how many hours per year do you spend in clinical practice?

A I see patients in the emergency department about 600 hours per year, sir.

Q How would that compare to someone who was involved in full-time clinical practice in the emergency room?

A Full-time clinical practice of emergency medicine is generally considered to be approximately 2,000 hours a year of practice.

Q Dr. Davidson, as I said earlier, you're a Fellow of the American College of Emergency Physicians. Would you describe the process that you undertook to become a Fellow of the American College?

A A Fellow of the American College of Emergency Physicians is first of all a diplomat of the American Board of Emergency [13] Medicine. That is, that physician is certified in the specialty by the American Board of Emergency Medicine, which is one of 23 recognized specialty boards.

In addition, a Fellow of the American College of Emergency Physicians must have sufficient career and specialty accomplishments that rise to a level for election to the rank -- to the category of Fellow and there is a laundry list which includes publication in learned journals, presentation at national meetings, participation in organizations, both locally, regionally and nationally, etcetera.

Q You're also a diplomat of the American Board of Emergency Medicine. Could you describe the qualifications for that position?

A The American Board of Emergency Medicine is one of 23 recognized specialty boards that certifies physicians. The process for certification by the American Board of Emergency Medicine includes recognition of previous practice and training and then successful completion of both a written examination and an oral examination. Certification is limited to ten years and recertification is required every ten years.

Q Dr. Davidson, could you describe your teaching

duties at MCP?
A The teaching of clinical medicine is very much a master- [14] apprentice type of relationship and I teach medical students in the clinical years and house staff, interns and residents at the bedside with the patients that I see in the emergency department. I also, to a much lesser extent, teach informal didactic settings from a podium, in a lecture hall or classroom, and do a great deal of one-to-one or one-to-two teaching in emergency medical services pre-hospital care.
Q Is all of your teaching responsibility in emergency medical services?
A It's all in emergency medicine and related subspecialties such as emergency medical services.

MR. ZEMAITIS: Your Honor, we'd tender Dr. Davidson as an expert in the practice of emergency medicine in Pennsylvania.

THE COURT: Any objection or any voir dire?

MS. MERSHIMER: No, your Honor.

THE COURT: Your motion is granted.

BY MR. ZEMAITIS:
Q Dr. Davidson, in your practice of emergency medicine, how do you define a medical emergency?
A Well, a medical emergency is any medical condition that requires intervention, usually both diagnosis and treatment, in an emergency kind of fashion, usually within minutes, seconds or minutes, you need to intervene quickly.
Q Is that a definition that is used among medical emergency [15] physicians, generally?
A I think so. I think that's a generally accepted operative definition.

* * *

Q I have placed before you, Dr. Davidson, the codified

version of the Emergency Medical Services Act which is found at 35 Purdon's Statutes, Section 69-22. Is there a definition in there of medical emergency or emergency?
A There's a definition here in the act of emergency, yes.
[16] Q Would you read that definition for us?
A It reads: "A combination of circumstances resulting in a need for immediate medical intervention."
Q Is that definition of emergency consistent with the definition you use in your practice as an emergency physician?
A Yes, I think so, it's -- immediate is seconds to minutes, yes.

* * *

[17] In your opinion, Dr. Davidson, is the definition of medical emergency in Section 3-203 of the Abortion Control Act consistent with the definitions of medical emergency that you just provided in your testimony?
A No, it's not.
[18] Q And why not?
A Well, I find this definition to be confusing and using terminology which in this context seems to me to be -- create absolute standards, and that's unfamiliar to me.
Q Let's look at some of the specific language of the definition. There's the term "serious risk" appearing three lines from the bottom of the definition. Do you see that?
A Yes, sir.
Q Is serious risk a term that has a standard meaning among emergency physicians?
A In point of fact, as a -- as a standardized terminology, it does not. Serious is more -- has a more relative -- relative term, something is more serious than something else, not a particular absolute sense.

Q The definition also talks in terms of a substantial and irreversible impairment, and I'd like to break that down to substantial impairment and irreversible impairment. Does the term "substantial impairment" have a standardized meaning among practitioners of emergency medicine?
A Substantial to me is a very unfamiliar term in this kind of context. I don't know -- I really don't understand what is sufficient to be substantial? Is it a major risk of a moderate kind of impairment or is it a very low risk, but nonetheless possible of a very serious kind of complication or problem.
[19] Q What about the term irreversible impairment, is that one that has a standard meaning among practitioners?
A Well, I think irreversible is a little -- is somewhat clearer than the -- than the other terms we've just talked about, although here again, irreversible for the physician may be -- may be pretty clear, but our patients often tell us that which we interpret one way is not really the way they under -- they understand it.

For example, I may say a wound has healed perfectly and yet the scar is considered an irreversible impairment by the -- on the part of the patient.
Q I gather from that, you're saying that people can differ on what constitutes an irreversible impairment?
A Yes.
Q Is that true within the medical profession that there may be differences?
A Well, again, I think some people -- as an emergency physician, I might not consider that scar to be much of an issue, yet the patient's psychiatrist, who feels that the patient has had some kind of problem ongoing because of it, may feel it's significant. So it's --
Q What about --
A -- situational.

Q Excuse me. What about the term "major bodily function," is that a term that has meaning to you?
[20] A All normal bodily functions are major or -- I don't know how to differentiate what's major and what's -- what's not major.
Q In your experience, in your clinical experience, has anyone ever talked to you in terms of a major bodily function versus a minor bodily function?
A It's not a term that's generally used among clinicians or really in giving advice to patients.
Q Would you have any way of determining for yourself what a major bodily function is versus a minor bodily function?
A Again, I can relatively, but not in an absolute kind of sense.
Q What do you mean by relatively?
A Well, it's very clear that, you know, loss of extremity is a bigger loss of a major bodily function than is that scar, but to my mind -- and that's why I spend time carefully doing plastic repairs of wounds -- one attempts to minimize any impairment of a bodily function.
Q In your practice of emergency medicine, the idea is to heal, whether it's major or minor?
A Correct.
Q Now, in your opinion, Dr. Davidson, what would the consequences be if this definition of medical emergency were to become applicable to emergency services in Pennsylvania?
A I think it would certainly create a degree of confusion [21] and likely delay care in those situations where it applied, namely to those pregnant patients who seek care.
Q Do pregnant women come into emergency rooms?
A Sure.
Q Why?
A Well, they come into emergency departments

because they have the same problems anybody has. They may have a minor, acute and recurrent illness, a severe sore throat or headache or something, something total -- or injury, trauma, that's not associated with the pregnancy. They may come to the emergency department because of a problem of some sort that may be related to the pregnancy, but -- such as urinary tract infection, which is not specific to the pregnancy, or they may come to the -- seeking medical care because of problems directly with the pregnancy.

Q What kinds of problems directly related to the pregnancy cause women to seek emergency medical services?

A Ectopic pregnancy is a common problem, spontaneous abortion, threatened spontaneous abortion, inevitable spontaneous abortion and complete spontaneous abortion.

Q Do any of these conditions that require women to come for emergency treatment ever require pregnancy termination as a result?

A Uhm, patients with inevitable spontaneous abortion typically undergo a termination of pregnancy, yes.

[22] Q what are the symptoms of inevitable abortion?

A Oh, inevitable abortion is characterized by vaginal bleeding, bleeding coming from the uterus, typically in association with some lower abdominal cramping, discomfort. In addition then the physician will find on examination that the uterine cervix has dilated, has begun to -- has begun to open up somewhat and it is at that point in association with the pain and bleeding that the -- that the term "inevitable abortion" is applied.

Q When a woman has the symptoms of inevitable abortion in your clinical judgment is it possible for the pregnancy to continue through the term?

A Those pregnancies, at least it's my understanding, go on and ultimately abort, miscarry in layperson's

terminology. Anyway, typically in current setting these patients are referred for elective D and C to empty the uterus.

Q Is that the course of treatment that occurs when a woman comes to the emergency room with a inevitable abortion?

A Well, it depends -- that's the typical ultimate treatment, yes. There may be variations that depend on the urgency and the urgency typically depends on the extent and amount of bleeding that the patient is suffering.

Q Who performs, in your clinical experience, the procedure when the inevitable abortion patient comes to the emergency room?

[23] A These patients are referred to obstetrician/gynecologists pretty uniformly for completion of performing an elective D and C.

Q Have you ever been required to perform the D and C procedure because of an emergency situation?

A I don't perform a complete D and C procedure, but a patient who is bleeding heavily with inevitable abortion, it is common practice to use an instrument to remove tissue so as to products of conception and potentially fetal parts so as to reduce the extent of bleeding.

Q What's the term "products of conception" mean?

A Well, we're talking about uterine contents that result from conception. It may be -- may include fetal parts, it includes parts of the placenta.

Q What happens to the woman if there is a postponement or what are the risks to the woman if there is a postponement of the procedure in the inevitable abortion situation?

A Well, the patient who is bleeding is at risk of bleeding into shock and requiring treatment for shock, fluid therapy and blood transfusion.

Q Are there any risks associated with blood transfusions that would not be encountered if there were no transfusion?
A If a transfusion -- every blood transfusion carries some risk. While the current state of the art has reduced that, there remains a risk of -- of infectious disease transmission [24] down the road, as well as acute risks from allergic or other kinds of immediate transfusion reactions. The major risks though in the current environment are infectious risks, particularly non-A, non-B, recently started to be called Hepatitis-C, which kills about 4,000 Americans annually and infects many more with a chronic illness.

There remains a small but real risk of passage of the HIV, human immuno deficiency virus which is associated with causation of AIDS.
Q Now, if there is a delay in the procedure to evacuate the uterus, the D and C procedure, what happens to the woman during that period of time?
A Well, presumably the patient would be observed during that period and the patient would have some pain from the continuing pressure on the uterine cervix and the patient can bleed, continues to bleed.
Q In your experience, Dr. Davidson, is inevitable abortion generally life-threatening?
A No, inevitable abortion is not generally life-threatening.
Q Does inevitable abortion typically result in a permanent impairment to the woman?
A Not a permanent physical impairment, no. That's -- patients recover from that.
Q In your opinion, Dr. Davidson, is inevitable abortion a [25] medical emergency requiring immediate medical treatment?
A Yes.
Q Would -- Dr. Davidson, do you believe that in your

experience inevitable abortion results in an irreversible impairment to patients who undergo it?
A No.

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BY MS. MERSHIMER:
Q Dr. Davidson, you said that an inevitable abortion requires immediate medical treatment?
A Yes.
Q So it must be done within seconds to a few minutes, is that correct?
A It requires -- it requires immediate attention within minutes to a few hours. Again, it varies, depending on the degree of patient's bleeding. There are patients who bleed [26] heavily enough that, in point of fact, we take them out of order and go see them immediately.

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Q Okay, have you ever performed any abortions due to a medical emergency?
A Uhm, again, and here I'm confused because I have removed pregnancies or part of the tissue associated with pregnancy from the uterus of women with inevitable abortions.
Q How many times?
A It's a regular occurrence, maybe a couple of times a year.
Q And when that happens is that always in the emergency room context where you work?
A That's where I work, so that's where it occurs, yes.
Q Medical emergencies that require immediate abortions are very rare, aren't they?
A Well, inevitable abortion is a regular occurrence. I mean, probably at my level of practice, I see it a couple,

you know, maybe a couple, three times a year, and we have enough exposure to it so that three dozen trainees get to see it more than five and less than fifty times in the course of a three-year training program. So it's a, regular, it's a regular occurrence.

[27] Q Well, when you say regular occurrence, about how many would you estimate your hospital sees in a year?

A Uhm, oh, I would guess in a 40,000 visit a year ER you're talking about once a week in an emergency department, give or take a little bit.

Q And an abortion is performed each time?

A The uterus is emptied, yes.

Q So when I say an abortion is performed, that's what you mean by the uterus is emptied?

A Well, I mean in each of those occasions the patient may not have heavy enough bleeding so that the emergency physician using a ring forceps will withdraw tissue. On the other hand, all of those patients go on to a D and C by a gynecologist, yes.

Q And these -- how soon after the women present themselves to the hospital -- wait, I take it -- well, let me back up. I take it they present themselves to the emergency room?

A Yes.

Q Okay and how soon after they present themselves to the emergency room is the abortion performed?

A Well, again, that's a feature of the patient's presentation. If the patient is bleeding heavily, it will be performed much sooner than if the patient is not bleeding as heavily. Nonetheless, these are performed in a non-scheduled fashion. It's not put off until -- till 8 o'clock the next [28] morning in the operating room.

Q In your expert report you said that it's -- you gave an example of an inevitable abortion where a pregnant woman presents herself in the emergency room context

experiencing copious vaginal bleeding, lower abdominal pain and progressive cervical dilation. How soon would the abortion be performed on such a woman? A patient bleeding like that who I assess is at risk of shock, if I see -- if I see or can feel tissue, I'm going to withdraw it with ring forceps in the ER and those patients will go to the operating room pretty quickly. Certainly we would like to try to get them there within 60, 90 minutes.

Q Okay. And if you don't perform the abortion that quickly for that woman then she's going to keep bleeding, isn't she?

A That's highly likely.

Q And she'll go into shock then, won't she?

A There's risk of that, yes.

Q And she'll probably die, won't she?

A Not necessarily, with optimum shock treatment.

Q Is there a risk that she'll die?

A Certainly.

Q Is it a serious risk that she'll die?

A Well, if there's a risk, and most pregnant woman are young and relatively healthy and, you know, it doesn't occur in the hospital very commonly in 1990. The patient would get [29] fluid resuscitated with -- with balanced salt solutions and then receive transfusion. And so shock treatment begins early, irreversible shock and death is very uncommon.

Q In these situations with inevitable abortions, in the cases you've seen when the women have presented themselves at the emergency room, have they wanted to have that baby?

A There are many patients who wish to retain their pregnancy, yes.

Q Would it be fair to say that for most abortions that are performed in the emergency context that the woman wants to have a child?

A Uhm, I -- I don't -- I really don't know that. I mean,

I can only speak of my own experience and certainly is mixed, it's not universal.
Q Well, what would be the majority of the cases?
A Uhm, in my experience, probably around a 50-50 division.
Q So at least 50 percent of the women that come into the emergency room experiencing the conditions of an inevitable abortion, they want an abortion anyway?
A They may or may not have confronted that issue; I don't really know. They may -- since I don't have a previous relationship with them, I don't know what they've been thinking.
Q If a woman -- if a pregnant woman would arrive at the emergency room ill and she's in a medical condition that you [30] believe an abortion is medically indicated, but you don't know if she wants to have the baby or not, would you consult with her first before performing an abortion?
A Certainly. I consult with all my patients before performing any procedure.
Q And would you get her informed consent to perform that abortion?
A I get my patient -- whenever possible, with the generally understood exceptions to the requirement for consent, I get my patients' consent before performing any procedure.
Q And would you attempt to determine the gestational age if you had the time?
A Again the only -- the only situation I can really envision is this situation of inevitable abortion. In my years of practice it's the only -- it's the only circumstance that I've personally confronted. And those -- those patients I usually don't have the resources to definitively determine gestational age. I do it on the basis of last known menstrual period which is as good as the patient's history is, but I don't usually have access to ultrasound or

titered levels of cumencorionic anatatropin (ph.) in the blood and so forth.
Q And that's because you don't have the time to determine gestational age because you have to immediately abort that child?
[31] A In the situation of the bleeding patient, yes.
Q Now, if this pregnant person that came in that was suffering from an inevitable abortion, if that person happened to be a minor would you attempt to get her parent's consent before performing the abortion?
A In the current -- in the current situation I speak to the, to the minor -- I speak to the patient and I -- and in my practice we commonly see parents or grandparents with that minor child. I certainly speak to family members and explain the situation, but it's my understanding and my practice, as I've had it explained to me by our hospital attorneys, that a pregnant patient consents for herself and so while I share information with the family, I seek the consent from my patient.
Q Do you perform any other surgical procedures on minors without obtaining their parents' consent first?
A In the case of the emergency exception to consent, all the time in patients with life-threatening or extremely urgent situations that occurs with regularity. In other situations, there are cases where patients have -- I see-- I've seen minors with wounds, both parents are at work, there is a caretaker who has not been given a legal document of some sort that indicates that they're responsible, but the patient and the caretaker indicate that they'd like the care taken -- care provided and delaying repair of the wound [32] worsens the outcome and so I will typically do what I believe to be best for the patient and repair the wound.
Q Let me see if I understand this. If it's a non-emergency situation and there is time to get the consent of the parent, you will do that?

A Well, I think, you know --
Q Could you just say yes or no?
A Well, it's not -- it's not a clear yes or no. What is time? A wound requires -- in order to reduce the risk of infection, wounds should be closed from six to eight hours from the time -- from the time that they occur. It may not be possible to get what I understand is legal guardians available to consent for repair of that wound. All wounds heal, it doesn't need to be sewn, but the outcome for the patient will be less salutary if I delay.
Q Well, do you just try first to contact the parents?
A Certainly.
Q And then if you can't contact the parents, then you use your best medical judgment about the treatment that should be provided under the circumstances?
A Yes, with proper advisement to our institutional, administrative and other authorities.
Q Well, what do you mean by that?
A Well, I --
Q You call up a lawyer first?
[33] A That's -- that's -- basically, that's an outgrowth of the current environment. I document in the record that I believe this is a situation that should receive care at this time and with this degree of urgency because in my medical opinion delaying is -- puts the patient at risk. The patient agrees with me but the competent legal guardian is not available to provide the formal kind of consent. I write that in the record and I, by our institutional policy, I must discuss that with the administrator on call who commonly has me discuss it with one of the people in the corporate law department.
Q Is closing a wound considered surgery?
A Certainly.
Q Now, if a pregnant woman presented herself in the condition of -- you diagnosed it as inevitable abortion and she was married, would you tend to notify her

spouse before performing an abortion?
A No, that's not something that I do.
Q Well, if a married woman ever presents herself in an emergency situation where treatment is needed, is there any attempt ever to notify the spouse that the woman is there?
A No. If the patient is able, is conscious and alert and able to consent for themselves, no. If the patient is unable to do so then certainly we attempt to reach next of kin, a spouse being the closest next of kin.
[34] Q Isn't it correct that most abortions that occur as a result of a medical emergency are performed in a hospital?
A I think that that's -- that's certainly correct in my experience.

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Q Okay, but you are saying that inevitable abortion is not, would not fall within the Pennsylvania's act definition of medical emergency?
A I -- I am saying that in my experience, inevitable abortion with significant bleeding which is a clinical condition that I see with regularity to my mind does not fit [35] in this definition and would cause me, especially since I understand criminal sanctions are involved, would cause me to delay or to seek additional consultation and would alter my current practice of -- of care.

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THE AUDIO OPERATOR: Would you state and spell your name for the record, please?
THE WITNESS: Thomas E. Allen, A-l-l-e-n.
MR. ZEMAITIS: Your Honor, Dr. Allen is tendered as an expert in the practice of obstetrics and

gynecology in Pennsylvania. Again I will give a brief synopsis of his qualifications. [36]

His curriculum appears as Exhibit 81 in plaintiff's exhibit binders, your Honor.

Dr. Allen attended college at the University of Pittsburgh where he received a Bachelor of Science degree in 1940. He attended medical school at the University of Pittsburgh where he received his degree in 1943. He served an internship at the University of Pittsburgh Medical Center in 1944 and a residency in gynecology at Elizabeth Steel Magee Hospital. That residency was interrupted by his military service and he returned to Magee Hospital in 1948, completed his residency in obstetrics and gynecology in 1951. He is an Emeritus staff member at Magee Women's Hospital today. I will note that the curriculum says active, that's a change that occurred fairly recently and I'll let Dr. Allen explain that.

He is on the consulting staff at the Presbyterian Hospital in Pittsburgh and he serves as Executive Medical Director of Women's Health Services, one of the plaintiffs in the case.

He has been a member of the faculty of the Department of Obstetrics and Gynecology at the University of Pittsburgh, serving as an associate clinical professor, an assistant clinical instructor and a teaching fellow.

He is a Fellow of the American College of Surgeons; has been since 1953. He's a diplomat of the American Board [37] of Obstetrics and Gynecology, became so in 1954, was re-certified in 1979 and again in 1989 and, again, your Honor,that does not appear in the curriculum,.

He is also a Fellow of the American College of Obstetricians and -- excuse me -- the American College of Obstetrics and Gynecology and he has served in that

capacity since 1955.

DIRECT EXAMINATION

BY MR. ZEMAITIS:

Q Dr. Allen, do you currently maintain a private practice of obstetrics and gynecology?

A I do.

Q And where is your office located?

A We have three offices; two of them suburban, the principal office is in Oakland, in Pittsburgh.

Q How many partners do you have in that practice?

A Currently I have only one.

Q Is he an obstetrician?

A Yes, he is.

Q In your private practice do you see patients, pregnant women who are intending to carry their pregnancy to term?

A Yes.

Q And do you treat those women throughout their pregnancy?

A Throughout their pregnancy.

Q Do you do deliveries on your patients who carry their [38] pregnancies to term?

A Not since my 70th birthday last year. We have a -- the medical staff has a bylaw that upon reaching that august age, they ship you upstairs and discontinue your -- your delivery privileges and major surgical privileges unless you have one of your younger colleagues scrubbed with you.

Q Is that the difference between active staff member and emeritus staff?

A Emeritus staff, correct.

Q And that's the position you assumed when you became 70 years of age?

A That's right.

Q During the years that you did do deliveries on your pregnant patients, how many deliveries would you

perform in the course of a year?
A Well, it varied from a maximum probably of 300 to a minimum of 150.
Q Dr. Allen, do you perform abortions?
A Yes, I do.
Q Where do you perform abortions?
A A few at Magee Women's Hospital and -- and a great many at Women's Health Services.
Q What role did you play in the founding of Women's Health Services?
A I was on the original committee that assessed the need [39] for such a service in Pittsburgh and raised the funds for establishment of the clinic as a nonprofit clinic and was its first medical director and have continued in that capacity since 1973.
Q When was Women's Health Service founded?
A We made the plans in '72, opened the doors in April of 1973.
Q Now, you said that there was a need for such service. What particular services are you talking about?
A For abortion services.
Q And has Women's Health Services continued to perform abortions since its opening?
A Yes, they have.
Q Have you been actively involved on the staff at Women's Health during that whole period of time?
A Yes, I have.

MR. ZEMAITIS: Your Honor, we tender Dr. Allen as an expert in the practice of obstetrician and gynecology in Pennsylvania.

THE COURT: Any objection or voir dire?

MS. MERSHIMER: No voir dire and no objection, your Honor.

THE COURT: Very well, your request is granted. He may testify in that area.

MR. ZEMAITIS: Thank you, your Honor.

[40] BY MR. ZEMAITIS:
Q Dr. Allen, what does the concept of informed consent mean to you as a physician?
A It -- it means assessing a patient's need for treatment and discussing with her the risks as well as the proposed benefits from the treatment that -- that is suggested and gaining her complete consent to that treatment.
Q What is the process that's undertaken to obtain informed consent from a patient?
A I or one of my designates sits down and talks with the patient about the problem for which she has sought treatment and make certain that she understands the risks and the probable outcome of that treatment and make certain that she joins in the desire to proceed with the treatment, whatever it might be.
Q Is that a process that takes place in a dialogue between you and the patient?
A It's a dialogue between, primarily between the patient and the physician or the physician, the patient and a designate whom the physician has confidence in.
Q In your experience, Dr. Allen, when you obtain informed consent from a patient, do you do it in a face-to-face conversation?
A Right.
Q In your opinion could you obtain informed consent, as you [41] understand it, through a telephone conversation with a patient?
A I could not.
Q Could you obtain an informed consent from a person, from any person giving informed consent over -- through the telephone?
A No, you have to have -- you have to have eye-to-eye contact with them to make certain that they understand and agree with what has been proposed.
Q How does that eye-to-eye contact facilitate your knowing that the patient understands and consents?

A It's largely a matter of body language, I believe, that you naturally have some people who are fearful when you explain risks to them, but so long as they -- at the end they come, you're satisfied that they understand what is proposed and agree that it should -- that it should be entered into willingly.

Q In your experience and opinion, Dr. Allen, is it consistent with standard medical practice to conduct an informed consent dialogue in person?

A Yes.

Q Would it be consistent with accepted medical practice to perform that dialogue by telephone?

A No, I couldn't do it by telephone.

Q Would it be acceptable to do it by mail, sending a form [42] and having it sent back?

A No.

Q If you were told by one of your patients who was referred to you by another physician that she had discussed all the procedures with another physician, that she had given her informed consent to that physician, would you rely on that in going forward with the medical procedure?

A I might do it if it were a colleague with whom I worked, for instance, one of my partners and he was not able to perform the -- I would still have the discussion with the patient, but I wouldn't have to go through all the ramifications that I know that he had done. But I couldn't do it with someone out in the field who may have been a referring physician.

Q When you say you couldn't, I take it that you would conduct your own informed consent dialogue?

A Yes, I would still do that.

Q And you would feel that was necessary in your medical practice?

A Right. It doesn't matter whether it's -- whether it's care of an obstetrical patient or care of a gynecological

patient either.

Q Now, are you aware that the Pennsylvania Abortion Control Act if it goes into effect would require that there be a 24-hour waiting period between the time a women is given the [43] information to obtain her consent in the performance of the abortion?

A Yes, I've read that in there.

Q In your opinion, Dr. Allen, is there any medical reason to delay a procedure, once a woman has decided to have an abortion and has given her informed consent to the abortion procedure?

A There is no reason for delay and actually there may be some harm produced from it.

Q How so?

A The patient comes into the clinic or to the hospital anticipating the procedure and it's not been an easy decision, as a rule, she's made the decision prior to that. She confronts harassment as she enters the clinic and from -- from the people who are trying to change her mind and comes in and has her counseling session with -- and it's quite evident for most of these people that they just need to have the risks explained to them because they've already reached the decision or they wouldn't be there. And then to make that woman go through a counseling session prescribed by act of the legislature that includes things in an attempt to deter her from that decision which she has made creates a more stressful situation for the woman, then she has to come back and do it a second time in order to have the procedure done.

[44] Q So let me make sure I understand. You're saying the combination of the mandated delay and the specific information required by the statute would in your opinion increase stress among the patients seeking abortions?

A In the -- on the part of the patient, correct.

Q And I also take it from your answer that in your

experience, most women who come to Women's Health Services for an abortion have already decided to have the abortion before they arrive there?
A Yes, they have.
Q Are there ever circumstances where women arrive having not made that decision ahead of time?
A Yes. Well, some women arrive at the clinic with ambivalent feelings, they -- because of teaching and some of the harassment that they've faced on the street coming in. They -- they have made a decision but that changes it a bit, or it makes them less certain of their decision, and that's the situation in which the counselor can spend more time with the patient and refer her to a personal counselor, if need be, who makes certain that this woman really wants to terminate her pregnancy before we go on. And some of these women do leave the clinic, do come back another day farther along in their pregnancy and with their mind definitely made up.
Q For those women who are ambivalent do you feel that it is [45] useful for them to have some additional time to reflect on the procedure?
A Yes, yes, but it's a small percentage. It's probably only about probably -- I don't know the exact figures -- probably only about five percent.
Q For a woman who shows no ambivalence or expresses no ambivalence, do you see any reason --
A No reason.
Q -- medically or otherwise for a delay?
A No reason for delay, that's correct.
Q Now, would delay of 24 hours -- and I mean just 24 hours at this point, Dr. Allen -- normally increase the risk to a woman's health in an abortion procedure?
A Normally it would not.
Q If the delay expands beyond 24 hours, is a point reached where the risks, the medical risks to the woman increase?

A Yes. Beyond -- beyond eight weeks of pregnancy there is an increased risk of complications that is about 30 percent for each additional week and there is a risk of mortality that is about 50 percent for each week of delay beyond eight weeks. Now, admittedly, the risk of mortality is extremely low, but it does increase with advancing pregnancy.

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[47] Q How does the mortality rate for abortion, even at 15 or 16 weeks, compare to the mortality rate for bearing children?
A It's seven -- depending on whose statistics you're reading, it's seven to ten times more dangerous to continue a pregnancy to term.
Q Do you know how the risk of abortion compares to other relatively minor surgical procedures, such as a tonsillectomy?
A It's about twice as safe as a tonsillectomy and about a hundred percent -- about a hundred times as safe as an appendectomy.

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Q Has ACOG taken a position on whether it's appropriate to mandate waiting periods for all women seeking abortion services?
A They have taken a position against that mandated waiting period.

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[48] Q . . . Could you give us a brief description of the counseling regimen as it occurs at Women's Health Services?

A The -- the procedure, the counselor who sits down with the patient and discusses the procedure, the risks, the expected outcome makes certain that she is not being coerced into this by some family member or somebody outside the counseling room and who secures her informed consent by reading to her, as a basis for the counseling, the consent as it exists in our chart, which we think it's fairly conclusive, and then describing for her any of the -- of the medical terms which the patient does not understand. That is all done prior to the patient's coming to the procedure room.

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[49] Q Now, you said that the person who counsels before the procedure will read a specific bit of information to the patient regarding risks.
A That's right.
Q Is that writing contained in standard documents that Women's Health Services uses?

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[51] Q Do you have a professional opinion, based on your experience at Women's Health Services, Dr. Allen, as to whether counselors are capable of giving information for informed consent and obtaining informed consent from patients?
A I -- I certainly believe that they're capable of it and probably do a better job than we physicians would do because that's their primary job.
Q Why do you conclude that they would probably do a better job than physicians in conveying the information?
A Because -- because they take more time and they're -- the counselors are all women who relate to women very well.

Q Are there other reasons why you think it's beneficial to use counselors to obtain informed consent rather than physicians?
A It's much more economic to pay a counselor who is a specially trained to do this to spend the time, it's economic of both times and dollars because it allows the physicians to devote their time in patient care with the -- with the knowledge that the needs of the patient have been met satisfactorily before she reaches the procedure room.
[52] Q In your experience has the practice of medicine grown more specialized as the years have passed by?
A Yes. I think it doesn't only pertain to medicine.
Q Okay. Do you find the use of counselors for the informed consent purpose to be consistent with this trend?
A Yes.
Q Do you find that the use of counselors to provide informed consent is consistent with accepted medical practice?
A Yes, it certainly is.
Q In your opinion that is consistent?
A In my opinion it is.
Q To your knowledge, Dr. Allen, has ACOG taken a position on whether the use of counselors is appropriate for informed consent?
A They have -- they have come out in favor of counseling, as has the American Public Health Association.
Q Now, you mentioned the category of personal counselor a few minutes ago and I want to explore that for a minute and make sure we understand. When do personal counselors get involved at Women's Health Services and what do they do?
A The -- the counselors have -- the abortion counselors have primarily been trained on the job by the personal

counselors. They do the individual patient counseling and if they detect any ambivalence or undue fear on the part of [53] women, some areas of some psychological problem that the patient may have, they will refer the patient to the personal counselor who is a trained psychologist or trained social worker, Master in social work, who can sit down with the patient and delve more deeply into whatever her problem may be that may not be related to the pregnancy that she has at all.

Q So that the personal counselor gets involved when the pre-abortion counselor detects a need for more involved counseling?

A That's right.

Q Do you know what percentage of women at Women's Health Services have or require personal counseling?

A I don't know, but it seems to me that in a -- in a day in which we see 40 or 50 patients, there may be three or four of them who -- who are referred to the personal counselor.

Q How long does the personal counseling session take?

A I don't know. It probably varies. It takes as long as it takes for that personal counselor to resolve the problem and sometimes they have to come back, you know, they have to come back for other sessions.

Q That would be when the ambivalence isn't resolved in the first --

A That's correct.

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[54] Q . . . Dr. Allen, in your obstetrical practice with patients who are intending to carry their pregnancy to term and have a child, do you typically inform them of the medical risks of the abortion procedure?

A No.

[55] Q Do you see any reason to inform them of the medical risks?

A There is -- there is none, the medical risk of abortion there certainly isn't, if she's anticipating the child to term.

Q Let me make sure I understand.

A You're not trying to change her mind.

Q If she is not going to have an abortion, there is no reason to tell her?

A No reason to do that, that's right.

Q How do you feel about the requirement that a woman who has decided to have an abortion must be told under this provision of the act the medical risks associated with carrying the child to term?

A I don't see any reason for it at all.

Q Do you think it's a helpful thing to do?

A No, I don't.

Q Could it be a harmful thing?

A It might strengthen her feeling that she should go ahead and have the abortion because the risks are less.

Q But if she's already decided to have the abortion you see no reason?

A Then there's no reason to do so.

Q There are a series of items that are set forth under the paragraph Arabic 2, reference to printed materials, reference [56] to medical assistance benefits, reference to the liability of the father of the unborn child for support, et cetera. In your experience, Dr. Allen, are these items that are part of the dialogue for securing the informed consent of a patient to a medical procedure?

A No, they're not.

Q How would you characterize these provisions of the statute?

A Well, they have to do with social and economic things which may or may not be available. There's some -- I mean, and legal things, also, which I don't feel

competent to advise a patient that she can get child support from the alleged father of the pregnancy.

Q Let me make sure I understand. Are you saying that this information, first of all, is not information that would be given for informed consent?

A That's right.

Q And it's not necessarily information that all women should be receiving?

A That's certainly true and it's -- I have some problems with it because I don't think that it's -- that it's always true, some of these things that are -- some of these statements here I don't think are really fact.

Q What statements would you think, Dr. Allen --

A That -- that there may -- well, I guess the "may" takes [57] that out of it, there "may" be available to the patient medical assistance and there may be available support from the father of the pregnancy.

Q In your experience, could telling a woman that there may be medical assistance benefits available mislead her?

A Yes, it could, and I have enough patients who have gone through pregnancy with very little support from either of these two sources.

Q Who otherwise might need that help?

A That's right, who do need it.

Q But the fact that they may be available did not in those cases turn into a reality, they were not --

A They were not available to them.

Q -- in fact receiving the benefits?

* * *

[58] Q In your opinion, Dr. Allen, is it the obligation of the counselor to try to persuade the person being counseled to one or another position?

A No. No, she should just find out how the patient

feels. She's not -- she's not there as a partisan for either position.

Q And in your experience do the counselors at Women's Health Services adopt that nonpartisan position in their counseling?

A Yes, they do.

Q Is that part of the training that the counselors go through?

[59] A That's part of their training.

Q In your opinion, Dr. Allen, if these items that are set forth in the statute were required to be incorporated into the counseling session, would that affect the nonpartisan nature of the counseling?

A Yes, in -- in -- it could because they sort of balance each other maybe a little bit if you gave the patients the statistics on the risks of carrying the pregnancy to term and then countered with some of this other extraneous material, why you'd probably come out about even.

* * *

Q Does the limitation of civil liabilities set forth in that subsection cause any concern for you in the context of good patient care?

A It -- it might abbreviate your -- on the part of some physicians -- the careful explanation and rendering of an adequate informed consent because it reduces their -- it eliminates their liability to malpractice civil suits if they include the things that are mandated.

Q So your concern is that other necessary information won't be conveyed to the patient?

[60] A Well, it -- it could, sometimes it might be short-shunted.

* * *

[61] Q Are you aware, Dr. Allen, that a violation of the informed consent provisions of the statute carries with it criminal penalties?
A Yes, I am.
Q Is there any other context you're aware of in which failure to provide informed consent information results in criminal penalties?
A No. Civil penalties, but not criminal penalties.
Q If the criminal penalties in Section 3205, the informed consent section of the statute, become effective, what impact do you think it would have on physicians who perform [62] abortions?
A I think it may deter some of my colleagues from providing the service.
Q What's the reason that you've concluded that?
A Well, they're a little more fearful of criminal accusations than they are of civil, because they're medical malpractice insurance tends to cover them pretty well for civil suits, but it has no coverage for criminal suits.
Q Have you discussed that with your colleagues?
A We've had several meetings between the time that the act was passed last fall and the time it was to take effect.

MS. MERSHIMER: Your Honor, I would object on hearsay grounds and ask that Dr. Allen's testimony on this point be stricken.

THE COURT: It's overruled.

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Q In your experience, do minors tend to seek help for pregnancy and pregnancy-related problems later in the pregnancy or earlier in the pregnancy than adult women?
[63] A Later.
Q In your experience, why is this the case?

A There's a certain amount of denial, they're not so well informed as to symptoms and signs of early pregnancy; they're frequently fearful of sharing this information adults, particularly parents. They might tell their best friend in junior high school, but a good percentage of them don't confide early in their parents.
Q For minors who seek abortions, what are the consequences of this delay in seeking medical treatment?
A They usually arrive -- as a group, they arrive a little bit later in their pregnancies.
Q Are they closer to the second trimester of pregnancy?
A Well, all the way up the line they're a little bit farther along in their pregnancies.
Q So there are larger percentages of minor women at later weeks seeking abortions --
A That's correct.
Q -- than there are adult women at later weeks?
A Right.
Q In your experience, Dr. Allen, are minor women capable of understanding the medical risks associated with abortion and giving informed consent to the abortion procedure?
A I think with a careful explanation of it by either a physician or a counselor, they can grasp the significant [64] points of it and given an informed consent.
Q Under Pennsylvania law, what's your understanding of whether -- today, that is, whether a minor woman can give informed consent for any procedure connected with her pregnancy?
A They can consent to continuing the pregnancy and they can consent to treatment for sexually transmitted diseases, but because of the Abortion Control Act, which is currently enjoined, if it were not enjoined they would not be able to do that.
Q To consent to abortion?

A That's right.
Q Now, in your experience, Dr. Allen, are minor women capable of knowing when parents should and should not be involved in the minor's decision-making process on abortion?
A They're much better informed of that than I am, or the counselor, or the State Legislature, I think.
Q In your experience, do they generally make responsible choices when they decide not to involve parents?
A Right, and most of the very young minors come to the clinic with their parent, with one parent, or at least a significant person. But there are some of them who just don't have that relationship, and they usually bring some other person with them who is older, but it doesn't have to be parent, it might be an older sister, grandmother.
[65] Q Dr. Allen, has ACOG taken a position on whether minors should be forced to involve parents in the abortion decision?
A They've taken a negative attitude to that.
Q So ACOG's position is that minors should not be required to involve parents?
A They should not be required, but it's desirable for them to notify their parents.
Q Is that consistent with your personal medical opinion?
A That's the way we feel too.
Q Dr. Allen, let me ask you a few questions finally about the husband notification provision of the statute. Is there any other statute or regulation you're aware of that requires a husband to be notified when a woman is about to undergo a medical procedure?
A No, adult woman, so long as she's conscious.
Q For example, if a woman chooses to have a tubal ligation that would render her sterile, does she need to notify her husband?

A No.
Q If a husband chooses to have a vasectomy that would render him sterile, to your knowledge is he required to notify his wife of that fact before having the vasectomy?
A He's not required. Most husbands and wives, if they have a good relationship, share this knowledge with their spouse.
Q Is it accepted medical practice, Dr. Allen, not to inform [66] a spouse when your patient is about to have a medical procedure?
A No, that's the responsibility of the patient, whether it's male or female, to notify whomever she wishes to. We don't discuss a patient's treatment with anyone but the patient, unless we have her request to do so.
Q So I take it you respect the patient's wishes with regard to confidentiality?
A Right.
Q Would a husband notification provision prior to abortion be inconsistent with medical practice as you understand it?
A It would be.
Q Why would that be?
A Because the wife is -- if I were to do it --
Q To require it, whether it be the patient or the doctor?
A Yeah, I think that it's inconsistent with other forms of medical treatment. If it applies only to abortion, then it certainly is not consistent with sound medical practice.
Q Has ACOG taken a position, Dr. Allen, with regard to husband notification provisions?
A They're opposed to husband notification.

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[67] BY MS. MERSHIMER:
Q Doctor, how many days a week do you work at

WHS, or Women's Health Services?
A About one a week.
Q And how many hours a day do you work?
A If I'm there -- if I work a full day, it's about seven hours.
Q And does that seven hours -- is that seven hours always performing abortions, or does that include breaks and lunch hour?
A That doesn't include much lunch hour, but it does include checking patients in the examining rooms, determining duration of gestation and --
Q And how -- I'm sorry. How many abortions do you perform a day, in an average workday?
A It varies. It's about -- it depends on how many doctors there are there, but it is usually about 15.
Q Sometimes 20?
A Sometimes 20.
Q And how many physicians do work a day at Women's Health Services?
A Usually two or three.
Q And they're all treating about 15 to 20 patients a day?
[68] A Well, we do abortions only three days a week and sometimes it's not a full day.
Q But aren't --
A I'm not there three days a week.
Q Do you know whether the other physicians are averaging about 15 to 20 abortions a day?
A I would judge that it may be closer to 15, it depends on the patient load.
Q And how much are you paid for performing an abortion?
A We're just on an hourly basis.
Q Well, what is that hourly rate?
A It's currently 175 an hour.
Q And is that true of all the physicians at Women's

Health Services?
A That's correct.
Q Now, do you normally know who the patient is before you perform the abortion on that woman at Women's Health Services?
A I look over the chart beforehand.
Q All right, you look over the chart, but you haven't met her before until you meet her in the --
A Until I walk into the -- well, sometimes we have, if we've been involved in determining what her period of gestation is in the examination room, prior to her being counseled. If she comes in with an inaccurate date or is [69] beyond 13 weeks by date, we will -- one of us will see her. It may not be the same physician who sees her in the procedure room, but one of us will see her.
Q So, you meet the woman for the first time either in the examination room or the procedure room?
A That's correct, except for a few of my private patients who come down there for the procedure.
Q What percentage of the patients do you meet for the first time in the procedure room?
A In the procedure, probably about 80 percent of them.
Q And how much time do you spend with the woman in the procedure room?
A During the procedure or prior to the procedure?
Q Both, why don't you break it down?
A All right, prior to the procedure, about five minutes--
Q And then --
A -- during the procedure, about ten minutes.
Q And do you see her at all after the procedure?
A In the recovery room we sometimes do.
Q Sometimes?
A We frequently do, yes.
Q If you don't, does another physician or nurse see the patient in the recovery room?
A The nurses usually take care of them in the recovery

room; we dispense all medication to them and see any problems [70] that may arise there during their hour or two-hour stay in the recovery room.
Q And when you -- if you see them in the recovery room, how much time do you spend with the woman?
A It varies, depending upon whether she's having a problem or not.
Q Well, what's the average time? What's the average time if there's no problem?
A No problem, maybe a minute.
Q If there's a problem?
A If there's a problem, it depends upon the problem.
Q Well, what are the problems that can occur?
A The most common problem is hematometra.

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[71] Q And how often does that problem occur?
A Probably in two or three percent of procedures.

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[73] Q You personally do the informed consent procedures for the abortions you perform at Magee Women's Hospital, is that correct?
A That's correct.
Q And --
A With help from my nurse practitioners in the office, whom I trust.

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[76] Q Dr. Allen, I'm handing you yet another black book. Would you turn to the exhibit that's marked Number 1? Are you familiar with Defendant's Exhibit No. 1?

A Yes.
Q Can you tell me what it is?
A It's Magee Women's Hospital informed consent for termination of pregnancy.
Q And is this a form that you have all women sign before you perform an abortion at Magee?
A Yes, this is gone over with them by the nurse in our office. And I've answered any questions that they might have about it.

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[77] Q Doctor, you've testified that informed consent should be face to face, correct?
A That's correct.
Q Is it possible to provide information over the telephone to a woman, and then follow it up with a face-to-face meeting another day?
A You mean to get a --
Q To obtain an informed consent?
A To obtain the informed consent. That should be possible, if you can have time to --
Q Thank you, Doctor.
A -- follow that -- yes.

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[80] A No, it was 1970 to '76, were their graphs. But the statistics are better now, but the ratio between early abortions and later abortions has not changed. We have fewer total -- a lower total mortality, it has continued to go down. The ratio between early abortions, which is almost zilch, and later abortions is still pretty much the same, it increases. It doubles every two years after eight to nine weeks.
Q Every two years or every two weeks?

A I mean every two weeks, yes.
Q You said that abortion is twice as safe as a tonsillectomy, from a mortality standpoint?
A Mortality is twice.
Q And what did you say it was as to an appendectomy?
A One hundred.
Q And in the case of a tonsillectomy or an appendectomy, if that was a minor, wouldn't the physician get the parent's consent before performing either of those medical procedures?
A If possible, I should think. I don't do either of those.
Q Well, do you think they would wait at least 24 hours to obtain the parent's consent?
A Well, a tonsillectomy is certainly an elective procedure. Appendectomies are a little bit less so, and so I don't think that there would be any problem with delay for a [81] tonsillectomy. I'm not sure what -- there's no law that says that you would have to get parental consent if it were considered an acute appendix and the parents were not available, somebody could give it.

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[82] Q Does the abortion counselor, when they determine that the patient is a battered woman, automatically refer them to personal counseling?
A I'm sure they do.

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[83] Q Now, is my understanding correct that you say the information in the written part, under consent for abortion on Page 11 of Plaintiff's Exhibit 6, is the base line of information as given to a woman?
A Yes, this is --

Q At Women's Health Services?
A That's right. This is read to the patient by the counselor, and then any questions that the patient may have are answered by the counselor. And then -- that forms the base, and then any other thing that the counselor feels is necessary to achieve informed consent is gone into it.
Q What if a woman asks about fetal development and asks, [84] like, what does the fetus look like, is she given answers to that?
A Yes, we have some pictures to show the patient what the--but we don't offer them, we don't display them in the wall or anything. They're in the counseling room, but they're not displayed and not every patient every needs to see them.

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Q And if the woman would ask about whether there's any agencies available should she want to carry the child to term, such as adoption agencies, does Women's Health Services answer those questions?
A Yes, they do, and they refer some patients to them. That's usually the job of the personal counselor.
Q All right. And if the woman asks about whether there [85] might be financial assistance benefits out there for her, do you try and refer her to the appropriate person to answer that question?
A Usually to a social service agency.

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[86] Q You also said that if the informed consent provisions go into effect that your colleagues might be deterred from performing abortions, is that correct?
A Well, we've had some discussions about this --

Q Well, yes or no?
A Yes.
[87] Q And that's based upon your discussions with your colleagues?
A That's right, when they were expressing concern about the act and what effect it might have upon them, and were particularly concerned about the criminal charges to be levied under the act. And it became more difficult for us to maintain adequate physician supply at Women's Health Services.

MS. MERSHIMER: Your Honor. I renew my objection that this is hearsay, and I would ask that Dr. Allen's testimony on how the act would deter or not deter his colleagues be stricken.

THE COURT: Overruled. I think we're not interested in the truth of this, but merely whether these conversations took place; overruled.

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Q Do you agree, Dr. Allen, that it's essential to the psychological and physical well being of a woman considering [88] abortion that she receive complete and accurate information on all options available to her in dealing with her unwanted pregnancy?
A Only if she hasn't already reached a decision.
Q Well, to reach a decision she needs to have information available to her, doesn't she?
A Yes, and we try to provide that, but I don't know . . .
Q All right. Now, when a woman comes in with an unwanted pregnancy, you said she could be under heightened stress or anxiety, is that correct?
A I said that the decision-making process is usually fairly stressful for the women -- woman.
Q And is that for the various reasons such as that she just realized she's pregnant, she's going to have to make

a quick decision about whether she wants to carry the child to term?
A It's not a physiological stress, it's a psychological stress. And it's usually a very difficult decision for a woman to make unless she has, prior to becoming pregnant, made a decision that abortion would be a backup for her contraceptive method, if it failed.
Q Would you agree that for a woman deciding whether to have an abortion that she should look at her individual circumstances, be provided complete and accurate information, and then have sufficient time for deliberation?
A Yes, and most of that has taken place prior to her coming [89] into the clinic.
Q And wouldn't you agree that as good crisis pregnancy counseling dictates that a woman be presented information in a non-directive manner, with sufficient information on all options, to insure that her decision as how to deal with her pregnancy is an intelligent, knowing and voluntary one?
A I don't know about intelligent, I would certainly agree with the voluntary.

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BY MR. ZEMAITIS:
[90] Q Dr. Allen, in your experience, is the informed consent dialogue different for each patient?
A It is different, yes.

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[91] MS. KOLBERT: Your Honor, Dr. Michael Alan Grodin is a pediatrician and a professor with over 11 years of experience in the field of medical ethics. Presently, Dr. Grodin is the Associate Director of the

Law, Medicine and Ethics program, and Director of Medical Ethics at Boston University Schools of Medicine and Public Health, where he is also an Associate Professor of health law, pediatrics and social medical sciences and community medicine.

In addition, he is an adjunct Associate Professor of philosophy in the College of Liberal Arts at Boston University. Dr. Grodin is a medical ethicist and human studies chairman for the Department of Health and Hospitals [92] of the City of Boston, and serves on the Board of Directors of Public Responsibility in Medicine and Research, and the American Society of Law and Medicine. He is also a member of the National Committees on Bioethics of the American Academy of Pediatrics, and serves on the National Committee on Ethics of the American College of Obstetricians and Gynecologists.

Following completion of his B.S. degree at the Massachusetts Institute of Technology and his M.D. degree at Albert Einstein College of Medicine, Dr. Grodin performed his post-doctoral and fellowship training at UCLA and Harvard. He has been on the faculty of Boston University since 1979.

Dr. Grodin has served as medical ethics reviewer for the *New England Journal of Medicine* and Oxford University Press, as well as other respected medical journals. Dr. Grodin has also delivered hundreds of addresses, is editing two books, and has authored or co-authored over 35 articles in chapters in books and professional journals, in the area of moral dilemmas in medicine and problematic decision making in clinical health.

DIRECT EXAMINATION

BY MS. KOLBERT:

Q Dr. Grodin, do you have a particular area of expertise in medical ethics?

A Yes, I primarily focus on the beginnings and ends of life, and ethical dilemmas surrounding those two periods.

[93] Q When you say the beginnings and ends of life, does that include pregnancy?

A Includes pregnancy, reproductive issues, abortion, new reproductive technologies, perinatal, neonatal issues.

Q Now, I told the Court that you are on the National Committee on Ethics for the American College of Obstetricians and Gynecologists, can you explain to the Court what your job responsibilities are there?

A The American College of Obstetricians and Gynecologists, which is a national organization association of board certified obstetricians and gynecologists, have several committees. One of the committees they have is called the Committee on Ethics, and that committee at a national level deals with policy implications surrounding questions that either the membership of the college and/or its administration seek to have elucidation on, illumination on. And the college's Committee on Ethics therefore studies these problems and gives statements -- issues statements on what the position, or what a reasonable position might be with regard to various issues, whatever the college wishes to ask us.

Q And I also understand you're on the National Committee on Bioethics for the American Academy of Pediatrics, what are the job responsibilities for that?

A The Committee on Ethics for the Academy of Pediatrics is [94] a parallel organizations for that group. As opposed to the College of Obstetricians, the Academy of Pediatrics is a national organization of board certified pediatricians who deal with issues of practice and policy, as well as children's issues. And they also have various committees, one of those being the Committee on Bioethics of the American Academy. And I sit on the national committee, which deals again with policy issues,

recommendations, concerns, whatever the administration and/or pediatricians should wish us to look at.
Q In your writings, professional activities and as a physician have you had an occasion to provide informed consent?
A Yes, I have.
Q And have you studied the doctrine and principle of informed consent?
A Yes, extensively.
Q Have you reviewed the literature taught and lectured on both the doctrine and the principle of informed consent?
A Yes.
Q And in your capacity-- can you explain for the Court that-- you are the medical ethicist, as I understand it, of the Department of Health and Hospitals for the City of Boston, can you explain for the Court the job responsibilities there?
[95] A Right. That is the clinical component of my job, as opposed to my academic responsibilities. That clinical responsibility is that I am the official medical ethicist for the Department of Health and Hospitals for the city, which includes not only the Public Health Department, but Boston City Hospital, which is a major municipal hospital in the City of Boston, as well as two other hospitals, chronic care hospitals. And in that capacity I am asked to not only educate and not only create policies for the Department of Health and Hospitals, but to do specific clinical consultations on patient care problems at the bed side, in the intensive care units, wherever they may ask me to come and consult and help them try to understand, illuminate and come to some conclusions about difficult moral and ethical dilemmas regarding patient care.
Q Approximately how many patients do you consult with in that capacity per year?

A I would say on the average maybe 50 or 60.
Q And can you explain for the Court your job responsibilities in teaching at Boston University?
A I am a professor of philosophy in the College of Liberal Arts, where I teach undergraduate and graduate doctoral students medical ethics and philosophy of medicine; I'm a professor of health law in the School of Public Health, where I teach ethical issues in medicine, public policy and public [96] health; and I'm a professor in the School of Medicine in the social and behavioral sciences -- socio-medical sciences and community medicine, where I direct the program of medical ethics and teach medical students at the undergraduate, graduate and post-doctoral level, as well as faculty.

MS. KOLBERT: Your Honor, at this time I would move the Dr. Grodin be certified as an expert on the question of medical ethics.

THE COURT: Any objection or any questions?

MS. MERSHIMER: No questions and no objections.

THE COURT: Motion granted.

MS. KOLBERT: Thank you, your Honor.

BY MS. KOLBERT:
Q Dr. Grodin, can you explain what is informed consent?
A Informed consent is both a procedural and substantive concept, which relates to the notion of a specific act that a patient in this case might wish -- be approached with a specific act and it relates to giving information, and having a discourse and dialogue with that individual, so that they understand various elements of choice, what choice they're going to have and what the elements of that choice are; and then ultimately, in a voluntary, competent manner, consenting to that act.
Q Is there a difference between the- principle of informed consent and the doctrine of informed consent?

[97] A Yes. As I understand those two concepts, the doctrine of informed consent would be a legal concept, which would be viewed in the legal legislature or by courts, whereas the principle of informed consent is a philosophical moral-ethical notion, which relates to the notion of respect for persons and autonomy and various ethical concepts which would be derived independent, for instance, of a law being in existence. So the principle of informed consent is a philosophical or ethical notion, and the doctrine of informed consent would be the legal embodiment, perhaps, of that ethical notion, or whatever the law says the doctrine of informed consent might be.

* * *

[98] Q What are the standards of this ethical informed consent?
A Well, there are several elements, first of all, to informed, voluntary consent. The first notion would be that it's free and uncoerced, meaning that it's voluntary. And the other notion would be that it is consent or competent, meaning that the person has the capacity, the mental capacity, if you will, to understand what they're being asked and what the elements of the informed consent process are.

More specifically, the question of standard would come up within the concept of what the information need be [99] transferred in getting this voluntary informed consent. And contemporary ethical discourse on this subject has suggested that the standard, meaning what information needs to be transferred in this doctor-patient relationship in the consent process, first of all is not an objective standard, meaning that the information that be transferred in an ethical sense should not be dictate purely by the physician. It seems to me that if in fact informed consent is to be grounded in

autonomy, giving people the right and the information they need to make decisions, than it's for the patient's needs that the informed consent process has occurred.

Therefore, the information should not be objectively what physicians think. If all physicians got together and decided that no information should be given, it seems to me that shouldn't be the standard, it should be what patients need. So that is not an objective standard, the standard--
Q Am I correct in saying that your testimony is the standards go to voluntariness and that they go to the subjective needs of the particular patient?
A Correct. So, insofar as informed consent is for patients, not for doctors, they're the ones that are being asked to have a certain action and to consent to it, the consent doctrine is set up for the needs and to create the autonomous situation, so that an empowered person can make a [100] decision.

Then the question would be, what is the content of that subjective information. And the modern, contemporary view of informed consent, from an ethical standpoint, would be that of course it is the patient's needs, but it is more than just what a generic patient would need, it is in fact what that individual, unique patient would need, because that's the person who is need of the respect that will cause them to be autonomously making the decision that they alone will need to make. So --
Q So are you saying then that the -- let me ask this, does that mean that informed consent varies from patient to patient?
A Absolutely.
Q What is the problem with content-based notion of informed consent?
A As I understand your question of content-based, meaning that there would be a specific direction as to

what information need be said or need not be said, seems to me that that goes against this ethical concept that each individual patient needs to be taken on their own merits. And some of them will have the need for more information, and some of them will have the need for less information, depending on their own clinical circumstances. And therefore, the contemporary view of informed consent from an [101] ethical standpoint would be that you should not have specific content-based informed consent, that that needs to be determined in the context of the relationship of the individual patients needs and the doctor or professional who's involved in giving the information.

* * *

[102] Q Now this morning, Dr. Grodin, there was a lot of talk about counseling and the informed consent dialogue. Is there, in your view, a difference between options counseling and the dialogue of informed consent as you've described it?
A Absolutely. And the distinction I would make is that informed consent can only be obtained in relationship to some action that need be taken, you are getting consent for an action, if you will. And that's quite different and, therefore, the standards of information and what have you relate to the notion of informed consent. Options counseling is just that, it's a discussion. There is no need for action at that point, it's basically discussing what the various options that are available and counseling, discussions around that. But that is quite different than asking for informed consent to a specific action. And therefore, usually, you would start off with options discussions and then move into informed consent for a specific action.

* * *

[103] Q Can informed consent ever be obtained over the telephone?
A I would say no.
Q Why not?
A Because as I've suggested informed consent is to a specific action, and you would need to understand not only that the person has been informed adequately, but that they are giving consent and that it's voluntary. And the concern I have, for instance, in obtaining consent is the voluntariness independent of being able to see the person, and to see how they react and understand and ask questions. How do I know, for instance, on the phone that somebody isn't holding a gun to the person's head and asking them to respond to the questions, there is no way to know that. So in the absence of actually coming face to face with the individual, I have a difficult understanding that they are giving their voluntary, if you will, uncoerced informed consent.

So there are many elements, not only the information that I would need, encounter and interaction to see about unsaid types of experiences and uncomfortableness and what [104] have you, but also the consent part. So I would need to make an assessment of competency, if you will, or capacity in a medical sense, which would require seeing the person. And then the voluntariness would be of great concern to me over the phone.
Q Can information be imparted over the telephone?
A Yes.
Q But that, in your view, is different from obtaining informed consent?
A Correct. By giving information, you're not asking for a specific action and consent to that.
Q Can informed consent be obtained through the use

of a tape-recorded message?
A No.
Q And how about through the use of printed materials?
A No. Those might be adjuncts, but consent could not be obtained.
Q During the informed consent dialogue, should a physician or counselor try to lead his patient to his or her preferred medical choice?
A No, the idea should be to lead the patient to what their choice is, not what the professional's choice is. Again, informed consent is for patients, not for doctors or counselors.
Q And is this true also with the informed consent dialogue [105] for abortions?
A Absolutely.
Q Now, you've said that the disclosure of information about the risks and the benefits of a particular medical procedure is the key to the ethical underpinnings of this principle, how extensive should that disclosure be?
A To the specifics of the information?
Q Mm-hmm.
A Again, that would depend on the individual clinical encounter, it would depend on the patient on their background, on their history of encounters with the medical system, on any one of a number of factors. And I would not be able to say specifically how much or how little, because it would depend on the clinical circumstance.
Q Can inappropriate disclosure, that is providing either too much information or not enough information ever be harmful to a patient?
A Absolutely. First of all, insufficient information would not give them perhaps the elements that they need to make that informed, knowledgeable, free, uncoerced, voluntary consent; and giving them more information than they need might cause them to be unnecessarily

confused, cause stress, cause anxiety, cause them to misunderstood in fact what the nature of the relationship is. So it would depend on how much more information and what the context of that [106] information was, as it would depend on how little information and what the context of that little information was.
Q Do you have a view on whether or not inappropriate disclosure can be harmful to the doctor-patient relationship?
A Absolutely. Again, if in fact the physician is giving what we call inappropriate information, meaning information that they don't feel is necessary in the doctor-patient relationship, it would confuse the physician in terms of understanding what the goal of the relationship is and try to figure out what the limits and extent of the informed consent process are, which as I said needs to be individualized. So it seems to me that it would cause confusion equally, confusion, problems, anxiety and concerns for the physician for not knowing -- not being in control of the mutual participation between the physician and the patient in this consent process.

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[107] Q Dr. Grodin, do you have an opinion about the provisions of this act and whether or not it may cause physicians -- or will cause physicians to violate ethical standards in providing informed consent?
A This act as written, or as I understand it to be written, is specifically content-based. Meaning that it directs physicians to give, or maybe even not give, depending on how you read it, certain information to patients, which again would stipulate what the nature of the patient's need is. And as I have said before, the patient's need has to be assessed on an individual basis. And therefore, this is a content-based notion of informed

consent, which is not what I think is the present contemporary standard of what informed consent should be.

Q Now, I direct your attention to Subsection l(i) in Section 3205, which appears on Page 8 of the document before you, which states that the nature of the proposed procedure or treatment that a reasonable patient would consider material to the decision of whether or not to undergo the abortion must be given to the patient.

A Right.

Q Do you have an opinion about whether or not that standard is appropriate?

A I would again note that I think it's not a reasonable patient that's the relevant issue here, but rather the [108] specific patient. And there may be patients, for instance, who are quite unreasonable, that they want a lot more information than what a reasonable patient would want, or there may be specific patients who want less information or need less information. And therefore, again, it seems to me that you don't want to stipulate even in what is a standard, which is most people would want to discuss the risks, benefits and alternatives. As to what the content of that might be, it seems to me that the standard should be the individual patient, not necessarily what a generic -- if I even knew, reasonable patient might need. So the materiality, it seems to me, goes to-- you can't materiality outside of an individual patient.

Q I direct your attention to Subsection 3(i), which is directly below, which requires the physician to provide the medical risks associated with carrying her child to term; do you have an opinion about whether or not that standard is appropriate and consistent with current medical practice?

A I would again make the notion that this is a content-based directive, which I think is inappropriate in

and of itself, because you would need to deal with the specific patients. It's particularly problematic though in the content of an abortion consent, because it seems to me that if in fact the patient has already made a decision based on the option discussion and now we're into the informed consent [109] part, that it is not relevant to be going into informed consent around issues that are unrelated to the action that the patient is there to give consent for. So, it seems to me that it's immaterial and not relevant.

Q Now, are you saying that the woman never should have information concerning the risks of carrying the pregnancy to term?

A Oh, of course not. But if a patient came to your obstetrics office and was going to carry a pregnancy to term, as an example, and that was her decision, it would seem equally inappropriate to say what the risks of an abortion are if she's coming to your clinic to be talking about pregnancy and carrying a pregnancy to term. And therefore, again, I would say on either side the issue is the appropriateness of the information in relationship to the specific consent that's being obtained around the specific action that the patient is being asked.

Q I direct your attention to Subsection 2(i), which requires that prior to an abortion a physician or a qualified physician assistant, health practitioner, technician or social worker provide or offer to the pregnant woman information that the department publishes, printed materials which describe the unborn child and list agencies which offer alternatives to an abortion; do you have an opinion about whether or not this section comports with medical evidence?

[110] A Not only do I think it inappropriate to have content-based consent, but it seems to me that to go beyond that and once you've decided that there's content-based need for bringing up information, to give

specific information that's generic for all parties seems to me inappropriate because that may not be the needs of that individual patient.

Q I direct your attention to Subsection 2(ii), which requires the provision of information involving medical assistance benefits that may be available for prenatal care, child birth, neonatal care, and the availability of that assistance; do you have an opinion about whether or not that particular subsection comports with medical evidence?

A Again I believe it's content-based, therefore problematic. But insofar as the information, it does not say whether in fact there is or isn't benefits, it seems to me it's confusing even at that level. It may or may not be the case, in fact, that there is or is not medical assistance available and, therefore, that doesn't say very much. And it also seems to be problematic for the physician to know whether in fact there may be medical care available, depending on where one lives and what the availability is of obstetrical care or of pediatric care, or what have you. It depends on what one means by available.

Q I direct your attention to Subsection 3(i), and ask you whether or not you have an opinion about the medical ethics [111] of providing information that the father of the unborn child is liable to assist in the support of the child?

A Again, it seems to me that that is information that's beyond the expertise of a physician to know whether a father is or is not liable, it seems to me that that's a legal question that is not for a physician or clinician to be discussing. Even if it be true, I might add, it seems to me that that's beyond the expertise of a physician, any more so than a lawyer giving medical information.

Q Now, if you take these sections together, from Subsection 2 and Subsection 1, little 3, that is the

information involving carrying the pregnancy to term, do you have an opinion about whether or not those aspects of the content-based informed consent will change the dialogue and, if so, in what way?

A Again, it seems to me that it dictates and intrudes on the standard, the notion of doctor-patient relationship in this material, individual-based notion of informed consent, because it dictates what will or will not occur. And, therefore, may in fact cause conflict between what the physician and/or patient needs or wants are, and at minimum might confuse what the outcome or what the importance is, what the goal is of that relationship, which is to have a patient informed.

* * *

[112] Q Dr. Grodin, I'm going to show you what has been marked as Defendant's Exhibit 49. I'd like, if you could, to take a look at that exhibit for me.

(Pause.)

Q And could you identify it for us?

[113] A It's dated January, 1990, and entitled Attachment Number 2, Directory of Social Service Organizations, and there are listing with addresses and phone numbers of a number of organizations in various counties in Pennsylvania, with also numbers under special services, and those numbers I believe refer to another document -- I presume refer to another document that list what those special services are or might be.

Q Dr. Grodin, do you have an opinion about whether or not it is appropriate as a matter of medical ethics to offer this type of information as part of the informed consent dialogue?

A Again, clearly not as part of the informed consent dialogue, because the informed consent is to an action and it seems to me that at that point we're talking about

the informed consent around an abortion, if that's the situation. So clearly it is not appropriate as part of the informed consent part of the dialogue.

Q Now, if some of these agencies listed in this document are agencies that provide services to pregnant, and may or may not be religiously based organizations, do you again have an opinion about whether or not it is inappropriate for doctors to offer this information as a part of the informed consent dialogue?

A Not as a part of the informed consent dialogue.

* * *

[114] Q Could you identify Defendant's Exhibit 51 for us?

A It is a one-page sheet with a number H520.705P, called the Commonwealth of Pennsylvania Department of Health Notices Required by Abortion Control Act, July, 1990.

Q Have you had an opportunity to review this document?

A Yes.

Q Do you have an opinion about whether this document and the notices that are listed therein are consistent with contemporary medical ethics?

A Again, this is a content-based document which specifically directs information to be given, which may or may not be appropriate, depending on the individual needs of an individual patient with the doctor-patient relationship in that clinical circumstance.

* * *

Q Within Subsection C, that begins on Page 9 and ends on Page 10, there is a provision that says that no physician [115] shall be guilty of violating this section for failure to furnish information if he or she can

demonstrate by a preponderance of the evidence that he or she reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient -- are you with me here?

A Yes.

Q Do you have an opinion about whether -- first of all, what-- what --

A That is often called in medical ethics parlance of therapeutic privilege, as well be in the legal, which means that in certain situations, and it is usually related to a specific case and a specific time, or a specific concern is brought up that giving certain information that the physician might otherwise think would be material to that individual person, or they might not give that information because of concern, for instance, about someone committing suicide or having some other serious reaction to the information in the context of informed consent.

Q Do you have an opinion about whether or not this particular therapeutic privilege comports with medical ethics?

A The problem I have with this notion of therapeutic privilege is that it's in the context of a content-based notion of informed consent. If in fact one follows the [116] contemporary view of medical ethics in terms of informed consent, which is that one goes to the material needs of an individual patient at that specific time with the specific concerns and materiality of that individual patient, then it seems to me one doesn't need to invoke the notion of therapeutic privilege very often unless there happens to be a specific situation, again, with a very serious concern that something will happen in the material base of what information you thought should be transferred. But in the context of this statute, it seems to me that you might want to or need to invoke this quite a

bit, because it's a general statute saying that all reasonable would need certain information and for that specific individual you might make the assessment that they need less information than what's in this. And therefore, you have to, if you will, invoke this therapeutic privilege more than, I would think, as the standard notion of therapeutic privilege, which is it should be invoked very, very rarely, if at all.

Q Do you have a -- within the circumstance that a physician was following this statute as outlined, do you have an opinion as to this particular therapeutic privilege, let's assume for a minute that this informed consent were applied?

A Then I would have concern about what the word severely means.

Q And what's that concern?

[117] A I don't know what it means. I'm not sure severely adverse effect would mean vis-a-vis a specific patient, outside of the context of that individual patient.

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Q I refer your attention to Subsection D, which is the limitation on civil liability, are you familiar with this subsection?

A Yes.

Q Do you have an opinion about whether or not this subsection comports with medical ethics?

A Yes.

Q And what is that opinion?

A I feel that no statute should make physicians immune for liability, no statute should make physicians immune from liability for meeting specific content-based informed consent. Again, as I said, if a patient needs more or less information to make an informed, empowered, autonomous decision, then that's the information that

they should have. And I would be quite disturbed by the notion that a physician is immune from liability for meeting just the minimum standard that for instance is set up in this statute, when in fact the patient may need much more information or much less information. And therefore, I have a problem with, [118] statutorily, making a physician immune from liability based on specific content-based information.

Q Now, Dr. Grodin, this Section 3205 also requires that a physician wait for 24 hours from the time that he or she obtains informed consent until the abortion is performed; do you have an opinion about the medical ethics of this 24-hour waiting period?

A Again, it seems to me that that is a content-based notion of informed consent that in some circumstances that may be appropriate for individual patients and in some circumstances it may not be appropriate. And therefore, it seems to me that you should not have a generic statement for all reasonable persons, if you will, because again some people may in fact not need or not want that amount of time, or may in fact need or want more time than that.

Q Are you aware of any other area of medical decision making which would have a similar 24-hour waiting period.

A Not to my knowledge.

Q Section 3208 of the act, which begins on Page 18, requires that the physician, as part of the informed consent dialogue, offer materials which are those which I have shown to you, do you -- this merely requires the physician to offer those materials, do you have an opinion as to whether or not that would violate your standards of professional ethics?

A Again, in the context of informed consent, which is what [119] I understand this to be about, it is consent to a specific action. And therefore, it seems to me

inappropriate to even offer, as an example, material that is irrelevant to the specific action that the person is being asked. As an example, if I were a patient that had discussed with my I family or with physicians or nurses whether I should have gallbladder surgery and have my gallbladder, by either surgery or by medical therapy, as an example, and then I've come to a conclusion over time that I want to have surgical procedure and I don't want to live with taking medicine any more, I want to have my gallbladder taken out, I've now come in to get consent for the gallbladder surgery. It seems to me inappropriate to say but, you know that I could give you information about medical therapy, when in fact the patient has already thought about that and now is coming in for a specific consent related to a specific action, which is a surgical procedure.

Q Do you have an opinion about whether or not offering pictures at two-week gestational increments of the fetus would violate medical ethics?

A Again, the same situation. I would not offer routinely information, that I would have to depend on individual patient for their individual needs. And then it seems to me that occurs in the option-based part of the two-part option counseling in informed consent approach to patient care. So [120] I don't have a problem specifically with pictures, if in fact that's what the patient needs and wants and asks for.

Q Now, you've testified in a number of different instances that the act as currently drafted would violate professional ethics. What's the effect on a physician who is required to provide this information which in your view would violate those professional standards?

A Well, it seems to me it may have many effects, not the least of which is to cause them to be confused and can cause them to not understand what the goal -- who the informed consent process is for; is it for patients, is it

physicians, is it for hospitals, is it for legislatures, what is the goal and intent? So that would be confusing and, again, problematic. If in fact the physician were to act on what they felt was the present standard of ethics and it was contrary, for instance, to what the law said, that would cause increased stress, not just confusion, but stress as to what one should do. Whether one should in fact follow what one believes or thinks the law is, if one can understand it, or what their medical ethics and their profession dictates to them. That would cause stress over time, which would be detrimental to their patient care as well as to them. More specifically, over time, many people will not want to place themselves in that type of situation and, therefore, they will stop doing whatever it is that is constantly placing [121] them in a situation where they have to act differently than what someone is telling to do.

Q In your view, would that mean the physician would stop performing abortions?

A I believe some would.

Q Dr. Grodin, I'd like to give you a hypothetical situation that is based on facts that will be presented in evidence in this trial. I want you to assume that you are a physician providing abortion services and that into your office comes a woman who has been battered and that you suspect that this woman has, from her injuries and her demeanor, that she has been battered, and you offered that woman assistance for the underlying problem of battering, but that woman refuses the assistance because she does not consider herself a battered woman. Similarly, you have a suspicion that informing that woman's husband of her pregnancy will lead to danger to her and may well place her in a life-threatening situation, do you have an opinion -- let me say one more fact, which is that the battered woman would be unwilling to declare herself battered under the

exception to Section 3209 of the act, that is she is unwilling to sign a statement that she considers herself to be at a risk of bodily harm as a result of notification. Do you have an opinion about what, if anything, the physician should do as a matter of medical ethics in that circumstance?

[122] A First and foremost, the physician's obligation is to meet the needs of the patient and to try to speak to their welfare and their beneficence, to benefit them. And therefore, it is clear that the information should not be passed on to her spouse, in that it would cause -- there is good reason to believe that it would cause her to have significant harm.

Q What, if anything, is your opinion about how the physician would make that event occur if the act requires him to -- or requires either a statement from the woman that she's notified her spouse or has exempted herself from the act's coverage?

A Well, again, the physician clearly cannot reveal the information because that would cause harm to the patient, according to the ethical principles of beneficence and patient, doctor-patient relationship and care. Therefore one would have to do, it seems to me, one of two things: either have the pers-- encourage the woman, if you will, to lie and say that she has informed the husband if she hasn't, which I understand might have some significance for her in terms of the statute, and/or the physician would have to certify that according to the statute there will be -- there are extenuating circumstances that require one not to pass on the information which apparently this doesn't meet.

So either the physician would have to take on the responsibility of disobeying the statute or the patient [123] would, it seems to me, but one of those two things would have to be done because one thing that clearly should not be done from a moral standpoint is to pass

the information on to a spouse who you have reason to believe will harm this woman.

Q Now, I would like to give you a second hypothetical that involves a woman who has been a victim of marital rape, that is, she's been raped by her spouse. And under Section 3209, prior to the performance of an abortion, the woman would either have to notify her spouse or again sign an affidavit that her spouse -- I'm sorry, that the pregnancy is a result of spousal sexual assault which has been reported to law enforcement agency having the requisite jurisdiction.

Now, assuming this circumstance that a woman comes forward to you, says she is a victim of marital rape, the pregnancy is a result of that marital rape but that for a variety of reasons she refuses to initiate criminal activity criminal prosecution against her husband and refuses to report to a law enforcement agency having the requisite jurisdiction, do you have an opinion about what if anything the physician should do as a matter of medical ethics in the circumstances?

A My concern again would be to the welfare of that individual patient who in fact I have developed a relationship with and my goal is to try to beneficently care for them and to give them the care that's necessary and [124] appropriate and to their best interests. And therefore insofar as I would have deep concern of passing that information on to a spouse which she says that that will cause her harm and I have every reason to believe it will, I would not pass that information on.

Q And again do you have an opinion about what the likely effect is on the doctor to avoid the requirement of the act?

A The doctor then to follow what is the ethical appropriate course of action in the nature of doctor-patient relationship then would either have to ask the patient to violate the statute and/or would have to

violate it themselves.

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Q I'm sorry, let me strike that. I would ask you to turn to Page -- it's Section 3206 of the act which is the parental consent division, and that begins on Page 10.
A Mm-hmm.
Q Are you familiar with this provision?
A Yes.
Q Do you have an opinion on whether or not this provision comports with medical ethics?
A As I understand the provision it requires the informed consent of both the parent and the child. Insofar as medical [125] ethics deals with informed consent in an individual person, one cannot get informed consent from two parties. Either the person is competent and has the capacity to do a voluntary informed consent and therefore they will consent and/or they're incompetent and therefore a proxy or surrogate is the one who is making the informed consent. There is no place in medical ethics, as far as I know, where you could ask two people to give an informed consent for a specific action. It is incompatible with the notion of a doctor's informed consent which again relates to an individual person's needs and a specific action that an individual person is going to, so either someone gives informed consent themselves or they are unable to and someone else must be a surrogate or proxy for them to give that informed consent.
Q Now, Dr. Grodin, were you in the courtroom this morning when Dr. Davidson testified?
A Yes.
Q And did you have an opportunity to hear his testimony?
A Yes.

Q As I recall the testimony -- and you may correct me if I'm wrong -- he testified that in his view in certain circumstances there was a possibility that the act, if applied, the definition of medical emergency if applied to certain circumstances would cause him to change his manner of medical care and violate what he termed his ethical [126] obligations. Do you have an opinion about the ethics and the dilemma that Dr. Davidson would be faced when having to apply the definition of medical emergency as contained by the act?
A Again, I feel that physicians' obligation are to patients, first and foremost, and that should be their concern which is meeting the needs of patients and trying to, particularly in an emergency situation, deal with those particular problems and therefore it causes me great distress to think that an emergency room physician might be worried about statutory definitions, legal counsels or anything else when, in fact, someone comes in with an emergency situation and they are called upon to act to the best of their medical judgment dealing with a particular medical circumstance.

So I am quite concerned about an emergency physician who says that there is a conflict or that they think about it or in fact they have to do something different than what they think the law dictates for them which will cause stress, anxiety, maybe change in the way they practice maybe for them to be less certain about how they should proceed or have other concerns. The primary if not sole concern should always be trying to meet the best interests of a patient.

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BY MS. MERSHIMER:
[127] Q And the therapeutic privilege that you were talking about, that applies to the physician in the doctor-patient relationship, is that correct?

A I'm sorry, I don't understand.
Q The therapeutic privilege that you had described, you said was contained in Section 3205(C), do you know what I'm talking about?
A I do.
Q And that applies to the physician in the doctor-patient relationship?
A As I understand it, yes.

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[129] Q All right, well, can you think of any circumstances other than the suicide example where therapeutic privilege would apply in an abortion context?
A Ask the question again, please?
Q Can you, when I asked you can you give me any examples other than the suicide example you gave where the therapeutic privilege would apply in abortion cases, you said "I can't think of many." I'm asking you for any.
A Well, again, if in fact the patient were going to -- if you had reason to believe that they would have severe depression and go into a severe depressive state and that [130] based on their psychiatric history, many of these things relate to psychiatric types of problems, but it seems to me that those are the types of situations where generally the therapeutic privilege might be invoked or where somebody would cause harm to themselves or to others based on the information being disclosed. But it seems to me that should occur quite rarely, I would hope. That's what the notion of the therapeutic privilege is because again you're giving -- you're not giving information that you believe the patient needs and is material; that's critical.
Q We've been going through some sections, 3205(A)(1)(3), and also Sections 3205(2) and all the provisions under that and you gave your opinion that you

had a problem with all those requirements under the informed -- as being information provided by informed consent, is that correct?
A Correct.
Q Now, if the Commonwealth took it out of the caption of being informed consent and just required it as additional information that had to be provided sometime before the abortion then you don't have the same ethical problem?
A That's a different question.
Q Well, I'm asking you.
A Could you ask me a question?
Q If the Commonwealth would take out the requirements that are listed in Section 3205(A)(1)(3) and all the provisions in [131] 3205(A)(2) and they take it out of being under informed consent but would make it a separate requirement that documents or information be available to a woman before she had her abortion, would you have the same ethical dilemma?
A I would still have problems with specific content directed information, even in the counseling setting, although I'm much more open to the notion of presenting lots of different information than the -- that are unrelated to the specific action of informed consent, I have problems with any content based specific information that all people need receive in all situations because individual people have individual needs and therefore some people need more and some people need less information.
Q So if any state enacted any informed consent provision that had content based requirements, that's no good ethically to you?
A My, again, sense is that the contemporary view of medical ethics is that we should try to meet the individual needs of the individual patient and therefore to direct medical care through the legislature or through

law or anything else is inappropriate.
Q The requirements under Section 3205(A)(1)(iii) talking about the nature of the proposed procedure and treatment and of those risks and alternatives to the procedure or treatment that a reasonable patient would consider material to the [132] decision of whether or not to undergo the abortion, that shouldn't be required as part of informed consent?
A Again, the infor-- what I would say is that the information about the risks, benefits and alternatives, that that specific patient needs is what should be given.
Q So the statute would be all right if it just took out reasonable patient to the specific patient?
A I -- yes.

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[135] Q When you were given the hypothetical about the battered woman and you said there was a choice between either the patient disobeying a law such as lying on the form or else the physician disobeying the law by going ahead and performing the abortion without having the notice being given, isn't another option is to encourage the woman to check off the box saying that she fears physical violence and guaranteeing her confidentiality and try to get her some help?
A Well, absolutely. But as the case was presented to me, she refused. Obviously you would want to discuss why it is that she's fearful, explain that checking off this box would mean that we wouldn't have to pass on the information, et cetera, et cetera, et cetera, but as the case was presented me in no uncertain terms even after persuasive discussion, not just, you know, open discourse, but in fact encouraging [136] and persuading which I think would be in the realm of what an appropriate doctor-patient relationship would be, if she absolutely

refuses, then you have only a few options available. The other one perhaps would be to question her competence or capacity, but I think that that was not as the case was presented. If in the context of that she also relates psychiatric symptoms or what have you or is delusional or what have you, then there might be other modes to go down, but it seems to me that as the case was presented, that's the only option available. In fact, it may be part of her disease or battering that she's unable to sign off on that, but that's a little bit outside of my expertise, but I have in my clinical encounter dealing with child abuse found parents that will not be able to admit and up front say that they abuse their child, even though the child has physical evidence of abuse in front of you and that they clearly have abused the child, but they are unable to specifically say that they abuse their child because of concerns about their psychodynamics of intent, all kinds of issues. So --
Q All right, thank you, Doctor, I think I get the point. You would agree though it's a doctor's ethical obligation in such a case when he is presented with a battered woman to encourage her though to get help and get treatment?
A I'm sorry?
[137] Q You would agree --
A Oh, in terms of the battering?
Q Right.
A Oh, yes, absolutely I would say that there is a serious problem here and the fact that you won't sign this may be as much a part of the problem because it's recognizing, accepting there is a serious problem and I would encourage her to explore this.

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RONALD JOSEPH BOLOGNESE, Plaintiff's Witness, Sworn.

THE AUDIO OPERATOR: State and spell your name for the record, please?

THE WITNESS: My first name is Ronald, R-o-n-a-l-d, middle name Joseph, J-o-s-e-p-h, last name Bolognese, B-o-l-o-g-n-e-s-e.

MR. ZEMAITIS: Your Honor, Dr. Bolognese will be [138] tendered as an expert in the practice of obstetrics and gynecology in Pennsylvania and in particular the practice of perinatal medicine.

Dr. Bolognese received his Bachelor's degree from Princeton University in 1959 and his M.D. from the University of Pennsylvania School of Medicine in 1963. After graduating from Penn, he served rotating internship at Bryn Mawr Hospital in Bryn Mawr, Pennsylvania, and he served as a resident in obstetrics and gynecology at Pennsylvania Hospital, also in Philadelphia.

He is licensed to practice medicine in Pennsylvania and New Jersey and he has specialty certifications from the American Board of Obstetrics and Gynecology in 1969 and the Internal Fetal Medicine Board, which is a division of ACOG in 1974.

He has served on the faculty of the School of Medicine at the University of Pennsylvania, serving as a Clinical Assistant Professor of Obstetrics and Gynecology, an Associate Professor of Obstetrics and Gynecology. He also serves as the Director of the section on Perinatology of the Department of Obstetrics and Gynecology at Pennsylvania Hospital and he has served as a Professor of Obstetrics and Gynecology at the University of Pennsylvania School of Medicine.

Since 1985 he has been Chairman of the Department of [139] Obstetrics and Gynecology at Pennsylvania Hospital.

DIRECT EXAMINATION

BY MR. ZEMAITIS:

Q Dr. Bolognese, could you describe for us the practice of perinatal medicine?

A In 1974, the early 1970's actually, the American College of OB/GYN determined that there were subspecialty areas that required additional training and expertise. One of those was maternal fetal medicine or more loosely referred to as high risk obstetrics. And the purpose was to produce a group of physicians who had the expertise in the identification of patients who had less than an ideal chance of a successful outcome of pregnancy due to either maternal complications, medical complications that the mother brought into the pregnancy such as diabetes, hypertension, or complications that arose in her previous pregnancies such as premature labor, neonatal demise, stillbirths, that tend to repeat during subsequent pregnancies. So then in general the patient was at significant risk for a poor outcome in a subsequent pregnancy.

Q Is perinatology now recognized as a specialty in the obstetric and gynecological practice?

A Yes, in 1974 the American College of OB/GYN established the subspecialty and I was one of the original 14 physicians boarded in maternal fetal medicine at that time.

[140] Q What was the qualification process that you had to go through to become qualified?

A The initial process was a grandfathering of the physicians who had a level of expertise. To prove that, they submitted a series of cases over a two or three-year period, identifying the types of complications, the types of patients that they cared for, and this was judged by senior members of the American College that these physicians indeed had an expertise and a familiarity with the process of complicated obstetrics.

They were then asked to submit a thesis on published material for approval by the board and at that point subjected to a intense oral examination for the completion of the process.

Q Since your qualification has your practice been a specialty practice in perinatology?

A Yes, it has.

Q Now, as I mentioned a few moments ago, you have some teaching responsibilities both at the University of Pennsylvania and at Pennsylvania Hospital. Could you describe the teaching responsibilities you have?

A Pennsylvania Hospital is the major affiliate of the University of Pennsylvania and well over half of the students who choose obstetrics and gynecology as their course are trained at Pennsylvania Hospital as part of the rotation. [141] And I participate in a lecture course and daily rounds with the medical students. In addition to that, we train 20 residents at any given time in obstetrics and gynecology at Pennsylvania Hospital and I'm responsible for some of the teaching of those residents. And, lastly, we have a fellowship in maternal fetal medicine. At any given time we have four fellows who are a part of our program and I play an integral part in training those fellows who will go on to be perinatal specialists around the country.

MR. ZEMAITIS: Your Honor, we move that Dr. Bolognese be qualified as an expert in the practice of obstetrics and gynecology in Pennsylvania and in the practice of perinatal medicine.

THE COURT: Any objection or any questions concerning qualifications?

MS. MERSHIMER: No, your Honor.

THE COURT: Motion granted. Shall we proceed?

MR. ZEMAITIS: Yes, your Honor.

BY MR. ZEMAITIS:

Q Dr. Bolognese, could you get in front of you, I think

it's the document you have right there, it's the Abortion Control Act and I would ask you to turn to Page 5 on which is contained the definition of medical emergency.

Have you had an opportunity to review that definition before your testimony here today?

[142] A Yes, I have.

Q Knowing the problems you encountered in your practice of perinatal medicine, how do you react to that definition as it would apply to that practice?

A It's a vague and confusing definition that places the physician in, I think, a dilemma in trying to interpret the law as well as interpret the specific components and words as substantial and good faith clinical judgment, impairment of bodily function. The orthopedic service may not interpret the uterus as a major body function and I may not interpret the knee as a major body function, so that there are just a vague, confusing definition of medical emergency.

Q I'd like to point out some of the specific terms and ask your reaction to them: serious risk. Is serious risk standing alone a term that you use in your medical practice?

A Alone we would try to define that a little bit better than by serious risk. We'd specify indications or conditions that would be -- would statistically tend to point us in the direction of serious. Serious is such a vague term and it is not a medical term.

Q Is the term "substantial impairment" a term that you use in your medical practice?

A I'm not sure what a substantial impairment is. Is 75 percent impairment substantial? Is 50 percent substantial? Is 25 percent? Depending upon the body function, five [143] percent could well be substantial and other body functions, 90 percent may not be considered substantial. So again it's a very vague, imprecise term.

Q Now, the final term I'd like you to take a look at is

"major bodily function." Do you have any understanding as to what that term means?

A Again, as a physician, I can't think of many body functions that would not be considered major. Obviously as an obstetrician-gynecologist, I suspect that I focus on the pelvic organs as major body functions, but that position may not be agreed upon. Certainly women can live without major bodily functions of the uterus and the ovaries, but in our judgment, that certainly a loss of the uterus or ovaries would be a loss of a major body function. So it's very imprecise and again vague as to all the medical terminology.

Q If the statute goes into effect and this definition of medical emergency begins to apply to the practice of obstetrics, what do you predict obstatricians will do?

A Panic. I think the first reaction of most physicians would be to look at this law and decide that they just don't want to have anything to do with it. I think the advent of increasing legal action on the part of physicians has had a significant impact upon how they practice, and that's in a civil area. Physicians in general are not used to a criminal area, but they are typically concerned and afraid, so my [144] first reaction would be that the assumption of most physicians is just not get involved with this. The second reaction may well be to create another layer of committee or judgment so that the physician may seek advice or seek sharing the responsibility of the decision by going through some type of a committee or I could imagine myself as a chairman of a department of being placed in the position of judging each and every medical emergency because the physician does not want to take that responsibility totally upon his or her shoulders. So I think you create another either no action or another layer of bureaucratic administration to decide a medical judgment.

Q What consequences would those have on actual

treatment of patients in emergency situations?

A Well, I think it would confuse -- first of all, the patient would either be rejected of that treatment and time would be lost in finding another physician to assume responsibility or liability or whatever to care for the patient or to create the circumstance of time lost by committee meeting or time lost in finding a chairman of a department to make that decision.

As a chairman of a department, I might well choose not to be involved myself because of the criminal responsibility that I could assume by participating in that judgment, so I think it would cause delay, confusion, and the [145] person that would suffer, the persons that would suffer in that end would be the mother and potentially the fetus.

Q Now, are you aware that in the statute there is a 24-hour waiting period, mandatory waiting period between giving of the information for informed consent and the performance of an abortion?

A Yes, I am.

Q In your practice as an obstetrician, once a woman has given her informed consent to any medical procedure, is there any reason, any medical reason to delay that procedure?

A Generally not. There are some situations and it was in line with what Dr. Grodin was pointing out. There are occasional circumstances where the complexity of the judgment placed upon a couple does require some time on their part to arrive at a decision one way or another, but in most instances, if it's truly a medical emergency or a judgment or procedure, once we have provided adequate explanation and informed consent tailored to the patient, tailored to the understanding of the patient, there are very few circumstances that would justify a delay.

Q Can you think of any specific examples where you

think it might be to the patient's benefit to have some time between receiving the information and having the procedure?

A There are certain circumstances in genetic abnormalities, for example, one example would be a Kleinfelder's Syndrome, [146] the identification of a fetus that has the Kleinfelder's Syndrome. This is a child with an extra Y chromosome, this so-called super male. Data in the past used to imply that there was a higher percentage of criminal behavior on the part of this type of an individual and based upon the fact that examples or blood tests in criminal -- in institutions, prisons tended to demonstrate that. That data is of no validity today but the fetus may well be unusual in certain circumstances, this fetus will be sterile, the intellect of the fetus will tend to be as an adult on the average side rather than above average, but not retarded, so that there are some subtleties in that judgment where the fetus indeed may be quite normal as an adult, except for some limitations and does that couple want to take those choices.

That requires a little bit of time and thought on that couple's part, so that would be an example that I could see.

Q In your treatment of high risk patients, are the women that you treat typically trying to carry their pregnancy to term and have a child?

A That's the primary purpose for seeing us, yes.

Q Do you ever face situations where you have to terminate the pregnancy of one of your patients prematurely, even though the woman would like to continue the pregnancy?

A Yes.

[147] Q What are the most common conditions you encounter in your practice of that type?

A The most common would be premature ruptured membranes leading to infection. The second example

would be the development of a bleeding source, usually from a placenta that is prematurely separating, that chronically is causing a loss of blood to the mother and necessitating or beyond her ability to proceed with blood replacement. Or the development of preeclampsia which can go on to eclampsia and that so-called HELLP Syndrome, would be the three more common examples.

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Q Dr. Bolognese, I'd like to focus for a moment on the [148] situation where the woman has a ruptured membrane ultimately leading to infection. How frequently does that phenomenon occur in your patient population?

A Well, prematurity represents about six to ten percent of all births in the country, and about 25 to 30 percent of cases of premature delivery are proceeded by rupture of the membranes prematurely.

In our circumstance at Pennsylvania Hospital as a tertiary care center, because of the expertise of the perinatal service and because of the expertise of our neonatal care, we receive a number of transfers of patients who have prematurely ruptured membranes at outlying institutions and who are going to be cared for at Pennsylvania with the thought of either providing the maximum care for the mother or the ideal delivery route or the best possible care for the neonate at the time of the delivery.

So it is a -- represents, prematurity represents well over 50 to 60 percent of the complications we care for and so it represents about 25 to 30 percent of those complications, so it's a fairly frequent problem.

Q Does the problem of the ruptured membrane occur in women before the fetus is viable?

A Yes.

Q And it also occurs after, I take it?
A Yes.

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[149] Q I'd like to take a particular example of this and assume for the moment you have a patient for whom the membrane has ruptured, a membrane has ruptured, but there is no infection evident at this point in time. What would be the accepted course of management for that patient?
A Well, depending upon the point at which the rupture occurred in the gestation, we will advise the patient that if the rupture occurs before 24 weeks of gestation, the further away from 24 weeks, the earlier in the gestation from 24 weeks we might well recommend to the patient that termination is or completion of delivery of the pregnancy is the best route since the fetus requires the presence of amniotic fluid for development of the lungs.

So, for example, take a patient who is an infertility patient who has had many years of attempting [150] pregnancy and finally succeeds at pregnancy, reaches 21 weeks of gestation and ruptures membranes. The likelihood of a successful outcome of that pregnancy, even if the patient remains pregnant, is extremely poor to impossible because the fetus may well survive to 30 weeks of gestation and because of the absence of amniotic fluid, when the fetus is delivered as a newborn, it has no lungs to resuscitate. So the mother may go through a prolonged period of hospitalization, increasing positive thought process because she is reaching that point, deliver a fetus which has no lungs and the baby will die in the delivery room.

We will try to encourage that patient to discontinue the pregnancy, but if a patient has been trying for many, many years and this is her last hope in her mind, she will

insist that we maintain a pregnancy. We will then do, we will hospitalize the patient, monitor her carefully for any infection as we would do after the 24 weeks of gestation and look for any opportunity to identify a risk to the mother or the fetus and proceed for delivery, such as the development of an early infection on the part of the mother.
Q Now, in those instances where infection does appear, what would the accepted course of treatment be?
A Once -- once the infection has been identified in developing in the mother, as best we can determine that infection is developing, we proceed to delivery.

• • •

[151] Q Once an infection appears, in your medical opinion, Dr. Bolognese, is there any reason to delay the process, whether it be delivery or cesarean section?
A Absolutely not.
Q What are the risks to the woman if you delay any procedure at the time the infection first manifests itself?
A The initial risk to the mother is an infection within the uterus which causes seeding of infection in the uterus. Then the patient potentially will begin to develop a blood-borne sepsis or spread of the infection throughout her body, which leads to an overwhelming septic infection, shock. And, lastly, if that infection is indeed an overwhelming infection she may develop what's called disseminated intravascular coagulopathy, DIC, which is easier, and that represents her coagulability, her ability to clot off her blood. She loses that ability and she may frankly hemorrhage to death.
[152] Q At the time the infection first appears, is the woman in any immediate danger?
A Not if we move rapidly for a delivery.
Q What are the risks to the fetus of a delay in the

procedure?
A The fetus will also develop an overwhelming infection and if we're dealing with a pregnancy that is either close to viability or beyond viability, the best approach for the fetus is for delivery and treatment with antibiotic therapy, respiratory therapy on the part of the intensive care specialists or neonatologists. So both patients in that circumstance would be at risk and delivery is in both their best interests.
Q When a woman presents an infection can you predict how long it will take for that infection to develop into the other problem, more problematic infections you mentioned a few minutes ago?
A Not -- not -- well, some infections can be chronic, other infections can become life-threatening within a matter of hours.
Q If you delay the procedure and the condition of the woman worsens, will that have any impact on the treatment of that woman?
A Not infrequently if the uterus becomes infected or seeded with infection, the uterus fails to adequately respond to [153] Pitocin and she may not be able to deliver vaginally, we may not be able to successfully induce the labor process or effective labor process and then we're forced to proceed to an operative delivery, which places the patient at more risk. She is then infected, the uterus is infected, the risks of a surgical procedure then are substantial. After evacuating the uterus she may not contract the uterus adequately and begin uterine hemorrhage. We may end up having to remove her uterus or perhaps her entire reproductive organs as a result of a delay in overwhelming pelvic infection, and we still may lose the patient.
Q So to make sure I understand, delaying the process of evacuating the uterus may change the method of treatment you have to employ?

A Absolutely.
Q And the method of treatment you would later have to employ, the surgical method, is considerably riskier to the woman than the vaginal delivery that would occur early at the time the infection is discovered?
A Absolutely.
Q You also mentioned earlier, I believe, and if you didn't, I'll mention it, preeclampsia.
A Yes.
Q Is that a condition that you encounter in your perinatal practice?
[154] A Yes. In fact, preeclampsia and infection and hemorrhage are three of the major causes of maternal deaths in this country. And preeclampsia again is one of the problems we encounter at our institution.
Q What is preeclampsia?
A As best we can determine, it's a combination of symptoms that may well be related to an immunologic problem on the part of the mother. It occurs in the first pregnancy of patients, tends to occur in the younger patient rather than the older patient and, interestingly enough, tends to recur, potentially may recur with a new marriage or a new partner on the part of the patient. The patient develops significant hypertension, she can have destruction of the liver, hemorrhage into the liver, she can have destruction of the kidneys and she may go on to have eclampsia, which is a seizure disorder of the brain, due to the edema that she tends or the excess fluid, water intoxication that she may take on.
Q You mentioned earlier, I believe, the term HELLP Syndrome?
A Yes.
Q What is HELLP Syndrome?
A HELLP Syndrome is a further development of preeclampsia with respiratory distress, an adult respiratory distress syndrome where the patient has a

significant complication in [155] the lungs fluid retention and they go on to die secondary to that.
Q How frequently do you encounter cases of preeclampsia?
A Again, preeclampsia tends to occur more commonly in the lower socioeconomic patient, so that as an urban hospital dealing with urban patients as well as, again, a tertiary care center where complications are transferred in, preeclampsia is a disease that we deal with not infrequently on an ongoing basis.
Q When preeclampsia manifests itself, what is the accepted method of treatment?
A The accepted method of treatment is the diagnosis and then proceeding again to delivery, since there is no cure for preeclampsia, and that a delay may again worsen the maternal condition, as well as causing hypoxia, loss of oxygen, reduction of oxygen to the fetus and possible permanent damage to the fetus.
Q Can you predict at the time that preeclampsia manifests itself what the outcome would be for a patient if the condition went untreated?
A Again it can be a chronic nature or the earlier the onset very frequently can be very severe and a patient can go into a HELLP Syndrome or become eclamptic within a matter of hours.
Q When the symptoms first manifest themselves, is the [156] patient in immediate danger?
A Patient is at risk but not at immediate danger.
Q What are the consequences if you delay the termination of the pregnancy for a preeclamptic patient?
A Again the problem would be the development of eclampsia, the development of HELLP Syndrōme, the patient may go on to seizure, the patient may go on to a respiratory distress and then eventually death. We may also lose the fetus during the course of that time because the mother, as she begins to spasm or contract her blood

vessels, she will reduce dramatically the blood supply to the uterus, hence the blood supply to the placenta and thereby the blood supply to the fetus. So we may end up losing the fetus as well as the mother in a severe case.
Q In your opinion, Dr. Bolognese, once a patient manifests symptoms of preeclampsia, is there any medical reason to delay treatment?
A None.
Q Would a delay in treatment potentially have an impact on the course of treatment?
A Again the decision, the longer one delays, the sicker the patient, the poorer the response or less time one has to induce a vaginal delivery and again you're going to be forced to proceed to an operative delivery and a very sick patient.

* * *

[158] Q Dr. Bolognese, in your testimony you mentioned on a number of occasions delivery of a patient or delivery of the pregnancy. Is that in fact a termination of the pregnancy?
A Absolutely.

* * *

BY MS. MERSHIMER:
[161] Q Have you performed any abortions --
A Yes.
Q -- that you felt were required to be performed immediately, but don't fall within the act's definition of medical emergency?
A Uhm, there would be instances again where ruptured membranes occurred prior to 16 weeks of gestation where again there's no reason to delay the pregnancy -- the termination of the pregnancy or abortion under the

definition of the State of Pennsylvania because there's no chance of viability and a delay would be, again, a potential risk to the mother because of infection. Once the membranes rupture at any stage of pregnancy, the mother is at risk to an infection. So once, whatever time that occurs in the gestation, the decision to proceed to delivery has to be considered, depending upon the circumstances.

Q Any other examples other than ruptured membrane?

A Again there could be instances of significant hypertension where a patient has been poorly controlled, instance of severe diabetes, again poor control on the part of the patient, where delivery of the pregnancy would be [162] justified abortion, depending upon the timing of the delivery, would be justified as a medical emergency.

Q Okay. And for severe hypertension in such cases how soon would you perform the abortion?

A If the patient has poor hypertensive control and becomes pregnant and her hypertension worsens because she has a chronic hypertensive disorder, not preeclampsia as we talked about before, again pregnancy is complicating her hypertension and immediate delivery would improve the circumstance. So in those circumstances that again, you've asked me for instances of emergencies where I would move rapidly, that would be another instance.

Q Okay. And that woman can't wait 24 hours before she had the abortion?

A If she has uncontrollable hypertension which is being worsened by the pregnancy, she can indeed develop a major hypertensive crisis and have a major -- major problems, so again I would move for delivery.

Q Okay. And what would those major problems be in that case?

A She could stroke out.

Q And die?

A Well, that's sort of a major problem, too, but I haven't been thinking quite that far down the road; yes.

Q What happens when she has a stroke?

[163] A Well, she could be permanently paralyzed, depending upon the age of the patient. She might partially recover or, depending on where the stroke was, she might have a hemorrhage and she could indeed die.

Q Okay. Now, in the case of diabetes that you gave, what, the abortion would have to be performed immediately, within 24 hours?

A If the patient has uncontrolled diabetes then she is again in a situation where she is developing ketoaciduria where she could have a seizure or a coma secondary to the diabetic state. There's no reason if the patient requests a termination to move to delay that for 24 hours to meet a regulation, when the best interests of the patient would be served by moving to a delivery or termination.

Q Well, is there some increased risk to her life, her health, by waiting 24 hours?

A If her diabetes is poorly controlled and cannot be controlled well because of the pregnancy then, indeed, I would move for a termination, yes.

Q And what happens, what's the result if there is no termination of the pregnancy?

A The patient may well develop ketoaciduria and may go into a diabetic coma or diabetic seizures.

Q And what does that all mean?

A What does that all mean?

[164] Q I mean, like does she lose her kidney or --

A Patients can again have a major central nervous system disorder as a result of the seizure.

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[165] A Delivery of the fetus at that point or terminating the pregnancy would be recommended to the patient because the likelihood of a successful outcome of a live fetus or live newborn would be essentially zero.
Q So you explain the risks to her of terminating the pregnancy compared to the risk of her carrying that child to term?
A Well, it's not the risk, the risk is to the fetus, largely, of ending up with a fetus that has -- or a newborn with no lungs. We would recommend the termination of the pregnancy because of the outcome of the pregnancy, not risk per se to the mother. We're saying in this instance because the fetus does not have adequate amniotic fluid surrounding it, and that appears to be important in the development of lungs of the fetus, that she, if she carries, continues the pregnancy, that she will end up with a newborn that has no lungs and cannot be resuscitated, so that's what we're talking about.
Q Well, so the woman has absolutely no risk at all by having a ruptured membrane?
A No, no, no. She has risk if she continues the pregnancy, due to infection; that's also discussed with her.
Q Right. Now, you said that if there is a case where [166] there's ruptured membrane and infection has developed, that you would proceed to deliver, is that correct?
A Yes.
Q And you said you would move rapidly for delivery?
A Yes.
Q How rapid?
A Once the diagnosis is made, the patient is moved to the labor and delivery and Pitocin is started.
Q So that would be like in approximately an hour?
A The unit at Pennsylvania Hospital is located right across from labor and delivery so, yes, we can proceed

within a matter of an hour.
Q And if you don't, what happens in the case where a woman has a ruptured membrane and the infection and you don't, fail to deliver the fetus immediately, within an hour or two?
A An hour or two? Nothing may develop or she may start a worsening of the infection process.
Q Well, in the cases that you've handled where there's been a ruptured membrane and there's been an infection, in those cases how quickly did you move to deliver the fetus?
A As quickly as possible.
Q And how fast is as quickly as possible?
A I think I answered that. As quickly as I can move the patient to labor and delivery and begin an induction of the labor process.
[167] Q And if you don't do that, what happens to the woman?
A I think I testified to the fact that if we don't deliver her at all, are you talking about?
Q Mm-hmm.
A The patient can then go on to develop a major infection, she could theoretically lose her uterus, she may go on to an overwhelming sepsis which may lead to shock and possible coagulation problems and death.

* * *

[168] Q In the case of preeclampsia, you said you would proceed to delivery?
A Yes, ma'am.
Q How fast would you do that?
A Again, as soon as the diagnosis is made, we would proceed
to move the patient to labor and delivery, initiate a labor process with Pitocin.

[169] Q And can you tell me again what would happen if you didn't proceed to delivery?
A Patient doesn't, isn't delivered? The pregnancy, per se, is the cause of her preeclampsia, so the patient will then develop extensive hypertension which may lead to seizure, she can bleed into the liver, she can lose her kidneys, she can go on to have a cerebral hemorrhage and possibly die.
Q And HELLP is just a further along development of preeclampsia?
A HELLP is a development of the process where the patient becomes sick enough, she goes on to a respiratory problem where the lungs, in essence her lungs fail her and she requires ventilator support and it's an issue of whether she will -- the lungs will return and she can get off the ventilator or she goes on to die.
Q And does that also occur in fetuses about 18 weeks gestational age earlier?
A Any time the patient has preeclampsia she can go on through a sequence of severity, more severe preeclampsia, go on to eclampsia or go on to a HELLP Syndrome.
Q Is that a way of saying yes, it occurs in 18 weeks or more?
A I'm sorry, yes, ma'am.
Q And again you would deliver the fetus as quickly as possible, once you made that diagnosis of HELLP?
[170] A Absolutely.
Q And, what, she could die if you didn't go ahead and proceed with the immediate delivery?
A If we believe that the cause of the syndrome and the worsening of the process is the pregnancy, then again terminating or delivering the pregnancy hopefully will improve her condition.
Q Jumping back to ruptured membranes, you said that some of the cases that your hospital receives are transfer

cases from other facilities?
A Yes, ma'am.
Q Do you know how long it takes them to transfer the patient?
A Depends on the distance.
Q Well, what's the distance that your hospital usually experiences?
A A more common distance would be within an hour of our institution, although we do have some transfers that go out as far as several hours.

* * *

BY MR. ZEMAITIS:
[171] Q Now, Dr. Bolognese, you drew a distinction at 16 weeks between abortion and delivery, and I believe you said that the source of that is Pennsylvania law, is that correct?
A Yes.
Q Is that the Pennsylvania Vital Statistics Law?
A Yes.
Q If you deliver a fetus that is 16 or 17 or 18 weeks old, does that fetus have any chance of surviving?
A No.
Q Up to what age would it have no chance of survival, what gestational age?
A Approximately 24 weeks of gestation.
Q Now, you said that the preeclamptic patient could go through a series of progressively more severe problems. Does that happen with all patients that experience preeclampsia?
A No.
Q Do some patients with preeclampsia move past the symptoms to a less severe stage?
A Not less severe. They will either -- they will become more chronic or become more acute, but they won't become less sick unless the pregnancy is terminated.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, et al.	:	**CIVIL ACTION NO. 88-3228**
v.	:	
ROBERT P. CASEY, N. MARK RICHARDS, et al.	:	**Reading, Pennsylvania July 31, 1990 9:35 o'clock a.m.**

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NON-JURY TRIAL - DAY 2

* * *

[4] DR. LENORE E. WALKER, Plaintiff's Witness, Sworn.

THE AUDIO OPERATOR: Would you state and spell your name for the record, please?

THE WITNESS: Dr. Lenore E. Walker, L-e-n-o-r-e W-a-l-k-e-r.

MS. KOLBERT: Your Honor, Dr. Lenore E. Walker has over 20 years of experience as a licensed clinical, forensic and school psychologist.

Currently she is the President of Walker & Associates in Denver, Colorado, and the founder and Executive Director of the Domestic Violence Institute, a nonprofit organization which conducts research and training on family violence.

[5] Dr. Walker is also an Adjunct Professor of Psychology at the University of Denver. During her

career, Dr. Walker has been the Department Chairperson and Associate Professor of Psychology at Colorado Women's College and an Assistant Professor of Psychology at Rutgers University Graduate School of Applied and Professional Psychology as well as Assistant Professor of Psychiatry at the University Medicine and Dentistry School of New Jersey's Rutgers Medical School.

Dr. Walker was one of the first scientists in the nation to conduct clinical research on inner-family violence and is today one of the foremost experts on the psychology of battered women and families.

From 1978 to 1981 Dr. Walker was the principal investigator for the National Institute for Mental Health funded study on the battered women syndrome. She has authored, edited and contributed to over 32 books and articles and professional journals. For her first book, "The Battered Woman" published in 1979, Dr. Walker was awarded the Distinguished Media Award by the Association for Women and Psychology.

In addition, Dr. Walker is a fellow of and has served on the Board of Directors and the Council of Representatives of the American Psychological Association and is Chair of its Women's Caucus.

[6] In 1987 she was awarded one of the organization's highest honors by being chosen as the recipient of its BPA, Distinguished Professional Contributions to Psychology and the Public Interest Award.

Dr. Walker has consulted with and delivered papers to numerous professional organizations, governmental hearings and has testified as an expert witness on domestic violence and the battered women's syndrome in criminal and civil cases in approximately 30 states and in the Federal Courts.

Dr. Walker received her Doctorate from Rutgers the State University Of New Jersey in 1972, her Master's

degree in Clinical School Psychology in 1967 from the City University of New York and her Bachelor's degree from Hunter College of the City University of New York in 1962.

Her curriculum vitae, actually I think it's her resume, is attached as Plaintiff's Exhibit No. 80.

THE COURT: Yes, I have that.

DIRECT EXAMINATION

BY MS. KOLBERT:

Q Dr. Walker, I've told the Court that you're a clinical and forensic psychologist. Can you explain for the Court the kinds of patients that you see and how many patients per year as a general matter you see?

A As a clinical psychologist, which is only part of the work that I do, I see a variety of different kinds of people [7] for both evaluations and for treatment. Basically they are people who come in with all different kinds of problems in living and I use psychological principles that come from abnormal psychology and developmental psychology to try to understand what their problems are and then develop a treatment plan for interventions to try and help them in some way.

I usually see people in psychotherapy usually once a week, but some people need it for a short period of time longer than that. My subspecialization is in violence against women and so I see many rape victims, battered women, but I also work with families, with both men and women and children in this practice.

Q As a clinical and forensic psychologist, as a professor in the field, as an author in the field, do you follow the research and the publications in the subspecialty of family violence?

A Yes, I do.

Q Do you have occasion to review the work of other clinical and forensic psychologists in the field of domestic violence, family violence, sexual abuse and child abuse?

A I do. I serve as an assistant editor on a number of the major journals in the field, both those that are published by the American Psychological Association and those that are published independently. I think it's approximately five of [8] them that I now serve as an assistant editor of, in addition I review for a number of other journals.

Q Would each of those journals, could they be referred to as referee journals?

A Yes. A referee journal is one which will not publish an article unless other peers review that journal, usually it's three people have to review it and decide that it's worthy of publication.

Q Are you a member of the American Psychological Association?

A I'm a member but I have a higher than a member classification, it's a fellow classification.

Q Well, can you explain to the Court what that is?

A Mem-- after you're a member for a certain period of time, if you have made a contribution that is considered substantial to the field of psychology, then your colleagues nominate and elect you to fellow status. And that's a small percentage of psychologists who get that honor and I have been so honored.

MS. KOLBERT: Your Honor, at this time I would like to move that Dr. Lenore Walker be certified as an expert in family violence.

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[9] THE COURT: Your motion is granted.

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[12] Q Have you had an opportunity to examine the Spousal Abuse Statute in Pennsylvania which is 18

Purdon's Section 3128?
A Yes, I have.
Q And is this statute consistent with the definition you would use for marital rape?
A No, it is not.
Q How would you define marital rape differently?
[13] A Well, marital rape, as I understand the statute, and I'm not a lawyer so it's just my own interpretation of the statute, it appears to be more narrow than would be the common definition that I would use and researchers use for marital rape in that it calls for sexual intercourse to have occurred. In my definition I also use other forms of coercive sexual behavior that may not include penetration, but might include serious sexual abuse of sexual organs, other kinds of penetration that might not be with a man's penis in the woman's body. And so it would be a little bit broader than what that definition would call for, but it would also be coercion.
Q Now, are you familiar that in the Spousal Sexual Assault Statute there is a reporting requirement of 90 days?
A Yes, I am.
Q Is the limitation -- I refer you to Subsection C of that section -- is the limitation of reporting to law enforcement personnel within 90 days within your definition of marital rape?
A No, it is not. That is an overly narrow time period. One of the psychological effects of having been raped is that women often in order to dull the pain of the memory of the rape try to deny or forget the actual rape itself and it can sometimes take several years before she is able to talk about a it or to report what has happened to her.
[14] Q Are there any particular type of women who are battered?
A No.

Q Can you give the Court a description of the range of women who fall within that category?
A Yes. All of the research, mine as well as that of other researchers, indicates that battering occurs across every single demographic group that we know, rich women are battered and poor women are battered. Women -- so it goes across all class levels, women who work and have careers and are well educated are battered as well as those who have no education and have no job skills. All different racial groups are battered, all ethnic groups are battered, all religious groups are battered. There is no way to predict who might become a battered woman.
Q How about the age range of women who are battered?
A Well, in my own research the age range ran from the age of an adult, which was 18 years old, even though we know that teenagers are also abused, all the ways up through women in their 70's and 80's.
Q Are there any particular type of men who are likely to become abusers?
A. Again there are o particular demographic group, just as for the women. Batterers come from every single one of the sociological demographic group. There is one factor, however, that is more likely to predict whether or not a man [15] will become a batterer and that is witnessing and experiencing battering in his own childhood home. A man, a boy who watches his father, who observes his father battering his mother, is 700 times more likely to use battering in his own home. And if he also has been abused himself, that raises the risk to 1,000 times more than a man who has not witnessed or experienced such abuse.
Q Could you describe for the Court the kinds of abuse that a batterer would use?
A Well, abuse ranges across physical, sexual and very

serious psychological levels. Physical abuse can take minor forms such as pushing and shoving and slapping, all the way--

MS. MERSHIMER: Your Honor, I'd like to object at this point. I don't see the relevance of the various types of abuse. The statute that we're challenging here requires spousal notice and then it also has an exception for if a woman fears, "If a woman has reason to believe that the furnishing of notice to her spouse is likely to result in infliction of bodily injury upon her by her spouse or by another individual."

Dr. Walker has been proffered in her expert report to testify that battered women are not likely to avail themselves of the exception. I don't see why getting into the details of how battered women are indeed battered which the Commonwealth does not dispute that there are battered [16] women in this world, is relevant to this whole line of questioning.

THE COURT: Ms. Kolbert, is this relevant or are we going off on tangents here?

MS. KOLBERT: Your Honor, I think it's very relevant. We are prepared to prove through Ms. Walker's testimony and testimony of other witnesses that not only are battered women -- will not avail themselves of the exception, but they're psychologically incapable of availing themselves of the exception and therefore will suffer the harms that this statute requires them to notify their husbands. The types of abuse that we're talking about are the very harms that will be inflicted upon women in the state as a result of the statutory language.

THE COURT: Overruled; I believe this is relevant. Also, I think it's desirable to produce a complete record and I'm just reluctant where a party does have a theory of relevance to shortcut that and perhaps have a record which is not as complete as it should be.

MS. MERSHIMER: Your Honor, so that I'm not

popping up all the time, can I have a continuing objection to this line of questioning?

THE COURT: Yes, you may.

MS. MERSHIMER: Thank you.

THE COURT: Shall we continue?

[17] BY MS. KOLBERT:

Q Dr. Walker, I think you were trying to describe the kinds of abuse that a batterer might use.

A Yes, I started with some of the more mild forms of physical battering and it ranges all the ways up through throwing a woman across the room, banging her head against the floor if she is knocked down, kicking her both with shoes on and with shoes off, pulling her hair, dragging her from place to place, to the use of objects and weapons with the battering, including throwing all kinds of objects that are found in the home, tying her up with objects from the home, using guns, knives, hatchets, hammers, whatever is available to cause extreme damage to women, burning them, poisoning them. Every time I think that I have heard the worst, I am asked to review and evaluate another case where there are more forms of torture that I could never have thought about.

Q Now, does battering take other than physical forms?

A Yes. In addition to physical abuse there is also sexual abuse within a battering relationship. When I first began my research I kept the physical and sexual abuse together as one category, but as I began to collect my data, I realized that sexual abuse is so difficult for women to speak about that it needed to be looked at in a separate way. And the sexual abuse ranges from being forced into unwanted intercourse through the use of being tied up, having objects inserted [18] inside of their body against their will, being mutilated sexually, having parts of their organs cut and being physically abused while being sexually abused, as well.

Q Now, Dr. Walker, would that also include sexual

abuse as defined by the Spousal Sexual Abuse Act in Pennsylvania?

A Yes, it would include that, then there's also the psychological abuse. And that has been the most difficult to measure because it's been very important, both as a researcher and as a clinician, to separate the normal kind of psychological dysfunction and the cruelty that happens in a relationship when that relationship starts to unravel and deteriorate from actual psychological abuse. And my research spent a lot of time trying to figure out what are the differences when it goes beyond the normal kind of verbal and psychological abuse that happens or psychological coercion that might happen in a dysfunctional relationship and in an abusive relationship.

And I have now settled on the definition that's used by Amnesty International for psychological torture as the best description of the psychological abuse that happens in a battering relationship. And they include a number of different factors that include verbal degradation, cursing and name calling and terrible putdowns. It includes denial of a person's powers. For example, for a woman that might mean telling her she's -- she can't do things in the house, [19] she doesn't take care of the children well enough, she doesn't cook well enough, even though she may indeed be adequate at doing those kinds of jobs. It includes attempting to have some kind of physical deterioration of the woman's body so that she's unable to function, such as being woken in the middle of the night and forced to sit up late for hours at night, listening to what the man has to say, and not being permitted to sleep. It may include food deprivation and other physical forms of debilitation and it includes isolation and monitoring of the woman's activities. So that men who batter women stalk them, find them, always have to know where they are and what they're

doing and they want to know what they're thinking, as well. The women describe it as the need for power and control, and particularly mind control over their activities all of the time. They become over-possessive and may become pathologically jealous. Much of that jealousy centers around sexual jealousy, and so they're often accusing the woman of having affairs with other people when most battered women have enough trouble with the one man and they're not going to be out having affairs with other men, although some women of course do that. It's a very small number compared to the, I think in my research, almost over 90 percent of the women said that they were being accused of sexual jealousy.

Q Dr. Walker, can abuse also take the form of harm to [20] children or to other persons in the family?

A Yes, it can and does take that form. For example, in my own research, 55 percent of the women said that the men who battered them also physically battered their children, which is a high number. There is a new study that has just come out of Denver, Colorado, that shows the overlap between child sexual abuse and battering of women at about one-third of all of the cases that the Department of Social Services in Denver has seen. And those kinds of figures are being replicated across the country.

Q Can abuse also occur in the economic arena, using economic coercion rather than physical or psychological coercion?

A Yes. Many men actually starve women and children. They do not give them a sufficient amount of money to feed, to clothe, to shelter their families. In many of those cases the women may actually work outside of the home for money and they are forced to turn their whole paycheck over to the men. In a recent case that I have been working on, all of the children were also forced to

turn their paychecks over to the man and he gave them two dollars a day spending money and he kept all of the money and had the power and control over how it was used. Now, that kind of economic deprivation is common in both homes where there is a lot of money and as well as in homes where the man may not even work or bring [21] home money.

Q Now, you've testified about a range of violence. Do we know anything or do you know anything as a researcher about the scope of this violence, both within the United States and here in Pennsylvania?

A Well, it's been very difficult to get incidence and prevalence figures, exactly how much violence there is, because battered women are very reluctant to talk about it. When I first began my research back in the middle 1970's, very few people had even heard of battered women. Of course, that is no longer true today. We have, in offering women some safety and some protection, some of them have come forward but it's still a very small number and generally they don't come forward until the violence is at life-threatening proportions. So that even though there are many women who are being battered today, we still don't know about who they are.

The best estimates, my estimate is that one out of two women at some time will become battered in their lives. The researcher who has collected the best empirical data is a sociologist named Murray Straus and his colleagues at the University of New Hampshire's Family Violence Research Center, and his research shows that between 25 percent and 33 percent of all women in the United States have been physically abused at least one time in the year that they [22] collected their information, and so that's just for a one-year period of time. So the estimates are very, a very high percentage of women will be battered.

Q Do you have any reason to believe that the statistics in Pennsylvania or the prevalence rate in Pennsylvania is any different than the national figures that you've cited?

A No, there is no reason to believe that they're any different. In fact, I have been in the State of Pennsylvania as a trainer for those programs that provide services to battered women since the late 1970's. The most recent time was just this past September of 1989 where I was a keynote speaker for the Pennsylvania Coalition Against Domestic Violence and the Alcoholism Treatment Providers, where they had a joint conference here. And there's every indication that in the State of Pennsylvania the statistics are the
same.

Q Do you as a scientist have any estimate of the prevalence rates of homicides that result as a result of wife battering?

A Yes, the best estimates are for husband and wife homicides, about 25 percent of all the murders in this country occur in homes where there's violence.

Q How about a prevalence rate for spousal sexual abuse which in defined by the Pennsylvania statute?

A I have no idea of what the prevalence rate would be. The figures that we can get from official statistics are very [23] small because most women who are sexually abused in a marital situation simply do not report it.

Q What is your estimate of the level of marital rape at this point?

A Well, in my research we attempted to measure sexual abuse within the marriage and when you ask the question "Have you ever been forced into having sex against your will," then we found 59 percent of our sample of 400 said that they had been. When we asked how many of them had reported it, I am not even sure one said yes.

Q And do you have any estimate of the prevalence of

violence against children within a battering family?
A Again, we -- we believe that over 50 percent of the battering relationships, children are also physically abused. We think about one-third may be sexually abused and psychological abuse is probably all of the children who watch a father or hear, lay awake at night hearing a father batter a mother would be considered psychologically abuse.
Q Now, Dr. Walker, you've talked about a range of very horrendous abuse and I think most people want to know, and I would like to know today, why do women stay in abusive relationships, why don't they just leave, call the police, call a battered women's center and just leave the relationship?
A Well, the question of why women don't leave has been the [24] question that has caused most people the most difficulty in understanding battering relationships and it's a complicated answer to why women don't leave. And it ranges, the complications range from fear of being killed or more seriously hurt when they do leave all the ways to the psychological theories of not being able, rendered helpless and rendered with lower self-esteem so they are unable to leave psychologically.
Q Now, you testified earlier that you studied the theory of learned helplessness in your study. Can you explain that to the Court?
A Yes. If you can bear with me for a few moments, it's a complicated theory, but I found it to be one of the most helpful ways of understanding what happens in a battering relationship.

In the mid 1950's and late 1950's when I went to school, I read of some research that was being done by a psychologist named Martin Seligman who --

THE AUDIO OPERATOR: Would you spell that, please?

THE WITNESS: S-e-l-i-g-m-a-n. He studied and

was trying to find a new way of understanding depression and he wanted to create depression that comes from external sources. At that time we believed there were two different ways that you could become depressed: one was from internal biochemical changes in your body, the other was from stresses or external [25] kinds of events. He wanted to see if you could create depression in the laboratory and so he used animals and then he went on to studying people. And I took his work one step further to looking at battered women.

When he first started with his animal research, he started with dogs, and he put them in, at that time it was called a shuttlebox. One side had an electrical grid and the other side did not, and there was a barrier between the cage between the two sides, so the dogs sometimes could escape and leave and sometimes it could not do so.

Today we could never do these kinds of experiments, but in those days that was routine kind of work for animal psychologists.

What he found was that if he gave the animals random and variable electrical shocks so the animals could never predict when they were going to be hurt or when they would be safe, and if sometimes he let them escape by taking out the barrier and sometimes he did not, that at first the animals would try to escape and then they just found a part of the cage and they lied in the cage. Sometimes they would defecate and lie in their own fecal matter in the cage and not even attempt to escape when he would open up the barrier.

Now, the earliest reports suggested that these dogs had been -- that they had produced learned helplessness, and hence they gave it that name. In fact, as he began his later [26] experiments, that name is really an erroneous one because they don't learn to be helpless, they learn to lose the ability to predict that what they do will make a difference to what happens to them.

Now, these dogs, although they appeared to be very passive, in fact found the part of the cage where the electrical current was the weakest. Electricity just does not go across all of those coils on an even level, and fecal matter is a good insulator from electrical shock.

And so what appeared to be being helpless actually was a coping strategy for these animals to minimize the amount of pain that they received, once they believed that it was inescapable pain. And they stopped trying to escape, instead developing coping skills.

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[27] In order to measure the thinking or cognitive processes or the affect or feelings, Seligman went on to work with college students.

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[28] And it was, of course, time limited from just the one experiment, but he demonstrated that indeed you can change a normal, healthy person's way of functioning if you subject them to what they perceive as inescapable random and [29] variable aversive or painful stimulation.

Now, I thought about that and thought about the battered women that I was dealing with, who even though I would sit with them and help them try and find ways to leave the battering relationship, much like Seligman's dogs, they just were unable to follow through with any of their measures that I would help them devise. And I wondered if, indeed, in the natural environment -- now not in the laboratory that Seligman made -- but in the natural environment of a battering relationship could there be the random and variableness of the pain from a battering relationship that would teach a battered woman that she did not or could not

predict that her actual responses would actually make a difference in what happened to her and her safety, and would that then cause her to not use her natural judgment and would it make her appear -- at that point we were looking at both depression and anxiety, without recognizing that there was a battered woman syndrome that would incorporate all of that. And so the work that I did and part of the research that I did was to measure whether or not that would happen and, indeed, I found that there were five factors in childhood experiences that would indicate a higher risk of developing learned helplessness and seven from a battering relationship. I used some of the same tests that Seligman used before and after with his college students, I used with the battered [30] women so that I was able to make those kinds of comparisons.

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Q Did your research discover anything about the cycle of violence that occurs?

A Yes. That was the second area that also needed to be measured. In psychology when we talk about why the people's behavior is maintained, we look at learning theory as one of the theories to help explain that to us. And in my work, what I found was that battering did not occur all of the time [31] in a battering relationship, but neither did it occur in the random way that most battered women and batterers perceived that it happened, that there really was a cycle that occurred and that that cycle had three phases to it. And my research attempted to isolate the cycle, measure it, and today we use it as one of the primary methods of teaching battering -- couples who are involved in battering to recognize their own cycle so that we can attempt to try and break the learned helplessness that may result from

the three, the experience of those three phases.
Q Can you quickly describe for the Court what those three phases are?
A I can. I could also chart it, which might speed it up a bit.

MS. KOLBERT: If that's all right with your Honor?

THE COURT: Yes. You want to step down? Keep your voice up, we are recording this. Perhaps a microphone can be moved over near the chart. Counsel may move around if they wish to see what is being done.

THE WITNESS: If you look at a graph with this line being time and -- the horizontal line -- and the vertical axis is being levels of tension and dangerousness and this being zero, zero level of tension and dangerousness and no time, the three phases include the first phase, which I call the [32] tension building period. Here are little battering incidents that occur and the tension goes up a little bit, the dangerousness a little bit and let's say an early, a low level violence incident, and then it comes down some, but it doesn't go back to zero in that first phrase, it stays around here and then goes up a little bit more, comes down, goes up a bit more with another incident, comes down, and maybe it stays for a while and then might go up again. I usually use a zero to ten scale just to help explain the relativity of the violence, with about eight being the level of danger where there's a life-threatening incident that could occur.

And if you end about here, let's say, in the tension-building phase, there comes a period of inevitability where if the couple is not separated at this point, it's going to go to phase two, which is the acute battering incident or the explosion, and that will just -- perhaps, such as this.

The tension then comes down. Now, physiologically it is reinforcing for there to be a lack of the tension which has been discomforting up until this point, and so

that in and of itself, the ending of the incident, is a reinforcement for the incident to get over with.

When we have police involvement, we often have it after an acute battering incident. Rarely will the police ever be involved at this level, even though these are [33] battering incidents and there may well be some physical damage that occurs at this time as well. So it's usually over here where women might notify somebody that something has happened and in most research studies, less than 50 percent of the women do do the notification.

At this point we enter the third phase, and this is the most important phase in terms of why battered women will often stay in the relationship. This is the period that I called loving contrition. Here is where the man often says he's sorry. Sometimes he doesn't use the words, but he does something nicer for her. He may give her presents, he may do something that she would like him to do that he might not have done otherwise. In many ways he shows her that he's sorry and he promises that it will never happen again. And most batterers that I have worked with and people -- other people have worked with really want to believe that they will not do it again, that they understand that they have hurt her and have gone too far. And during this time he shows his other side of his personality, his charming side, and his loving side.

Now, this phase works also because prior to the battering or the tension building starting, there is a period of time, often during the courtship of battering relationships, where the man is very loving, very nurturing, spends a lot of time with the woman and really makes her feel [34] like he loves her more than anyone or anything else in the world. It's even more than in most normal relationships during this period of courtship time, and this helps the woman remember what he was like when the mean, cruel part of him didn't

exist. And so this is the reinforcer for staying in the relationship and the two theories together, the theory of learned helplessness and the cycle of violence that occurs are important in trying to identify why women stay, how the battering relationships hold together and then, of course, in developing intervention plans to help break the cycle of violence within these relationships.

BY MS. KOLBERT:

Q Thank you, Dr. Walker. Let me ask this: have you studied or do you have any findings about the communication patterns in partners in both dysfunctional relationships and abusive dysfunctional relationships?

A Yes, we do. The communication patterns in battering relationships are very different than communication in both relationships where there is marital dysfunction and in normal relationships.

In normal relationships we find that there are far more positive than negative interactions when people communicate with one another. In relationships where there is marital dysfunction, we find the opposite, that there is more negative than positive communication patterns.

[35] Q Let me stop you there. When you say marital dysfunction, are you talking about the abusive families that we have just laid out for the Court or another kind of family?

A No, I'm talking about families which are in distress of some kind, but not abuse, where there is not abuse as I would define it and as I defined it earlier for the Court would take place. So in those relationships we know that there are more negative communication patterns than positive communication, but they're evenly distributed across the time of the relationship.

In abusive relationships there is also more negative than positive communication, but they don't occur evenly distributed, they occur in -- in blasts, if you will, or in

chunks of time. A research named Gerald Patterson calls it chaining and fogging. One even chains off and follows the next event and it creates an inability to communicate effectively in those relationships.

Q In the field of psychology is there a diagnostic system that psychologists use?

A Yes, there is.

Q And what is that?

A The current diagnostic -- there are a number of diagnostic systems that are used, but the current one that is most popular in this country in called "The Diagnostic and Statistical Manual of Mental Disorders" and we are now using [36] the third edition which has been revised. And it's abbreviated the DSM-3R.

Q Is there a category in the DSM-3R for women who are battered or come from abusive dysfunctional families?

A No, there is not.

Q Is there a category that you use in diagnosing battered women?

A Yes, there is.

Q And what is that?

A The category that is used is called the post-traumatic stress disorder category and battered women syndrome, which is the collection of psychological symptoms that occurs after exposure to battering is considered a subclassification of that post-traumatic stress disorder which is abbreviated as PTSD.

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[38] Q Can you describe for the Court the criteria for establishing post-traumatic stress disorder?

A Yes. There are five specific criteria that must be met before a post-traumatic stress disorder is diagnosed. Two of them are called threshold criteria and three of

them are psychological symptomatology.

The two threshold criteria, the first one is Criteria A on the chart, and that says that the trauma that is experienced must meet certain kinds of stipulations that are listed in the descriptions, that it has to be an event that is outside the range of usual human experience and that [39] it would be markedly distressing to almost anyone, which basically means that you can take any normal, healthy person, expose them to such a trauma and that that trauma will cause, be expected to cause psychological symptoms in that person.

Now, there is a psycho-social stressor rating scale, hard to say, in the DSM-3R, that helps the clinician make the diagnosis of that particular criteria, and that rating scale ranges from a zero to a six.

Most people who work in the fields of post-traumatic stress disorder believe that anything in the Level 5 and Level 6 meet that threshold. Sometimes a trauma under that could cause a PTSD or a post-traumatic stress disorder, but it wouldn't automatically be considered relevant or part of that criteria.

Q What are the symptoms of post-traumatic stress disorder once the diagnosis -- once the threshold stressors have been identified?

A Then there are three major symptom categories that you have to meet and they are very specifically listed. The three of them include changes in the way people think in their cognitive abilities, that are, in those changes and those distortions, are enhanced by memory problems.

The second group of symptoms are avoidance symptoms or a depression kinds of symptoms and the third group are anxiety symptoms or what we would call higher arousal of the [40] organism kind of symptoms.

And if I may just give a quick example, in the first group of memory kinds of distortions and distortions in

the way people think, one of the major difficulties in working with somebody who has a post-traumatic stress disorder is every time they have to talk about it, they not only remember what they're specifically talking about, but they also remember all of the other battering incidents that have occurred and they start to have not just the memories of it in their head, but they begin to re-feel all of the feelings that occurred at that time, so that they are reinfecting themselves every time that they have to talk or think about the kind of trauma, the battered women the kind of battering that has occurred.

In the other symptoms, the pressure symptoms and the anxiety symptoms, are unusual in that they occur together, rather than separately as would be more commonly found in those disorders.

Q Now, Dr. Walker, you've talked this morning about why women don't leave battering relationships. Is everything that you've said about why they don't leave also true for why they do not tell other people about the battering?

A Yes, it is.

Q And that would be true for women who are battered as well as victims of marital rape?

[41] A That's correct. There is also much denial and minimization because of the need to avoid the pain that every time they would talk about it and think about it would occur again.

Q Are there any periods of time within a relationship when the frequency of battering increases?

A Yes, there are.

Q And what are those times?

A The most natural time for an increase in severity and frequency are during pregnancy when there is one infant in the home and when there are teenagers in the home. Those three periods have been found to have the greatest increase. When I do my work in plotting out

the cycle of violence you can see the differences in the patterns that occur over a long-term relationship at those times.

Q Are you saying then that just the notice of a pregnancy can well be a flash point for violence within a relationship?

A It certainly can be. First pregnancies in fact tend to be one of the most common times that men escalate their violence, sometimes from psychological abuse to physical abuse.

Q Are there any special populations of women that are particularly unable to escape from abuse?

A Well, there are certain populations such as women who live in small towns, rural areas, and certain small groups of [42] people such as in Appalachian country or on an Indian reservation that will have a greater difficulty in seeking resources because everybody, there is no confidentiality, everybody knows what's happening to them, and that does cause more difficulties in being able to leave and escape from a battering relationship.

Q Dr. Walker, the notebook in front of you with the manila tabs, at the very back has a tab entitled the Abortion Control Act. Are you familiar with the Abortion Control Act?

A Yes.

Q Now, I'd ask you to turn to Page 7 of that document and look at Section 3205 which is the informed consent provision of the act. Do you have an opinion about how the 24-hour waiting period required by Section 3205, from the time that a woman obtains -- I'm sorry, from the time that the woman obtains information and gives her informed consent until the abortion is performed will affect battered women?

A Yes.

Q And what is that opinion?

A In my professional opinion it will be a detrimental

effect on battered women. One of the criteria for post-traumatic stress disorder is even understanding information that's given to a battered woman is going to be filtered through their knowledge and fear of increasing their likelihood or risk of being battered again. And so there is [43] a heightened hypervigilance to any kind of cues of danger and for women during that period of time, they can be predicted to be far more anxious and have many more flashbacks to battering incidents during that 24-hour waiting period which will, like the experiments that I talked about for those people who developed the learned helplessness, will cause distortions in their judgment and in their affect, their feelings and in their behavior during that period of time.

Q Now, earlier you testified about how women in abusive relationships are closely monitored. Do you have an opinion about whether or not the 24-hour waiting period will affect battering relationships as a result of that monitoring?

A Yes, I do.

Q And what is that opinion?

A In my opinion, battered women and batterers are so closely attuned to one another that she will be frightened that he will know what is happening and know that there is this special period of time and be more scared, more frightened, and that he will use that as an excuse to batter her. And so the likelihood of her being able to keep this information from the batterer is greatly reduced. Most batterers are so sensitive to what the women are behaving and thinking and feeling that he will pick up something is different and harass and badger her and batter her.

Q Now, Dr. Walker, I'd like you to turn to Page 20 of the [44] act. Are you familiar with Section 3209 which requires that a woman, prior to having an abortion, notify her husband?

A Yes, I am.
Q Let's hold up for a second in discussing the exceptions to that notification, but do you have an opinion about notification as to how it will affect battered women?
A Well, battered women, if they increase -- the period of pregnancy is a time when abuse is increased, the risk of abuse is increased, notifying, just simple notification will have a much higher predictability that a woman will be physically, sexually and/or seriously psychologically abused.
Q Now, some people have proffered a theory that women ought to be forced to notify their husbands because, especially in abusive relationships, the husbands are going to find out about the abuse at some point in the future and the abuse will be worse if the husband finds out that the woman was trying to hide it from him. Do you have an opinion about that theory?
A Yes.
Q And what is that opinion?
A Well, I think that notifying, forcing a battered woman to notify her husband is like giving him a hammer to just beat her with. The probability of her being battered is much greater if she is forced to notify him. In battering relationships you can force her to talk to him and you cannot [45] force communication and if you do, you will be fostering negative and abusive communication in those particular kinds of relationships.
Q In my hypothetical there was an assumption that the husband will find out anyway. Do you have an opinion about whether or not that is true in most battering relationships?
A It certainly is possible that he will find out, but it is also possible that he will not find out if she is given the ability to go forward with what she chooses to do without being put under any kind of onerous procedures or

regulations.
Q Dr. Walker, if a woman believes that her husband will harm her if she tells him of her pregnancy, is her perception of her harm likely to be accurate?
A I'm sorry, would you repeat that?
Q If the woman believes that she's going to be harmed, if she tells her provider that she thinks that her husband is likely to harm her, is that perception likely to be an accurate one?
A Usually it is.
Q Will notification, forced notification guarantee discussions between spouses?
A No. Forced notification will not that there can be any kind of discussions. In battering relationships where the man must have power and control, there are rarely discussions [46] when she raises an issue. It's usually when he raises an issue and wants a discussion that it might take place.
Q Will forced notification improve the communication in any way between the batterer and the woman?
A No, it will not.
Q Now, Dr. Walker, within Section 3209, beginning on Page 21 of the act, there are exceptions, beginning in Subsection B. I would like to ask you to refer your attention to Subsection B(2), which indicates that there is an exception where her spouse, after diligent effort, could not be located. Do you have an opinion about whether or not that exception can be utilized by battered women?
A No -- yes, I do have an opinion.
Q What is that opinion?
A Well, when I read it, I smiled to myself because most batterers stalk the woman, whether or not they are living together, and so it's rare that you would not be able to find a batterer. Most battered women would be delighted if that were the case after they've terminated

the relationship, they would not want to find him.
Q I refer your attention to Subsection B(3) -- let me go back a second, I'm sorry. Strike that question and let me ask a followup to the diligent effort question. Would a woman who made diligent -- who has left her abusive spouse, who is making a diligent effort to find him place herself in [47] jeopardy in any way?
A Yes, she really does place herself in much greater jeopardy of being killed. The risk of a battered woman being killed in this country today has increased and the time when she is most likely to be murdered by her husband is at the point of separation and termination of the relationship. The latest data suggests up to two years she is in greater danger of being killed by this man.
Q I refer your attention to Subsection B(3) which provides an exception where the pregnancy is a result of spousal sexual assault as described in the Pennsylvania statute which has been reported to a law enforcement agency having the requisite jurisdiction. Do you have an opinion about whether or not this section will be utilized by women in abusive dysfunctional relationships?
A Yes, I do.
Q And what is that opinion?
A In my opinion this section will rarely, if ever, be used by battered women because they will rarely report to a law enforcement agency that they have been sexually abused.
Q In your experience have many women within your own client base reported spousal sexual abuse to law enforcement personnel?
A In my experience they do not report sexual abuse to law enforcement personnel. Even if they want to, many of the law [48] enforcement personnel they are not willing, able to hear what the women are saying. Women have a great deal of difficulty talking about sexual abuse and so the information simply is the most

difficult to get.
Q Now, I direct your attention to Subsection B(4) which permits an exception to the husband notification where the woman has reason to believe that the furnishing of notice to her spouse is likely to result in the infliction of bodily injury upon her by her spouse or by another individual. Do you have an opinion about whether or not women within abusive dysfunctional relationships are likely to avail themselves of this exception?
A Yes, I do.
Q And what is that opinion?
A My opinion is that they're not likely to avail themselves of this exception.
Q And why not?
A Well, there are several reasons. The first reason is that battered women do not trust professionals and they do not trust that the information will be kept confidential, and so that will limit their ability to report or to use that particular section. In addition, another reason is that many battered women believe that they will be psychologically abused. And for most battered women, when you ask them what is the most serious thing that happens to them, the worst [49] thing that happens to them, it's the psychological coercion and the harassment and degradation that occurs. And so if the requirement that it has to be infliction of bodily injury at that particular time would be something that a battered woman would not likely or not necessarily believe what would happen, although she would indeed believe that she would be abused by the man should she have to notify him.
Q Now, Dr. Walker, we've spent some time this morning discussing the theories of learned helplessness and the cycles of violence, as well as the diagnosis of post-traumatic stress disorder. In your opinion, are these

three psychological phenomenon responsible for the inability of women to report that they have been abused and sign an affidavit that they are likely to -- let me get the exact language of the statute -- that they are -- "Likely to result in the infliction of bodily injury upon her by her spouse or another individual"?

A Yes, they certainly are very much responsible.

Q So you're not just saying it by -- let me ask you this: Are you saying that she is not likely to do it or that she cannot do it?

A I'm saying that most battered women cannot do it. They don't self-identify very easily and they don't have the psychological ability to be able to avail themselves of that exception.

[50] Q Do you have an opinion about whether all battered women would be covered within the exception as stated in Subsection B(4)?

A Yes.

Q And what is that opinion?

A Not all battered women would be covered by this exception. Those who experienced serious psychological abuse such as the psychological torture described under the Amnesty International definition would not be covered. Those women who are sexually abused in a way that is not covered by the sexual assault statute would not be covered. Those women who are unable to report the sexual abuse that they experience would not be covered and those battered women who do not define themselves as battered women or who are not prepared to terminate the battering relationship, psychologically prepared to terminate it, would not be covered.

Q In your opinion will forced communication as required by Section 3209 of the act, husband notification of her abortion, improve marital integrity in any way?

A Absolutely not. It will not only not improve it, but it will increase the probability and likelihood that a woman

will be seriously battered.

Q In your opinion will the forced notification provision of Section 3209 of the act improve family communication in any way?

[51] A No, it will not improve family communication in any way. If anything, it will make family communication much more difficult and much more dangerous in these relationships.

Q Dr. Walker, have you ever heard of the term "post-abortion stress syndrome"?

A Yes, I have.

Q Is this a recognized syndrome in the field of psychology?

A No, it is not. It has been raised by some psychologists as a possibility, as a trauma. It does not raise, an unwanted pregnancy does not raise to the Level 5 or 6 in the threshold level for a PTSD diagnosis. In addition, when I was on the Board of Directors at the American Psychological Association, because the press had reported that there was such a syndrome, the Psychology Association decided to review all of the scientific literature to see if there were any reports that were based on rigorous scientific studies and there were absolutely no studies that supported the existence of such a syndrome.

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CROSS-EXAMINATION

BY MS. MERSHIMER:

[52] Q Dr. Walker, that study of 400 battered women, how did you obtain that pool of women?

A We advertised in many different ways. We used some battered women shelters, we used mental health centers, we went into businesses and put signs up in the ladies rooms in businesses to get some of our subjects,

we attempted to find as many self-referred, self-identified battered women.

In addition, as the -- we monitored, we did what's called the stratified random sample, it's certainly not random because we didn't knock on everybody's door. We wanted to make certain we had enough people across different demographic groups, so we monitored as it came in. And when we saw we were not getting a sufficient number in a particular group, we then went out and looked specifically for that group.

The only two groups that we had such difficulties with were native American population nd the older women, nd so we had to make a concerted effort to find some other of those people in those categories. No, excuse me, the other group was rural women as well, and so we hired interviewers to actually go out to rural areas because they -- we found that they couldn't come into the metropolitan Denver area.

Q Well, when you say you made a concerted effort to get these women, but you didn't knock door to door?

A That's correct.

[53] Q Well, would you just go and focus again on the shelters or agencies that treat or help battered women?

A No, in 1978 there were just very few agencies that would treat battered women. Today it would probably be easier to get such a sample pool. And so what we did do was we went into communities where there would be older people in some of the housing specifically for senior citizens and actually conducted some of the interviews there so that people didn't have to come out. We hired interviewers and trained them. We -- our sample pool was drawn from a six-state, at that time it was HEW region, today it would be Health and Human Services region. And so we hired people to actually go to rural areas and interview in the areas and, again, we put notices up, we had newspaper and public service

announcements on television and on radio, so that we got the broadest possible coverage in order to get the word out that we were looking for subjects.

Q And then these women would come forward and voluntarily give you interviews?

A That's correct.

Q And do you know how many of the women in your group of 400 were married?

A I don't. I have some of the statistics here that are published in the Battered Woman Syndrome book and I don't believe that we took those details of whether they were [54] married or not married, although we may have some of it somewhere, I just haven't been able to find that number.

Q So you don't have an estimate even?

A I don't. Most of them were, but certainly some were not.

Q Well, I'm just kind of curious. How do you know that most of them were if you don't have the statistics?

A Well, I mean, the study, the analysis is now almost ten years, well, 1981 we completed the analysis, so it's about nine years. At that time we were trying to find out what the average length of time was for a battering relationship and the one statistic that I do have is our comparison with the NORC data, the -- and I forget what those initials stand for, but they were sociological data that came from the census that compared the length of time of the average marriage and the length of time of the average battering relationship that we studied. And our statisticians told us that the percentage of married women were high enough to be able to use those kinds of comparisons.

Q Is sexual abuse a form of physical abuse?

A Well, as I testified to, it certainly could be but there are certain distinctions to sexual abuse that make it no longer considered. And you have to consider it

separately from physical abuse because it is different.
Q Well, I understand you have the two categories, but sexual abuse is a type or a variation of physical abuse, is [55] that correct?
A Again, most women would not define it that way and so we just don't use it as a form of physical abuse. There are times when, particularly in a marriage, when a man will sexually abuse a woman without physically hurting her because she submits to the sexual abuse. And so because of those differences, we don't consider it automatically a category of physical abuse.
Q In the vast majority of cases, sexual abuse involves some sort of physical contact, is that correct?
A Yes, I would imagine so.
Q When you said that one out of two women will be battered at some time in their life, where did you get those numbers from?
A Those are the estimates that I have produced and that comes from a combination of my clinical work and my research work. It is an estimate and it is one now that is standard in the field, most researchers and practitioners, clinicians use that as the estimate.
Q And is this published somewhere?
A Well, it's certainly published in my writings and it's published in a number of other people's writings that I have seen.
Q I want to understand. Were you testifying this morning that battered women, that they don't have the ability to use [56] their natural judgment very well?
A On some things that is true.
Q Is a battered woman likely to make major decisions without telling her husband?
A Yes.
Q When you were testifying about the 24-hour waiting provision and you testified, am I correct, that the women as they're receiving the informed consent or options

counseling, whatever, in an abortion clinic, they're understanding that information through a filter of fear?
A That's correct.
Q Are you saying that battered women then should be given no time to consider informed consent information?
A No.

• • •

[57] Q You've testified that the men tend to be very possessive and know the whereabouts of the women that they batter, is that correct?
A Yes.
Q Are battered women then going to be less likely to be able to get out of the house to get counseling for abortion services?
A That's correct, it will be more difficult.
[58] Q Is it going to be more difficult then for a battered woman to even obtain an abortion in the first place?
A That is correct.
Q Would you agree that battered women are in more need of counseling than your average woman that seeks abortion?
A No, not necessarily so.
Q Even though they are having information, they're filtering that information through this filter of fear, as you said, they don't need extra counseling?
A Not necessarily. They need the ability to be -- have their own needs respected, so they need a counselor, as most counselors that I've worked with who are trained to do, to be able to listen to them and talk with them, but not have any enforced periods of time or regulations on the amount of time that it may or may not take for them.
Q Would you agree that most battered women who deny that they're battered, that the best thing for them is

to seek professional help?
A Sometimes that's true. There are programs for battered women that are very useful for them, but there are also women that need to come to it at their own time period, that many women or as most women believe that they can somehow save a relationship and I believe that each woman needs to have the dignity of being able to use that period of time to come to whether or not she needs counseling. Most men who batter [59] women are in need of enforced treatment and, indeed, the criminal justice system has now changed dramatically and has moved to that kind of mandatory counseling for men who batter women, to take responsibility for the abuse and to stop their violence when assaults are reported to the police. That tends to be the more effective sentencing for many of these men who are convicted of assaults.
Q At some point for a battered woman, if she's going to recover, she's going to have to acknowledge that she is indeed a battered woman, isn't that correct?
A Well, no, not necessarily. She needs to become safe from battering and that tends to be, once we can provide safety for a woman from being battered, many women do recover spontaneously. In fact, that's the whole, one of the major differences of a post-traumatic stress disorder diagnosis from other kinds of mental health disorders that are listed in the DSM-3R system is that we are taking an essentially normal, healthy person and placing them in an abnormal situation and when you remove the fear of further trauma from the abnormal situation, but simply time alone may be sufficient to reduce the symptomatology and stop the disorder, which is a quite important distinction between the PTSD and other kinds of diagnoses.
Q And most women that break out of this cycle of violence and learned helplessness then, would you agree

that for most [60] women that counseling is the best thing for them?
A No, not necessarily. Many battered --
Q Just -- just get out of the relationship and they'll just be better; they don't have any psychological problems?
A Many women simply do not. Now, the problem is that just getting out of the relationship does not terminate abuse.

As I testified earlier, the probability of a woman being more seriously hurt or actually killed increases when she gets out of and terminates the battering relationship, and so that is a real problem for keeping battered women safe. Once they get past that two-year period, if the man stops stalking, if the courts -- and generally we need the assistance of law enforcement and the courts to stop his abusive behavior towards her and the children -- then most battered women spontaneously heal.

Now, some women go into a battering relationship already having some psychological difficulties. Those woman, those problems won't go away and they may be the ones who need counseling, and so I spend a good deal of my time professionally trying to train professionals as how to differentiate between those women who are in need of counseling and those women where the symptoms spontaneously disappear.
Q Are you aware of any spousal notices that are currently in effect in the United States?
[61] A No, I do not.
Q Do you know of any that have been in effect in the United States?
A I'm not personally aware of them, no.
Q So there is no hard data out there to know whether a battered woman would avail herself of any exceptions to the spousal notice provision, isn't that correct?
A Not specifically about a spousal notification

provision--

* * *

Q Would you agree that there is some evidence out there to demonstrate that some women who receive -- some women that have an abortion do suffer from anxiety or depression afterwards as a result of having the abortion?
A I'm aware that --
Q Can you answer yes or no?
A No, I can't answer yes or no, it's --
[62] Q You don't agree that there are some women out there that have an abortion, experience anxiety or depression afterwards?
A There are some women where we know that they have experienced anxiety or depression, there is a small number of women, but there is no -- they are not in a post-abortion syndrome.

* * *

RE-DIRECT EXAMINATION

BY MS. KOLBERT:
Q Now, Ms. Mershimer asked you whether or not there are women who suffer from anxiety or depression as a result of the abortion. You would agree, would you not, that there are some women who suffer anxiety or depression following an abortion?
MS. MERSHIMER: Objection; leading.
THE COURT: Overruled.
THE WITNESS: Yes, that is true.
BY MS. KOLBERT:
Q Do you have an opinion about whether or not those women [63] are suffering from anxiety or depression as a result of the abortion?

A Yes, I do have such an opinion.
Q What is that opinion?
A Well, based on my review of the literature and the most, the latest, the most recent article that was published in Science Magazine, which reviews all of the empirical data, that small percentage does not have the kind of syndrome that would be classified under a post-traumatic stress disorder, that those women, that there is a small number that do suffer from a depression, that there is a small number that do suffer from an increase in anxiety, but not in the syndrome, the way that we would use the PTSD criteria.

* * *

DIRECT EXAMINATION

BY MR. ZEMAITIS:
[65] Q Now, Ms. Roselle, would you describe the process that a woman who comes to Women's Health Services for abortion goes through, the various steps of that process?
A Her first contact with the clinic would be by telephone where she would call in for information, and she would either come in for a pregnancy test or she would indicate that she had already had a positive pregnancy test and she would make an appointment. And during this telephone interview which lasts 20, 30 minutes, she would be given a lot of information [66] about the clinic and how to prepare for her surgery.

Within a few days the appointment occurs, most women can be scheduled within the week. She arrives at the clinic, she signs in, she has a confidential interview with the receptionist where her -- the chart that she has already started to complete is reviewed and her medical history, as she has completed, is reviewed for accuracy.

If -- her next step is the laboratory where the

pregnancy test is repeated, at which -- after which if the pregnancy test is indeed positive, she is either directed to counseling or she is directed for a sizing and a sonar. If she is directed for sizing and sonar, then she has counseling afterwards.

Following the counseling, which includes the informed consent process, the procedure is performed. She proceeds to the recovery room where she undergoes medical monitoring and she receives additional counseling on her care after she goes home, her future contraceptive plans, and then she is discharged.

Q You said that women sometimes come to Women's Health Services not yet having had a pregnancy test?

A That's correct.

Q And they have a pregnancy test at Women's Health?

A That's correct.

Q In those instances would a woman have an abortion, if she [67] chose to have an abortion on the same day as her initial pregnancy test?

A That would be highly unusual for someone to have a pregnancy test positive for the first time and have an abortion the same day.

Q Under what circumstances might that occur?

A Probably the only time that it would occur is if she were at such a point in her pregnancy that a delay of even 24 hours meant that she would have to go -- move from a 12-week to a 13, 14-week procedure or from that level to a second trimester procedure or perhaps not have the procedure at Women's Health Services at all, but she would have to be referred out of state.

Q I'd like to ask you some questions about the consequences of the Abortion Control Act on the operations at Women's Health Services, starting with the husband notification provision. Ms. Roselle, married women that come to Women's Health Services for abortions, are they accompanied by their husbands?

A Yes, they are.

Q What percentage, in your estimation, in Women's Health Services' estimation are accompanied by their husbands?

A 70 percent of the women are actually accompanied by their husbands.

Q And that's women that come to Women's Health Services?

[68] A That's correct.

Q Have you attempted to determine for those women who do not bring their husbands how many of them have notified their husbands or how many of their husbands know about the procedure?

A Another 25 percent of the husbands are aware that the woman -- of the pregnancy and her decision to have an abortion, so 95 percent of the husbands are either with their wives or are aware.

Q What are the reasons that the husbands don't come, even though they know about the abortion?

A Most often is that they have to work or that they have to provide child care while their wife is having surgery.

Q Now, for the five percent of the women who are not accompanied by their husbands and who haven't told their husbands, does Women's Health Services currently require them to notify their husband before they can have an abortion?

A No.

Q Why not?

A We feel that's an invasion of their privacy, if they make decisions, very sound decisions on their own and we would not intrude upon their decisionmaking.

Q Do women that don't tell their husbands tell Women's Health Services why they don't tell their husbands?

A Well, sometimes they do, yes.

[69] Q What kinds of reasons do patients at Women's Health Services give?

MS. MERSHIMER: Objection, your Honor, this is hearsay.

MR. ZEMAITIS: Your Honor, it's not introduced for the truth of the matter, but that this is what women report to Women's Health Services as those reasons.

MS. MERSHIMER: Your Honor, it's exactly offered for the truth of the matter. If they want to say that she's had conversations with women, fine, but then he's asking what did they say, it's for the very purpose of the reasons why women don't report or don't tell their husband.

THE COURT: Overruled.

BY MR. ZEMAITIS:

Q You may answer the question.

A If you could repeat the question?

Q The question is what reasons do women offer for not telling their husbands?

A They give a variety of reasons. Their husband may be ill and they don't wish to burden them with the additional stress of knowing that there has been a pregnancy within their relationship that, for example, one of our own counselors became pregnant while her husband was dying of leukemia and she chose to have an abortion and she chose not to tell him of the pregnancy. We have had women who have or a woman who [70] expressed her concern about her own health, that she had had three prior pregnancies, a lot of trouble with blood clots during those times. Her husband did not believe in the use of contraception. When the fourth pregnancy occurred, she knew that he absolutely was opposed to abortion, she made the decision to have the abortion without involving him because she knew that he would feel that it would be more holy of her to die than to sacrifice the fetus.

Q Any other categories of reasons that women give?

A That perhaps they -- that the pregnancy occurred when the marriage was failing, that marriage was already ending and there was a last attempt at reconciliation that didn't work and the decision not to have a child into -- as a single parent.

MS. MERSHIMER: Your Honor, may I have a continuing objection on all this testimony about what women have told her?

THE COURT: Yes.

* * *

Q The statute would require that a woman who -- all women who are married to fill out a form stating whether they have told their husband or, if they haven't, why they haven't. [71] Are you aware of that requirement, Ms. Roselle?

A Yes.

Q Does that cause any concern for you in your administration of Women's Health Services?

A Well, we'll now have to change our counseling to require women to tell us about some of the bases of their most intimate decisionmaking and that becomes a barrier between the care we provide and the relationship that we can establish with them because if they choose not to, what we're essentially saying to them is that if you choose not to tell us this or you choose to falsify this information, we're making you a criminal.

Q Do you have any concerns about the form being put in the files at Women's Health Services?

A Well, medical records, as we all know, in Pennsylvania are not immune from subpoena. And I had spoken to this before, before I actually had the experience when one of our records -- and I would like to add that I am the medical records custodian for

Women's Health Services -- one of our medical records was subpoenaed by the former husband of one of our patients. They were in a property settlement dispute, there was a property award made to her which was not followed through on, and he was subpoena her records saying that she had had an abortion in an attempt to discredit her and to prevent the property settlement, as agreed upon, to be [72] carried through.

Q Is your concern that a form in the file at Women's Health Services would be subject to subpoena and abuse as in that situation?

A It would become part of the medical record and under those circumstances, it could be subpoenaed.

Q Was Women's Health required to disclose the file in the case you just mentioned?

A No, we were not; the woman settled before the case went to court.

Q Ms. Roselle, I'd like to ask you some questions about the reporting requirements under the statute. Now, an individual induced termination of pregnancy form has been collected for the past two years. Have you been involved in the process of preparing those reports and submitting them to the Commonwealth?

A Yes.

Q Have you made any attempt to determine how much it costs Women's Health Services to keep up with that reporting obligation?

A Yes.

Q And what is the result of your estimate?

A It costs us $12,000 a year.

Q And how did you arrive at that figure?

A That is two-thirds of the clerical supervisor's salary [73] plus her benefits of 25 percent.

Q Do any other medical procedures that are performed at Women's Health Services require the submission of a form for each individual procedure?

A No.

Q Are you aware of any procedures performed in Pennsylvania generally that have the requirement of a detailed report for each procedure?

A No.

Q Does Women's Health Services receive any publicly allocated funds?

A Yes.

Q Under what circumstances?

A We receive medical assistance reimbursement for abortions provided for women who are victims of rape, incest, and we have the ability also if we would perform an abortion to ave[illegible]he death of a woman.

Q You say you have the ability, is that your testimony that that is not an instance, that you have not had instances like that where you have sought reimbursement?

A Not within the last year.

Q Have you sought reimbursement for rape or incest victims within the past year?

A Yes.

Q How many have you sought in the past year?

[74] A 46.

Q Is that number lower or higher than it has been in prior years?

A In 1988 it was 249.

Q What percentage of abortions performed at Women's Health Services are paid for by Medical Assistance payments?

A Less than one percent.

Q Approximately how many abortions are performed at women's Health Services during the year?

A Between 6500 and 7,000.

* * *

[76] Q Now, Ms. Roselle, are abortions ever performed at Women's Health Services on an emergency basis?
A Yes.
Q Under what circumstances?
A We have had women who have presented for an elective abortion who have been threatening to spontaneously abort and we immediately see them. If there is a physician available, we immediately see them and terminate the pregnancy right then.
Q I would like to ask you some questions regarding the [77] informed consent provisions and their effect on Women's Health Services. Dr. Allen testified yesterday that Women's Health Services does provide counseling to its patients. I would like you just to make it clear for the record what kinds of counseling are provided and when for an abortion patient at Women's Health Services.
A Okay. There are -- our counsel-- we have three types of counselors and the counselors are, we have personal counselors. These counselors would have at minimum a Master's degree in psychology, in social work. Our Director of Personal Counseling has a Ph.D. in counseling and a Master's in social work.

Personal counseling is specifically geared for the woman or the couple who are experiencing problems making decisions about a pregnancy. It may be that they are ambivalent, that the woman is feeling coerced, that the woman is under -- very sad because she has decided to terminate a planned pregnancy that is complicated by fetal anomalies that are incompatible with life after birth. These therapists, after they have completed their higher degree, must have at least five years experience before we will allow them to do problem pregnancy counseling.
Q How do you determine -- do all patients, abortion patients, go through personal counseling?
A No.

[78] Q How do you determine which women or women and their partners go into the personal counseling?
A There are two ways, and I can't say that one outweighs the other; they are equal. One is that by word of mouth, Women's Health Services has an excellent reputation in the Pittsburgh community as providing outstanding counseling services, and a lot of women simply call and say "I would like to see a counselor."

The second way is if that the woman are identified as having difficulties making decisions or difficulty, unusual difficulty or unusual ambivalence or the coercion factor has entered in by another type of counselor within Women's Health Services and then they are referred for personal counseling.
Q What is that other type of counseling?
A Well, the other type of counseling, to distinguish, their title is a paraprofessional counselor and these are what Dr. Allen referred to as the pre-abortion counselor, or the abortion counselor yesterday. And these women are trained by Women's Health Services to be health educators and also to be able to assess someone's capabilities of making decisions and whether or not they're comfortable with their decisions and whether or not what they are expressing is consistent with their, say their body language, with their affect, with their general demeanor within the counseling session.
[79] Q How are the paraprofessional counselors selected?
A Paraprofessional counselors must go through a rigorous selection process. They begin by completing an application with us and we review the application for some kind of exposure to counseling that they have conducted, and then once they pass the paper screening, then they are, between five to eight people are scheduled simultaneously for what we call a group interview. The group interview is essentially a two-hour problem solving

session where we give the applicant two problems that they must solve. One is a problem around sexuality, the other problem is a series of policies that if you were the Board of Directors of Women's Health Services, how would you handle these. And then we have two observers in the room while they are doing this problem solving and we select them, that we score them based on their attitudes towards contraception, towards sexuality, their ability to be supportive of each other without being competitive. We are looking for someone who has an innate ability to relate to other people. Once they get past that, then they go through an individual interview.

Q Is there any minimum age requirement, or excuse me, any minimal educational requirement for counselors?

A We require them to have a GED or a high school education.

Q During the course of the counseling by the paraprofessional counselors, does the counselor give [80] information for informed consent?

A Yes.

Q So that's not done by a physician?

A No.

Q Does the paraprofessional counseling occur for all women who have abortions at Women's Health Services?

A Yes.

Q And does it typically occur on the day the abortion is performed?

A Yes.

Q If the 24-hour waiting period goes into effect as required by the statute, what impact do you project it will have on patients of Women's Health Services?

A Well, they'll certainly experience a delay and I also feel that they're going to have increased expenses. I'd like to expand a bit and talk to you about where our patients come from, we serve women from 34 counties

within Pennsylvania, from portions of Ohio, West Virginia, Cumberland, Maryland, you know, as far east as Cumberland, Maryland, and New York State, so we have a very large service area. And it is not unusual for women to travel three, four hours to get to the clinic. Sometimes it's much longer because they have to take buses to get in.

Q So that 24-hour -- typically the counseling and abortion occur on the same day?

[81] A That's correct.

Q So that if there were a 24-hour waiting period, there would have to be two visits to accomplish those two goals?

A That's right.

Q The statute, as I think you know, Ms. Roselle, also has a provision requiring parental consent and it requires informed consent for parents. Some of the physicians who testified yesterday said they did not think that informed consent could occur by telephone or by a form. Were you here for that testimony yesterday?

A Yes.

Q Do you agree with that testimony?

A Yes.

Q What effect would it have on minor women who seek abortions at Women's Health Services if both parents had to come in for counseling and the 24-hour waiting period were to go into effect?

A Well, what we get is layer of -- layers of obstacles that the teenager, the minor would have to experience and it -- and the more parts of the law that become -- go into effect,the deeper the layers and the greater the obstacles. If you talk about a 24-hour period, we're talking about delay and additional costs. If we're talking about parental consent, we're talking about additional delay. If we talk about with a judicial bypass, it's still more delay, more expense, more [82] trips to the clinic.

And then if we talk about physician doing the -- conducting the informed consent portion of 24 hours in advance, then it becomes even more difficult and even more layered and that's particularly true of a young woman.

Q Would it be possible if the 24-hour waiting period went into effect for Women's Health Services to guarantee that there would only be a 24-hour delay for each woman seeking an abortion?

A No, we could not do so.

Q Why not?

A We don't have physicians available to us every day of the week, other -- in the clinic, so therefore we would not be able to conduct the informed consent interviews every day.

* * *

[83] Q Do you believe it is consistent with the counseling process at Women's Health Services to insist that all the information in the statute be given to all patients?

A No.

Q Why is that?

A Not all the information that the statute requires is relevant to all patients.

Q Could you look at -- go to the other binder and look at the last tab, which is a copy of the act, and turn to Page 8 which has the specific information required by the informed consent provision?

At the bottom of that page there is a mention of [84] Medical Assistance benefits may be available for prenatal care; do you see that?

A Yes.

Q Is that information that is given to all women who come to Women's Health Services for an abortion?

A No.

Q Why not?

A Because it's not relevant to all women who come to Women's Health Services for an abortion.

Q Ms. Roselle, do you have any personal experience in counseling?

A Yes. I was a social worker in a family planning clinic in the early 70's in Norfolk, Virginia.

Q If you were required to give information as a counselor that is not relevant to the person you are counseling, what impact do you think that would have on the counseling process?

A Well, it interferes with the counseling relationship because people don't under-- they don't understand where it's coming from and they also think that you're not listening to them.

* * *

[85] Q On Page 9 there is a provision that requires that the father of the unborn child is liable to assist in the support of the child. Is that information that Women's Health requires to be given to all women at present?

A No.

Q Why not?

A Because it's not relevant.

MS. MERSHIMER: Objection, your Honor; same basis, lack of foundation. Ask that the witness' answer be stricken.

MR. ZEMAITIS: Your Honor, I don't think this is without foundation. Ms. Roselle knows the protocols at Women's Health Services and she knows the reason for them.

THE COURT: Yes, I think there's an adequate foundation; overruled.

BY MR. ZEMAITIS:

Q Now, Ms. Roselle, are you also aware that the

department will be required to make available to a clinic such as Women's Health Services certain printed materials?

[86] A Yes.

Q Have you had an opportunity to review any of those printed materials?

A Yes.

Q What was the first opportunity you had to do so?

A Yesterday afternoon.

Q I would direct you to the document that is behind Tab 49.

MR. ZEMAITIS: In the defendant's exhibits, your Honor, I'm sorry. This is the document we added to this morning. Defendant's 49.

Your Honor, I will represent for the record that this document was presented -- the first page of this document was presented to us last Friday by counsel for the defendants and the remaining pages were presented to us yesterday at the beginning of the hearing and it's my understanding that this is a version of the printed materials or part of the printed materials that will be offered under Section 3208 of the act and will therefore be required to be at clinics for distribution under Section 3205. And with that basis and representation, I would like to ask Ms. Roselle some questions about it.

BY MR. ZEMAITIS:

Q Have you had an opportunity to review this list -- this directory of social services organizations, Ms. Roselle?

A For Allegheny County.

[87] Q You paid particular attention to Allegheny County because that's where you're located?

A That's correct.

Q Do you have a general familiarity with the social service organizations that are available in Allegheny County to help women and children?

A Yes, I am a convener of a group called the Women's Service Providers, which is the executive directors of the women's service agencies in Allegheny County. I am also Chair of the National Association of Social Workers for Southwestern Pennsylvania, so I do have a great deal of familiarity with social agencies.

Q Now, the listings for Allegheny County begin on Page 3 of the page numbered 3 and continue to the page numbered 6. In your review of that list, did you notice any omissions of agencies that you think would be appropriately included on that list?

A Yes. Family Health Council is not included on the list. Family Health Council is the umbrella agency for all the family planning clinics in Western Pennsylvania and I believe they have about 40 counties. They also provide adoption services and they provide prenatal care.

Another exclusion would be Women's Health Services, Planned Parenthood and Allegheny Reproductive Health Center. The fourth abortion clinic in Allegheny County is on this [88] list, so therefore I would speak for the rest of us.

Q Would you tell us what that fourth clinic is?

A Yes, Allegheny Women's Center.

Q And that appears on Page 4 of the document?

A That's correct.

Q And to your knowledge Allegheny Women's Center provides abortions?

A I -- I am certain they do.

Q Does it provide services for women that Women's Health Services does not provide, to your knowledge?

A No, they do not.

Q And the other clinics you mentioned that are not listed are Planned Parenthood?

A Planned Parenthood.

Q And?

A Allegheny Reproductive Health Center. Another

very glaring omission in this is the Women's Center and Shelter. We only have one shelter for battered women in Allegheny County and it's not on this list.

Q Are there any institutions that are listed or organizations that are listed for Allegheny County that cause you any concern?

A Women's Health Services is very careful about where we refer. For example, we recently updated our referral list for adoption agencies and how we did that is we went and [89] visited every adoption agency in talked with them and found out their philosophy and then we established information to give to patients that we do give to them. We wouldn't -- this list has not -- some of the agencies on the list would not meet our criteria for an agency to which we would make referrals.

Q Can you give me any examples?

A Any of the Crisis Pregnancy Centers.

Q And why do the Crisis Pregnancy Centers, why are they not organizations that you could comfortably refer women to?

A Because we know from the literature that women have brought to Women's Health Services from the Crisis Pregnancy Centers that they give misinformation and disinformation with the sole purpose of dissuading someone from having an abortion. They simply want a woman to terminate a -- or to continue a pregnancy.

Q So absent the requirement that that organization is on the State's list and you have to give it to women, you wouldn't use those as referral agencies from Women's Health Services?

A That's correct.

Q Now, turning back to the other mandated provision in the statute which are the -- you don't even have to have it in front of you, but the availability of assistance, Medical Assistance benefits and the fact that the father is liable [90] for support of the child, do you have any

concerns as to the accuracy of that information when it is appropriate for women?

A I'm trying to --

Q If Women's Health Services were required to tell all of its patients that the father is liable for the support of the child, do you have any concerns about whether that would be useful information for Women's Health Services patients?

A Well, first, half of our patients, our abortion patients are married, so we certainly wouldn't say that to half of our patients. The other half of the patients, if there was an indication that financial problems were the sole reason that someone was having an abortion, the paraprofessional counselor would refer the woman for personal counseling. And during the personal counseling session, support of the alleged father would be discussed. And the women, if that was an area in which she chose to explore, then a referral to perhaps Legal Aid or Neighborhood Legal Services -- neither of which are on this list either -- would be made.

But it's so infrequent that someone would say that the sole reason they're having an abortion is economic that it's very rare that we would do that. So it's just, it's simply not relevant for the vast majority of women and to be required to do it holds out false hope to these women.

Q In your experience as a counselor, Ms. Roselle, what is [91] the purpose of counseling?

A The purpose of counseling is to help -- help anyone, regardless of their age, make decisions, to discuss, to identify what their options are, to discuss the pros and cons of each option and to reach a decision and to utilize all of the resources of themselves, their community and their support system in making that decision.

Q Is it the obligation of the counselor to try to persuade the person he's counseling to one or another

position?
A It is their ethical obligation not to try to dissuade someone.
Q Now, Dr. Allen yesterday discussed the fact that pictures of fetal development are available at Women's Health Services if any patient wants to see them. Is it a routine part of the counseling process to offer women the opportunity to review those pictures?
A No.
Q Under what circumstances would a woman be offered that opportunity?
A When she requests to see the level of fetal development.
Q If a woman requests to see those pictures, how would the pre-abortion counselor react or the paraprofessional counselor?
A It's usually posed by a woman who has been to a Crisis Pregnancy Center and gotten some inflammatory literature or [92] has been exposed to a movie called "The Silent Scream" and then she wants some factual, scientific information. It is also a very clear indication of her ambivalence and she is not, she's not immediately given surgical services, she is offered and referred for personal counseling.
Q Now, insofar as the parental consent provision of the statute is concerned, are there instances today where minors come to Women's Health Services, saying that their parents know about the pregnancy but that they refused to accompany them?
A Yes. In a case that I was personally involved in was a 14 year old from a very rural area about 75 miles from Pittsburgh. The physician made the referral directly to me because we have mutual acquaintances and this young woman, when she became -- when her family became cognizant of the pregnancy, she was shipped off to live with the sister who was 19 and a single parent,

and the -- her 15 year old boyfriend was forbidden from seeing her. After a couple of weeks of living in her sister's household, she decided that she needed to have an abortion, that this at 14 was not the lift that she wanted to look forward to, and so she convinced her boyfriend to walk to a rural health center where she was counseled by a physician. And the physician called me and said, you know, "They're 14, she's 14 and he's 15, and we've got about a week left for a first trimester abortion and they [93] don't have any money," and I immediately approved a grant from what we call our Vivian Campbell Fund, so there would be no fee, no charge to the patient, and then the problem was how do we get them there, because neither of them was old enough to drive but they were about to be parents. So we convinced or she convinced her 16 year old brother to make his first trip into the City of Pittsburgh, and if you live in rural areas, you understand that sometimes super highways are overwhelming for -- for even adults. So this 16, 15 and 14 year old came in and the young woman had her abortion, and the 16 year old brought the news that now that the pregnancy was terminated, the young girl was allowed to return to her parents' home. So that's when she left the clinic, she was able to return home.
Q Ms. Roselle, has Women's Health Services been the target of activities by opponents of abortion?
A Yes.
Q How long; for how long a period?
A For 17 years, since the day we opened.
Q Have the employees of women's Health Services been the target of activities by opponents of abortion?
A Yes.
Q And has that continued up to the present?
A Yes.
Q How about patients?

[94] A Yes.
Q And does that also continue up to the present time?
A Yes.

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[95] Q In the past year has there been any change -- I'm sorry. The question I had asked you and you had not had an opportunity to answer was to describe the kinds of activity.
A Well, they -- with -- beginning with 1986 --
Q That's when you came to Women's Health Services?
A That's when I -- when I started. There are leafletters almost every day, picketers on Saturday, some what was referred to as sidewalk counseling. One of our doctors' home was picketed, my home was picketed with, I came home on a beautiful Sunday afternoon after having been to a horse show with my daughter where she won her very first best of show, it was a wonderful family day to coming home to "Sue Worstell" -- which is my married name -- "is a murderer. [96] This home was bought with blood money." Then -- that was a very difficult day, I'm sorry, I didn't really mean to tell that story. My daughter was subsequently a target of a kidnapping threat where -- which was turned over to the FBI. She was 16 at the time, which was a kind of a time when she was feeling real independent, so we had guards at the house for a period of time and she wasn't allowed to go home after school by herself, things like that.

We have seen a great escalation in the kinds of harassment of all of the clinic employees of our patients and really of the building owners, too, beginning in September of 1988. Prior to that, Operation Rescue had come to Pittsburgh, but in September of '88 we were a target, Women's Health Services, targeted the Fulton Building and there were over 600 people at a

demonstration and there were 370 arrests that day.

We have also in September of '89 there were four people who forced their way into the clinic with -- behind an employee who was coming to work, with buckets of roofing tar, and they positioned themselves with their feet in the roofing tar and during the subsequent arrests, the tar was spilled in our main patient care area. The --

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[98] Q Now, since this tarring episode, have there been any major demonstrations?
A Well, we have become the target of a group called "Project Multitude," and they have had three demonstrations at Women's Health Services. The first one was in February that they had 1200 people there, where they -- they were [99] there for five hours and they sang and had speakers and generally had a very peaceful demonstration. People could get down the street, women could get into the clinic and there was no problem. In April there was about half that number, there were about 600, they were much more aggressive, they were much more taunting and abusive towards anyone who was walking down the street. We had a number of complaints afterwards, there were a number of our patients gave written documentation about the harassment that they encountered and for the first time ever in the existence of Women's Health Services did women actually say I will not go through that mob and I want to reschedule an appointment. And so that was the first time.

In June the -- they came back again and there were 450, according to the police, and the police cordoned off part of the sidewalk for an entire block and put the demonstrators on part of the sidewalk and part of the street, and there was actually a clear pathway for people

to go down the street, which on first blush sounds fine, and it really, people could actually get access to the building. The problem was, was that the police also refused to allow women to be escorted, so the whole time that they were walking in this open space, their photographs were being taken by both television cameras, from the media, from the press, from the anti-abortion demonstrators so that they had no privacy [100] whatsoever. I mean, I have been wont to say that after that situation, that women had more privacy when they were having illegal abortions than when they're having legal ones now.

Q Now, just to step back for a moment, you said after the tarring incident, were there repairs that needed to be made at Women's Health Services?

A Yes. The final tally on damages was in excess of $27,000.

Q In between these major demonstrations that you've mentioned, has regular picketing continued to go on at --

A Yes.

Q -- Women's Health Services?

A Yes.

Q You mentioned earlier, I think the term was sidewalk counseling. Does that continue today?

A Well, the sidewalk counseling is what they call it, but what the woman are -- they're really shouted at. And they're shouted at: "Don't go into that building, don't kill your baby, we love you, Jesus loves you and don't do these kinds of things." And they're followed down the street and they act-- they -- the demonstrators actually hold open the door and shout into the lobby of the building after the woman.

Q Has the character of the sidewalk counseling changed in the past few years?

A Oh, yes, it's become much more aggressive. It's not just [101] a matter of handing a leaflet and saying "We

have services that can help you. This is very aggressive and it's not reaching out anymore.

Q Has Women's Health Services or its staff been the victim of threats in the past year?

A Yes. We ran an advertisement, it was not -- it was an educational piece, but because of the controversy around abortion, we had to pay for space in a newspaper. And when the educational piece came back to us, to me one day, and in purple ink was written across it: "I will personally kill one of your staff by June -- one of your employees by June 15th."

* * *

[102] *CROSS-EXAMINATION*

BY MS. MERSHIMER:

Q Ms. Roselle, is a positive pregnancy test required prior to a woman being able to schedule an abortion at Women's Health Services?

A Yes, it is.

Q So she can't even come before she has had one?

A She can come for just a pregnancy test, but we don't make abortion appointments until she's had a positive pregnancy test.

Q And from what you've testified this morning, there are some unusual circumstances where a woman will have a pregnancy test on the same day that she'll have the abortion?

[103] A Yes.

Q But usually it's she comes back another day then for the abortion?

A Yes.

Q And she comes back another day for the counseling?

A No.

Q So there's occasions when she'll come in, have a pregnancy test and have a counseling for an abortion and

then come back a different day for the abortion?
A I'm sorry.
Q Okay, yeah, I want to be clear.
A The -- what -- she would have the pregnancy test. She would ask to see a counselor. She would, during the face-to-face with the counselor, she would receive the information-- this is a paraprofessional counselor -- that she would normally receive over the telephone, had she called to make an appointment, she would receive her appointment. Then she would come back on another day and receive the pre-abortion counseling, informed consent and the surgical services.
Q And what is the information that the paraprofessional counselor gives the woman?
A At what time?
Q Right, well, let's back up. You said normally a woman, if she comes in for a pregnancy test and the counseling on the same day, the paraprofessional would give --
[104] A I --
Q The paraprofessional would give the woman the information that normally would be provided in a telephone session, is that what you said?
A Yes.
Q Okay, what is the information that is provided in that telephone session?
A To the best of my recollection, okay?
Q Right.
A The -- the date of her last menstrual period, the -- her decisionmaking, what kind of support system she has, what alternatives she's investigated and then information about the preparing for the abortion, what to wear, what to eat prior to coming in, whether or not she is going to have intravenous sedation, various things. Does she have any known allergies, does she have any preexisting medical conditions that would be contraindicated to the

service and her arrangements for financing.
Q If the woman, the patient would ask -- is this a telephone counselor, is that a fair name for her, or --
A Well, it's the paraprofessional counselors and our nurses rotate in the telephone room and in the clinic, so --
Q Okay.
A -- call them a counselor.
Q All right, well, at least during the telephone session?
[105] A Mm-hmm.
Q If the woman on the phone, the patient, would ask for information about the risk of the procedure, would that be provided to her then?
A Oh, yes.
Q And you said these sessions tend to last from 30 to 40 minutes when there's a telephone counseling session?
A It varies. I would say 20. I'd say -- I think I testified 20 to 30.
Q Okay, 20 to 30. From what you've just said, it's either nurses or paraprofessional counselors that man the phone, is that right?
A Mm-hmm.
Q How many people do you have manning the phones on any given day?
A Five.
Q And what is the paraprofessional's salary?
A I believe their beginning salary at this point in time is $7.80 an your.

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[109] Q Do you recall making a verification in this case on April 18th, 1988?
A Yes.
Q Or thereabouts? And you recall making the statement that "The great majority of our patients have

absolutely decided to have an abortion before seeking medical care"?
A Yes.
Q Can you tell me the basis of that statement, how you know that?
A Well, I know that most of the women who go through pre-abortion counseling are not referred for problem pregnancy counseling because they are not ambivalent, they are not conflicted, they are not being coerced, they have made this decision. They don't request problem pregnancy counseling.

* * *

[112] Q Now on July 20th, 1990, the Philadelphia Inquirer quoted you as saying, quote, "We've certainly found an increase in pre-abortion anxiety. There are more questions that indicate people have heard the propaganda, is it really murder, does it have little toes, can it feel pain. We know if they've had a pregnancy test at a Crisis Pregnancy Center that they will have a lot of misinformation."
Is that an accurate quotation?
A I've never seen that article.
Q Is it --
A Could I see the article?
Q Certainly.

* * *

[113] Q Could you tell us, ma'am, is that an accurate quotation?
A That's part of a quotation.
Q Is that part that was quoted, is it accurate?
A As -- as I recall, yes.
Q Now, if a woman who is nine weeks pregnant and

asks a counselor whether the fetus has hands and fingers, would she be told yes, that's correct?
A No.
Q Why not?
A A counselor is not qualified to answer that kind of question.
Q Well, would she be referred to photographs or any sort of literature?
[114] A She'd be referred to the personal counselor.
Q And then would the personal counselor provide her with photographs and literature?
A If that's what she asked to receive. The other thing that might occur is a physician would be called in.
Q If a woman asks about alternative facilities that would help her carry a child to term, is she provided that information?
A Yes.
Q And if she asks questions about assistance benefits, is she referred to an agency that can address that?
A She's referred to the Department of Public Welfare in the county in which she resides.
Q And I think you testified that if a woman asks about whether a father might be liable for a support payment, she's referred, given information about that?
A Uhm, yes.
Q What materials does Women's Health Services provide a woman considering options to abortion such as adoption?
A Well, she receives -- she receives personal counseling and then based on what her situation is and what her desire is, she's referred to a licensed abortion -- or adoption agency within the county in which she resides. That agency, for example, if she is Roman Catholic she will probably be referred, at her request, to Catholic Social Services or the [115] Roselia Home. If she has no religious preference as to an adoption agency, she may

be referred to the Zoar Home or to the Children's Home. It depends on what her situation is.
Q And what materials do you provide a woman, if she asks for it, about prenatal care?
A Well, the materials that we provide about prenatal care depends on where she lives and whether or not she has private insurance that will pay for prenatal care and delivery.
Q I'm not sure if you fully answered my question, so --
A I'm sorry.
Q So what information do you give them about prenatal care?
A Well, if they -- if they do not have private insurance, if they're going to be on medical assistance, there is no private provider that will take care of medical assistance patients in Allegheny County. And in fact, in some of our counties, women can't get prenatal care and be on medical assistance at all. So therefore, we have a problem.

And if they are on medical assistance, they have to go to a clinic. And if they live in the wrong county, then they go to -- sometimes the Family Health Council can handle them and sometimes a physician, out of the goodness of his heart will, you know, take a limited fee, but will not accept medical assistance.
Q Now prior to performing an abortion at Women's Health Services, is the woman or patient told the gestational age of [116] the fetus?
A Yes.

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[117] Q I'm not sure if I asked you this question. How many doctors perform abortions? I know you have abortion services [118] provided three days a week. How many doctors do you have working each day?

A Either two or three.
Q And how many doctors are contracted -- you contract with the doctors; right?
A Yes.
Q All right, how many are contracted with Women's Health Services all together?
A Right now we have 13.
Q And those three days that abortions are provided, is there a time frame that the abortions are provided, is it like 8 to 5 or 12 to 8; do you know?
A Yes, there is a schedule. The first appointment is at 7:45.
Q Till when?
A 12:30.
Q P.M. or A.M.?
A P.M.
Q That's for each day?
A Yes.
Q And that's -- I mean, just so I'm clear, that's the period of time that the abortions are actually performed?
A I'm sorry. I apologize, those are the appointments. Abortions, the clinic actually begins, as far as the surgical procedures start, between 9 and 9:30 and depending on the [119] number of appointments and the number of physicians available, they end between 4 and 4:30.

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Q I just want to see -- to have this straight. You had said that the cost to keeping up with the reporting [120] requirements for the Department of Health were about $12,000 a year?
A That's right.
Q And you said that was two-thirds of the clerical employees salary?
A That's correct.

Q And that's because you took the clerical employee's salary and had her do some of the work of your medical director so the medical director could fill out the forms for the Department of Health?
A Yes.

* * *

[121] Q Now you said, am I correct, that acts of harassment or protests against Women's Health Services have occurred since the day the clinic opened?
A Yes.
Q And that was 17 years ago?
A Yes.
Q And it has continued on periodically ever since then?
A And it escalated in September of '88.
Q And it's -- and you've had these acts all the way through the period of time that the 1988 and '89 amendments have been enjoined; that's correct?
A And they've continued to escalate.
Q Now we've talked a lot about Plaintiff's Exhibit 6, Women's Health Services' medical form.
A Mm-hmm.
[122] Q And page 11, being the informed consent form?
A Mm-hmm.
Q That's the only form of consent form that there is; right?
A Yes.
Q You don't have a different in cases of rape, incest or battered women?
A There are different forms for women who are rape and incest victims to complete, but they aren't part of -- informed consent.

* * *

[124] Q When we were talking about Defendant's Exhibit 49 this morning, you said that there were some agencies that were omitted from the list of providers?
A Yes.
Q Is there anything prohibiting you from telling the Department of Health that some agencies have been omitted and should be added to the list?
A No.
Q Is there anything to prevent Women's Health Services from supplementing the Department of Health's list?
A I don't know.
Q Is there anything that prevents counsellors from offering their opinion about additional providers other than is on the list?
A I don't know.
Q Now when you were talking about whether information would be provided to a woman about a father being liable for support payments, that that information would be provided in cases where that was the sole reason the woman was offer for the reason to have an abortion?
A Yes.
Q Now if the woman would say that was just one of her [125] reasons, not necessarily the sole reason, would she still be provided that information about the father --
A Yes.
Q -- giving support?
And are you familiar -- wait -- and you said that this very rarely happens that a woman's concern -- sole concern is that there's not enough money?
A That's right.
Q Is it more frequently that that's a partial factor, however?
A That's correct.
Q And are you aware of any -- do you know what the

Family Planning pregnancies -- I mean Perspectives is?
A Yes.
Q Could you tell me?
A Family Planning Perspectives is a journal that's published by the Alan Guttmacher Institute.
Q And are you aware of any recent studies by Family Planning Perspectives that establishes that about 20 or 21 percent of the women who have abortions, that one of the reasons they have an abortion is they don't feel they can afford the baby?
A I read Family Planning Perspectives every other month cover to cover and I don't know that direct quote. If it's from the article that I testified about in my deposition [126] before, I just can't remember that it was 21 percent. It sounds familiar.
Q Does that sound about right in your experience at Women's Health Services?
A I don't know.

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Q Ma'am, do you recall when I asked you if a woman asked who had a nine week old -- she was pregnant nine weeks gestational age and if she asked the paraprofessional counsellor if the fetus had hands and fingers whether she would be advised yes, she was and you said no, because she would be referred to the personal counselor?
A That's correct.
Q Would the personal counselor tell her yes to that question?
A Possibly. I think that -- and I'd like to qualify my response just that I haven't done problem pregnancy counselling in a lot of years -- about 17. But the protocol would be that she would explore the reason for her question. And if the -- because questions like that

come out of [127] ambivalence about whether this woman really wants an abortion or she wishes to continue the pregnancy. And that may be the real issue.

But if the issue is truly that she wants to know that piece of information and a drawing or a photograph would be helpful to her, then she would be offered that opportunity.

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[128] Q Now we had a discussion about telephone counselling at the beginning of your cross and I want to make sure the record is clear on that. Women who have pregnancy tests other than at Women's Health Services, when they first contact Women's Health Services, it's to set up an appointment for an abortion; is that correct?
A Yes.
Q During that conversation, would they have telephone counselling?
A Yes.
Q And that's the telephone counselling where you describe the series of information that would be asked or obtained from the woman?
A Yes.
Q How long does that process typically take?
A 20 to 30 minutes.
Q And the woman who comes in to Women's Health Services for a pregnancy test and wants to set up an abortion appointment at that time would get that same -- the same information as the telephone counselling?
A Yes.
[129] Q But that would occur on site?
A That's correct.
Q Now that's not a substitute, is it, for the pre-abortion counselling that takes place on the day of the procedure?
A Oh, absolutely not.

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[143] MS. MERSHIMER: Your Honor, the Commonwealth would call Dr. Vincent Rue.

VINCENT M. RUE, Defense Witness, Sworn.

MS. MERSHIMER: Your Honor, Dr. Rue's curriculum vitae is Defendant's Exhibit 62. To summarize, as the Court has requested, Dr. Rue has a B.A. Cum Laude from St. John's University, 1970, in Sociology. He has a Masters in Social Work from St. Louis University in 1972 in Clinical Social Work. He has a PhD from the University of North Carolina at Greensboro in 1975 with a major in Family Relations and a minor in Sociology. In early 1990, he was co-founder and co-director of the Institute for Abortion Recovery and Research in New Hampshire. In 1975 through 1990, he was the Executive Director and also Psychotherapist and an individual marriage and family therapist at Sir Thomas Moore Clinic, Downey, California. From 1975 to 1980, he was Associate Professor of Family Relations in the School of Fine and Applied Arts, California State University at Los Angeles. He is also an adjunct Associate Professor at the School of Professional Psychology, United States International University, San [144] Diego.

He has numerous professional associations. He's provided consultation and written articles regarding adolescent problem pregnancy decision making, problem pregnancy decision making, spousal notice and informed consent and the psychological effects following an abortion. And he has presented a number of presentations on these topics.

DIRECT EXAMINATION (VOIR DIRE)

BY MS. MERSHIMER:

Q Dr. Rue, you're a licensed marriage and family therapist and trained psychotherapist; is that correct?

A Yes.

Q Could you explain that?

A I am licensed in the State of California as a marriage and family therapist. I work with individuals who present with a variety of problems, from anxiety disorders to depression, et cetera. I work with marital units, husbands and wives who express difficulty in one way or another with communication and sexual dysfunction, et cetera.

And I also work with families who have experienced distress and provide therapy for them. I have had training in the area of psychotherapy, which is really more advanced and more in depth work than general counselling. And that is primarily what I have done in the last 15 years in [145] California.

Q Do you clinically treat individuals with emotional and/or mental problems?

A Yes, I do.

Q And how long have you been doing that?

A I've been doing that as a licensed therapist for 15 years in California. And prior to licensure, an additional three years.

Q Okay, now while employed at Sir Thomas Moore Clinic, what types of counselling services did you provide?

A I provided personally individual counselling, individual psychotherapy, psychological assessments, as well as group therapy, conjoint marital therapy, conjoint family therapy, crisis pregnancy counselling and post-abortion counselling.

Q When you say post-abortion counselling, did you begin to develop a specialty in that area?

A Yes, I did.

Q Could you explain that specialty?

A The area of post-abortion counselling and post-abortion trauma in a relatively new area. It, in

essence, focuses on the painful aftermath that some women and men feel after experiencing an abortion. It's characterized by the unwanted, undesired --

MS. KOLBERT: Your Honor, I would object as to the substantive aspects of this in that counsel for plaintiffs do [146] have some questions as to voir dire.

THE COURT: Yes, are you qualifying the witness at this point?

MS. MERSHIMER: I was attempting to, your Honor.

THE COURT: Well, we're concerned with his qualification, not with the substantive aspects of his testimony. You may wish to limit it in that manner.

MS. MERSHIMER: I apologize, your Honor.

THE COURT: And then tell me the field of his expertise.

BY MS. MERSHIMER:

Q Could you tell the Court how many women you've provided psychological,counselling for in problems occurring after abortions?

A I would say hundreds.

Q And have you counselled women before they've had an abortion?

A Yes, I have.

Q And could you tell me the number of those?

A Again, in the area of hundreds.

Q And have you counselled men who have experienced difficulties following abortion by their wife?

A Yes, I have.

Q And could you tell me the number of men in that area?

A At least over 100.

[147] MS. MERSHIMER: Your Honor, I would offer Dr. Rue as an expert in psychological effects following abortions, problem pregnancy decision making with abortions and marital family relationships.

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CROSS-EXAMINATION (VOIR DIRE)

BY MS. KOLBERT:

Q Dr. Rue, it is true that you're not a psychologist; is that correct?

A That's correct.

Q And it's also true -- let me ask you to turn to your curriculum vitae, which is in the notebook in front of you under Defendant's Exhibit 62 -- no, I'm sorry, it's the manilla notebook.

Sir, it's not -- that's the plaintiff's exhibits. It's the Defendant's Exhibit Number 62.

A Okay.

Q Did you prepare your curriculum vitae?

A I did not type it, no.

Q But you did prepare it and examine it before sending it to plaintiff's counsel?

A No, I did not.

Q Did you examine it before sending it to plaintiff's counsel?

A No, I did not.

[148] Q Is this a vitae that you use in other instances besides court appearances?

A This is my vitae, but it was sent from my Los Angeles office and I am in New Hampshire at this point.

Q Now I direct your attention to underneath the -- it is correct that you -- I'm just a little confused about your PhD. Did you receive a PhD in family psychology as your vitae reports?

A No, it should be listed as family relations, which is what counsel just previously --

Q And that is, as I understand it, from the School of Home Economics at the University of North Carolina?

A It's from the School of Home Economics, Department of Child Development and Family

Relations.
Q But the PhD is a home economics PhD with a major, as you've described in your resume, in family relations?
A No, I don't believe that that is accurate. It is not a PhD in home economics, it is a PhD in family relations. In the Department of Child Development and Family Relations, there was a joint specialization or an individual specialization.
Q Okay.
[149] A Mine is in the area of family relations.
Q But you would agree that the degree was granted by the School of Home Economics?
A No, that is not correct. The degree was granted by the Graduate School of the University of North Carolina.
Q I would like to -- so you're saying that there's no home economics degree at all?
A There certainly are, yes.
Q But your's was not a home economics degree?
A That's correct.
Q I'd like to show you the commencement report from the University of North Carolina at Greensboro in 1975.

MS. MERSHIMER: Your Honor, could I see this exhibit?

(Pause in proceedings.)

BY MS. KOLBERT:
Q Can you read for me the -- what is next to your name under Candidates for Degrees?
A It says Home Economics. I've not seen this before and I was not present at my graduation.

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[151] Q Have you ever performed informed consent counselling or offered informed consent counselling in any way?
A With respect to what?

Q With respect to women seeking abortions?
A I have provided crisis pregnancy counselling.
Q No, my question is it's true that you've never proved informed consent counselling, that is, obtained a woman's informed consent prior to the performance of abortion?
A Well, counsel, because I'm not a physician, I don't think I could do that.
Q And it's also true that you've had no experience counselling women in Pennsylvania who have obtained -- who [152] have given informed consent for abortions; is that correct?
A That is correct.
Q And it's also true that you've never conducted any independent research about informed consent counselling within Pennsylvania abortion clinics; is that correct?
A That's correct.

MS. KOLBERT: Your Honor, plaintiffs would object to any testimony by this witness as to informed consent and informed consent counselling. We have no problem with him being certified as a marriage and family therapist and an expert in family relations, but that that would not go to testimony as proffered by the Commonwealth as to his expertise in informed consent in that interchange.

THE COURT: All right, Ms. Mershimer, do you wish to ask any further questions or make any comment concerning the objection? To qualify your witness in the area of informed consent.

MS. MERSHIMER: I would ask a few more questions, your Honor.

THE COURT: All right, why don't you proceed.

REDIRECT EXAMINATION (VOIR DIRE)

BY MS. MERSHIMER:
Q You say that -- you had previously said that you have provided psychological counselling for hundreds of

women [153] experiencing problems after having an abortion?
A Yes, I have.
Q And what did that counselling involve, what were the issues?
A The issues involved were an evaluation of the stessors that were currently operating in that person's life, the relationship context in which the pregnancy occurred, if it was a minor circumstances in that person's family, the psychological status of that person, her well being, crisis decision making in the past, her methods for utilizing, her methods in resolving those crises. It also included spiritual areas of moral issues that might be relevant to her decision with respect to the outcome of her crisis pregnancy. The meaning of the pregnancy itself for her. We also discussed stages of fetal development, psychological risks to the procedure, et cetera.
Q In that crisis making decision process of counselling, did you discuss information that the woman had at the time of the abortion or lack of it and the effect that had on her in the psychological problems afterwards?
A I'm sorry, could you repeat that?
Q In that -- in doing the counselling in that crisis making decision process, did the counselling include infor -- counselling on the area of whether -- of the information that had been provided to the woman before having an abortion or [154] the lack of information that had been provided to her and any effect that had on her -- on after the abortion, psychologically?
A Yes, I did.
A And you said that you've counselled hundreds of women -- or I'm sorry, maybe 150 women before having an abortion?
A At least.
Q And in that counselling process, does that -- is there

areas of information that -- do you discuss infor -- is part of the counselling request for information that the woman has or believes is beneficial in making the decision?
A I'm sorry, can you...
Q Well, when you counsel the women before an abortion, what are the issues or topics that are discussed?
A We look at what the -- as I mentioned earlier, what the pregnancy means to her. Whether or not any of the risk factors that have been identified in the psychological literature are relevant to her circumstances.

Some risk factors, for example, are the existence of prior children, any coercion, whether or not she has her partner's support. If she's a minor, the issue of her parents. Her information that she has with respect to fetal stages of development, how she became pregnant. Again, her psychological well being, prior decision making in crises, et cetera.

[155] MS. MERSHIMER: Your Honor, in response to Ms. Kolbert's comments, I would say that Dr. Rue is qualified to talk about pieces of information that are required by the Pennsylvania's act and whether it serves a beneficial purpose or whether there could be psychological effects after the abortion by information not being provided.

THE COURT: All right, what -- outline again the area of his expertise in which you wish him to state opinions.

MS. MERSHIMER: The psychological effects following abortions, problem pregnancy decision making with abortions and marital family relationships.

THE COURT: All right, I will grant your motion and let him testify in those areas. And in respect to the objection, it's overruled.

It's a matter of weight, which I will accord to his

testimony determined by his background and his qualifications, his answers and all the factors that go into an evaluation of the weight that should be given to the testimony of an expert witness. I will weigh and evaluate all that in making a judgment as to his testimony. Your motion is granted, shall we -- would you proceed then?

MS. KOLBERT: Yes, your Honor.

MS. MERSHIMER: Yes, your Honor.

[156] *DIRECT EXAMINATION*

BY MS. MERSHIMER:

Q Now we had just started asking some questions. Did you begin to develop a specialty in the area of counselling women for emotional issues following abortion?

A Yes, I did.

Q And can you explain that specialty?

A The specialty was in the area of helping women recover from a painful abortion experience. What I found was women and men described a repeated involuntary grieving that was going on, an inability to put this abortion behind them.

MS. KOLBERT: Objection, your Honor, as to not a proper foundation yet laid about his findings.

THE COURT: Did you wish to lay a further foundation for this?

BY MS. MERSHIMER:

Q You've said that you've had approximately seven -- I'm sorry -- hundreds of cases in your -- in the 15 years of experience, treating -- counselling women in the psychological problems following abortion?

A Yes, and in addition to the treatment of post-abortion pain, I have reviewed some 239 studies in psychological aftermath of abortion, as well as done empirical research on problem pregnancy decision making.

Q And what is involved in clinical treatment of such

women?

[157] A First of all is the assessment of whether or not the aftermath that this woman is experiencing is related to the abortion or if it is related to some traumatic experience that was pre-existing to the abortion.

Any appropriate therapy must commence with the development of a trusting relationship, so the beginning phases of therapy basically entail an opportunity for this person to begin checking out with me, the therapist, whether or not I'm hearing what she is saying or he is saying, whether or not I truly care about that and whether or not I have any experience in an area that this person is experiencing pain in.

It has been my experience with a number of patients that they have sought out help after an abortion to other mental health practitioners and the mental health practitioner says I've never heard of anything called post-abortion trauma and I don't quite understand this. In fact, maybe you should change your values. Given that, these individuals then, in the early stages of therapy, are seeking out an affirmation from me whether or not their pain is legitimate. And indeed, I would say to that person at the beginning stages of therapy, yes, I have seen post-abortion trauma. I have seen this in some women and men and I do not want you to feel isolated.

So the beginning stages of treatment are [158] establishing that important caring relationship. Beyond that, treatment entails the opportunity to fully experience the grief that is involved with the loss that an abortion presents.

These women define their abortion experience this way: They say that I did not, at the time, fully know or understand what my pregnancy meant and what the abortion would do to the pregnancy. Upon reviewing information, seeing things in the media like Life

magazine this month, these individuals may begin feeling the grief that is related to the loss that this abortion caused. As that occurs, the stages of grief must be talked about, must be felt and must be resolved. That's really the second phase of treatment.

And the third phase is stabilizing any of the dimensions of post-traumatic stress that we see here in the example from Dr. Walker. Because as I have written and as I have see clinically, post-abortion trauma, as this is a trauma, follows very closely the diagnostic criteria post-traumatic stress. And these individuals need help in realizing that when they re-experience the painful aftermath of abortion that they're not alone. That this is a normal response to an abnormal situation and that this can be resolved over time.

Post-abortion trauma does not resolve itself typically spontaneously or naturally. Grief usually is best [159] resolved with a caring other and post-traumatic stress, to the extent it is related to the abortion, requires therapy, requires times and requires therapeutic work on the part of the patient to resolve.

Q And this therapy include multiple counselling sessions with women?

A Indeed it does.

Q In the past five years, how many patients would you say that you counselled in general a week?

A My caseload generally ran between 30 and 35 patients a week, and that's over the last 15 years. And approximately 40, sometimes 50 percent of that caseload were in the area of post-abortion problems.

Q Now do you have any experience in the area of problem pregnancy decision making?

A I do.

Q And could you explain that experience?

A In 1973 I was associate director of a problem pregnancy research project in North Carolina where we

looked at the decision making process that women went through in the consortium of agencies as far as making a decision about a pregnancy outcome. And that report was a technical report and written up as to problem pregnancy decision making.

Q. Do you have continued experience in counselling women in that area?

[160] A Pardon me?

Q And did you have continued experience in counselling women in that area?

A Yes, after that time, I commenced my practice in Los Angels and during that time, I have worked with hundreds of not only young women, but also older women who found themselves in a crisis pregnancy circumstance. And they sought out my therapy and my assistance in resolving that.

Q Do you have any experience in the area of marital family relationships?

A Yes, I do.

Q Could you explain that?

A I have worked with couples and families over the years, both spouses together and spouses individually. I have worked with married couples with respect to crisis pregnancies. I've worked with couples who found themselves involved in either psychological abuse or sexual abuse, child abuse, battering, parent/child conflicts, sexual dysfunction, communication disorders, various things like that.

Q Now have you read Sections 3205, 3208 and 3209 of Pennsylvania's Abortion Control Act?

A Yes, I have.

Q And could you turn to Defendant's Exhibit -- it's the last book, it's the manilla tabs -- it's volume two and it's the last section, marked "The Act", page seven.

[161] A What was the exhibit number, counsel?

Q There's -- it's after Exhibit 62.

A After 62. Okay.
Q Page seven, Section 3205. Now focusing on the informed consent provisions under Section 3205 A1 ii, it requires a physician to advise the women of the probable gestational age of the fetus. And Section 3205 A2 i requires a woman to be advised that the Department of Health prints materials that describe the unborn child and that she can review those materials if she chooses to.

Have you read those provisions and reviewed them?
A Yes, I have.
Q And then under Section 3208 A2 on page 19 of the act, that requires the Department of Health to have material available that describes the probably anatomical and physiological characteristics of the unborn child at two week increments, including pictures of the fetus at two week increments. Have you reviewed this provision before today?
A Yes, I have.
Q Now in your experience counselling women, do you have an opinion whether information on fetal development would be information that some women would consider relevant in choosing whether or not to have an abortion?
A Yes, I do.
Q What is that opinion?
[162] A My opinion is that the vast majority of the patients that I have worked with that have obtained abortions that have had negative reactions have said to me that they either knew nothing about the fetal development at the time of the preg -- of the abortion or if they did ask, they were misled in the abortion counselling. That this is nothing but a clump of tissue. It has no characteristics that could identify it as human.

And to the extent these individuals were misled or had insufficient information, I believe that informed consent was not possible and I believe that the

psychological traumatization was worsened because they were misled into believing that this was not a human fetus.

And so I think it's terribly important that this information be voluntarily provided and that an individual avail herself of information so that she can make a knowing, a voluntary and intelligent decision that could effect her for the rest of her life.
Q In your clinical practice, have women sought therapy or counselling before an abortion decision with you?
A Yes, they have.
Q And in your clinical practice, did you offer women information about fetal development even if they did not ask for it?
A I introduced the topic and strongly encouraged them to [163] educate themselves in this area if they have not done so before hand.
Q Now did you insist that they look at materials or just make it available to them?
A I strongly encouraged them. I did not insist on it.
Q Now why was that?
A Well, I don't insist on many things as a psychotherapist and in this area, if a person believes that she doesn't want to look at pictures, doesn't want to have any information, I don't feel it's my role to force that upon her.

On the other hand, it's certainly, I believe, well within my role as a counsellor to say to her, I have worked with a number of people who have been traumatized because they haven't availed themselves of sufficient information to make a knowledgeable decision with respect to an abortion.
Q Is information regarding fetal development something that should be disclosed to a woman -- or saying that the information is available to be reviewed, is that something that should be done or given to a woman

only if she asks for it?
A I think that it's perfectly appropriate for her to receive the information if she asks for it and that she not be coerced into obtaining information.
Q From your clinical experience, do you have an opinion whether merely advising a woman that materials regarding just [164] fetal development are available and that she can decided whether or not to review them is unnecessarily traumatizing to the woman?
A I do have an opinion.
Q And what is that opinion?
A My opinion that offering her the opportunity to be educated with respect to biological and scientific facts, this opportunity which is voluntary is certainly not going to provide the basis of any psychological trauma for a person considering an abortion.
Q Now what --
A If anything, I would say, if I could add, this will help her utilize her own personal values and that those values be informed and based upon some facts.

If, after reviewing these materials, she were to believe that this is, indeed, a human fetus, then she may act and decide accordingly. If, on the other hand, after reviewing these materials she makes the decision that this is not a human fetus and proceeds, I think she is preventing probable increased psychological damage from being misled or receiving fetal -- information about fetal stages of development after the abortion at some later date or in the context of medical care in a wanted pregnancy later on.
Q Now what other information, when you counsel women before is they have an abortion, what other information do you discuss [165] with the woman?
A Well, I think I've answered that question, but we look at all options. We look at the meaning of that pregnancy for her. We look at what stressors are in her

life. Her age certainly has a great deal to do with this. If she is a minor, her decision making may well be framed in fear, misinformation or impulsiveness. Very often a crisis pregnancy unfolds very quickly. By definition, it is a circumstance that demands an attention -- an immediate attention with respect to thinking and ultimately coming to a decision.

The last thing I want her to feel is that she is pressured by anyone into making a decision that is premature to a full understanding of the facts of her circumstance and the facts surrounding any option that she may elect.
Q Now Section 3205 of the act also requires that a woman be advised that the Department of Health publishes materials that list agencies that offer alternatives to abortion, that medical assistance benefits may be available for female care, child birth and neonatal care and that the father of an unborn child is liable to assist and support of her child or that information does not need to be provided in cases of rape. And if the woman chooses to receive these materials, she must be provided them.

Are you familiar with these requirements?
[166] A Yes, I am.
Q And in your experience counselling women, is this information that some women would want to know prior to deciding whether or not to have an abortion?
A Yes, it is.
Q Why is that?
A I think this is information that many people don't know, that they have the right to know. Research by Mary Cunningham Agee indicated -- she asked the question of women that had obtained abortions, if you had known that there were other options for you, would you have elected an abortion? And 90 percent said they would not have.

Many young people have no understanding that the alleged father could be held liable and responsible for financial payments. The whole area of options counselling is terribly important, where the individual recognizes that there are support services across a broad spectrum that are available for her. Very often, in the bureaucratic maze of life, people don't know what support services are available. And indeed, I believe they have the right to know.

Q Now from your clinical experience, do you have an opinion on whether making this information available to the woman could be traumatic or burdensome?

A I do.

Q And what is that opinion?

[167] A I cannot foresee any circumstance where an individual that is offered this information on a voluntary basis could be psychologically traumatized.

Q Now the Commonwealth requires the information we just discussed, in addition to the nature and risk of the abortion method and the medical risks associated with carrying a child to term to be given to a woman 24 hours before an abortion is performed. Are you familiar with that requirement?

A Yes, I am.

Q Do you have an opinion on whether the 24 hour waiting period is beneficial?

A I do.

Q And what is it?

A I think time offers an opportunity to digest information. It is one thing to obtain information. It is another to personalize it. A 24 hour deliberation period is the very minimum I would encourage a person to evaluate the many complex factors involved in this important decision that will, in one way or another, be with her for the rest of her life.

Crisis pregnancy decision making, as I said earlier,

unfolds rapidly. There is also the stigma of shame attached to this. I am a failure because I am victimized, if you will, by my unwanted pregnancy. Very often there is shock involved. There may be no prior experience with this level [168] of crisis decision making. Hormonal changes are operative once a woman is pregnant. This only can compound and conflict the decision making process. All of these factors mix together and create an environment where deliberation can be extremely beneficial.

And lastly, I would add, the opportunity to reflect and draw upon the support of those that love that person, that perhaps know that person better than any social worker of counsellor or psychologist, that's exceedingly important. The 24 hour deliberation period I think is a strong encouragement on the part of the state to do that. And I think it's essential for people when the decision making stakes are high.

Q Now if a woman knows she's pregnant for a week or two, she's had a pregnancy test, she knows she's pregnant, she believes she wants an abortion and she goes to an abortion clinic for that procedure, is the 24 hour waiting provision still beneficial, in your opinion?

A Yes, I believe it is.

Q Why is that?

A We don't know what information this individual has based her decision on. And if it is a fully informed decision, it will simply be a confirmation to her that her decision is right for her. By insuring that she have, on an voluntary basis, information of a biological, scientific nature, I [169] believe it's a way of assisting her in having adequate information to make a decision and for her to check out and affirm the rightness or the wrongness of a decision that she may have made earlier.

I would also add that it has been my experience clinically that women in the crisis pregnancy decision

making may well -- their decision may well fluctuate. That having started, at this point -- this is often true with respect to adoption, I can't possibly give this child away in an adoption and then over a period of time, that decision changes. There is a consideration of an abortion. That changes. I think it's well documented in the literature that across time unwantedness varies as a function of the length of the pregnancy.

Q Of your clinical experience and the review of literature, does time play a role in the crisis pregnancy decision making?

A Time plays an important role in the crisis pregnancy decision making. Very often, a decision is made impulsively to be rid of this crisis and a person may even simply rely on a previous crisis pregnancy experience. We know today in the United States that probably 40 percent of all abortions are repeat abortions. This puts women at risk, having had an abortion, to have a subsequent abortion. Repeated multiple abortions carry certain health risks, both medical as well as [170] psychological.

The time period to evaluate is this really in my best interests, what is involved here, are there other support services available for me, all of that is terribly important in a woman making a decision that is truly informed and beneficial for her.

Q The example I gave you or asked you about if a woman has already known she is pregnant and she goes to the abortion clinic and I asked you about the 24 hour waiting period still being beneficial, is it possible that she will obtain new information or additional information that the clinic that she didn't have before that would aid her in considering?

A Yes, it is. That's what I meant by the state would be insuring a certain standard of information -- scientific information on a voluntary basis that would be very

helpful to her. We simply don't know what information she has utilized in making that decision.

Q Now could you turn to page 20 of the act, Section 3209? That's a spousal notice provision.

A Yes.

Q And that requires that a woman give notice to her spouse, but not consent, just notice, that she's about to have an abortion, except in four circumstances.

A Mm-hmm.

Q Have you reviewed that section previously?

[171] A Yes, I have.

Q And could you look at Defendant's Exhibit 48?

A Yes.

Q Now there will be testimony that Defendant's Exhibit 48 is the proposed certification regarding spousal notice that the Department of Health will use if the spousal notice provision goes in effect. Have you reviewed that before?

A Yes, I have.

Q In your experience counselling married women and men, do you have an opinion on whether spousal notification is generally beneficial?

A I do.

Q And what is that opinion?

A My opinion is that spousal notification is beneficial. People are not perfect, neither are marriages. Most are neither so good that spousal notification is unnecessary or so bad that it would be presumed harmful to the wife to notify the husband with respect to the abortion.

In relationships in particular, people often misjudge their spousal partner. For the majority of couples, communication in very important in marriage. In fact, I believe it's the bedrock of healthy communication -- of healthy marriages. It is advantageous for wives to draw upon the support of their husbands in this crisis decision making period. I believe it's beneficial. The literature is

clear [172] that if there is a conflictual relationship, this woman is at risk for psychologically later on experiencing a painful aftermath from an abortion.

So clinically, I have seen this to be terribly important. That even if the husband were to disagree with her about obtaining an abortion, that this is not bad, that this is not horrible. This is positive in that it provides an open review of a decision with respect to a member of a family -- potential member of the family. And it's extremely important for her to be able to bounce her ideas off of his thinking and vice versa.

And in my opinion, it would be as equally unjust for the wife to exclude him from any consideration as it would be for him to exclude her from any consideration.

Q In your clinical experience, have you counselled battered women?

A Yes, I have.

Q And you reviewed literature in this area?

A I've reviewed some of the literature, yes.

Q Were you here when Dr. Walker testified this morning?

A Yes, I was.

Q Do you agree with her opinion --

MS. KOLBERT: Objection, your Honor. I don't believe that the witness has been certified as an expert of battery.

THE COURT: I will receive the testimony and weight [173] and evaluate it. Lets continue. Overruled.

BY MS. MERSHIMER:

Q Were you here when Dr. Walker -- I don't know if you answered that question. Were you here when Dr. Walker testified this morning?

A Yes.

Q And do you agree with her that battered women tend to deny that they are battered?

A Yes, I would agree with Dr. Walker's perception of

that.

Q Do you agree that battered women are not likely to avail themselves of the exception in Section 3209, that they do not have to notify their spouse?

A No, I would not agree.

Q Why is that?

A I believe that battered wives exist within a context of denial, but that they are not happy deniers. That they are not pleased, that they are not satisfied in their life circumstances. I believe that they want help. That they would seek that help out if help were there and if they felt safe enough in obtaining that help.

Research by Richard Gelles and others indicate that 75 percent seek out help of battered wives. I believe even Dr. Walker, in some of her written materials, has indicated that most battered wives will report, for health problems will deal with health issues. And I think that this is [174] terribly important.

In fact, I see this step where she indicates that she is at risk of being battered, I see this as the commencement, an opportunity for her to commence a path of recovery where she no longer needs exist in denial. She doesn't -- she's not being coerced into therapy somewhere, she's not being coerced into an abortion or not obtaining an abortion. But she is being confronted with an open and honest expression that her circumstances are indeed distressful and sad, that she is battered and at risk of future battering.

And I think these women, with their circumstances, demand a great deal of compassion on our part.

And it is my a hope that this would commence a path of recovery for a person by acknowledging that she is at risk.

Q From your clinical experience, do you believe that counselling is necessary for battered women to recover?

A I believe that battered wives, similar to wives of

alcoholics, similar to wives in dysfunctional marriages, that these individuals are at great risk for reinventing the relationship wheel if they don't receive proper therapy and counselling to understand what psychological factors are involved, first of all, in her getting herself into that circumstance, secondly staying and third, reconnecting with a person very similar, say, to her first husband who battered her. We see this constantly clinically.

[175] A person is married to an alcoholic and comes right back after a divorce and finds an alcoholic who now batters her. So she's a great risk without counselling for reinventing a relationship that's dysfunctional and that could be very painful for her.

Q From your experience and review of literature, do you agree that the majority of battered women will recover from the battered women's syndrome spontaneously when removed from the threatening environment?

A No, I would strongly disagree with that and add that if they are experiencing post-traumatic stress or whatever the particular psychological manifestation of their symptoms is, that these people need professional help to resolve their crisis, to resolve their psychological impairment and to better a future where they are not at risk for further battering or further dysfunctional lifestyle.

* * *

[176] Q Dr. Rue, you testified that in your experience women who had not been sufficiently informed prior to obtaining their abortion, that they had -- that that had some sort of impact on their lives; is that correct?

A That's correct.

Q Could you explain that impact in more detail?

A Well, it could be characterized as intense grieving, distancing in relationships, a mourning, a deep loss, a feeling of tremendous anger and resentment that she was misled. I think generally when a woman feels she has not provided informed consent and information has been insufficient, I think there is generally a sense of regret about what has occurred.

With respect to an individual who is married and she has not notified her husband, had a secret abortion, did not understand what the abortion really did to her pregnancy, this can be a tremendously painful remembering for her and can constitute the basis for a diagnosis of post-traumatic stress which the husband cannot understand. He sees his wife distancing. He sees her emotionally numb and he asks what's wrong. And she says nothing. He says, well, you seem to be different.

[177] And of course, she is different, but she hasn't made the connection herself between the manifestation of these symptoms being tied to her abortion experience. And because all of this interconnects and interweaves, her opportunity to make a decision that is supported pre-abortion, that should necessarily be support post-abortion has been truncated, not only by a lack of information, but also because she doesn't have a support system. S o I see that these individuals can suffer tremendously in a psychological way if they have not received sufficient informed consent.

Q And do you know how long this suffering or the psychological problems can last?

A Well, Speckhard's study found eight to 10 years after an abortion these individuals began ab-reacting, that is, having negative experiences.

The one thing that is characteristic about post-traumatic stress is that an acute reaction is not typical. It's rather that individual chronically attempts to

cope with something that is outside the range of normal human experience. The attempt to process in some way, which is what the re-experiencing phase is, part two here. But more characteristic is the delayed aspect of post-traumatic stress.

Here, an individual will say I feel relief after an [178] abortion, but it is only months and/or years later where she will begin feeling the painful aftermath in a way that can be quite impairing of her relationship, of her career, of her child bearing and child rearing. This delayed aspect is particularly critical.

And I might add that in Science magazine of 1990, Dr. Adler and others reviewed some of the literature on abortions aftermath and Dr. Walker referred to this today. They by no means did a conclusive analysis, a systematic or meta analysis of the literature. And certainly not one that we provided to Surgeon General Koop.

But I might add that Dr. Adler and her colleagues state very clearly in that Science magazine article that the long term effects of abortion are unknown. And you see, that presents a public health risk in terms of a person experiencing this syndrome or depressive disorders or anxiety disorders. It presents a health risk and it's something we should certainly be aware of.

* * *

BY MS. KOLBERT:

* * *

[180] Q Let me ask you this, Dr. Rue. Is it fair to say that in your view, life begins at conception?
A That's a fair characterization of my professional opinion, yes.
Q Is it your professional view that abortion is the

unnecessary taking of human life and is morally wrong?
A No.
Q Is it fair to say that you have a strong personal belief that abortion is the unnecessary taking of human life and is morally wrong?
A I have strong beliefs, but I don't --
Q Is that one of them?
A I don't --

MS. MERSHIMER: Your Honor, I object. I don't see what the relevancy of anybody's personal views are, including counsel or the witness.

MS. KOLBERT: Well, your Honor --

MS. MERSHIMER: It's the testimony as a professional.

MS. KOLBERT: Your Honor, I think it is very [181] relevant in this particular instance, because I think it shows not only the bias of the witness, but how he uses that belief in his particular practice.

THE COURT: Yes, objection overruled, it does go to bias.

* * *

Q Dr. Rue, is it fair to say that you have a strong personal belief that abortion is the unnecessary taking of human life and is morally wrong?
A I believe it is -- abortion is a failure. I believe it is a simple solution to a complex problem. I think it's a poor solution to this complex problem and I am personally not in favor of abortion.

I will add to that that in forming that opinion, I have reviewed the literature from those that espouse a belief in the benefits of abortion, as well as those that espouse beliefs in the harm of abortion.
Q But it's your personal belief, that's all I'm asking. All right --

A My personal belief.
Q Is it also your view that you personally oppose the use of IUD's or other kinds of birth control methods to operate after the -- an egg is fertilized?
[182] A To the extent that an IUD is an abortive fashioned, if we're talking about my personal opinion, yes, I would not be in favor of the utilization of an abortive fashion.
Q So I would also take it to believe that although you're personnally opposed to abortion, that you would favor legal abortion as a public policy matter or not?
A As I said earlier, and I would really reiterate the testimony of Dr. Jacquelyn Forrest, who's director of research at Alan Guttmacher, abortion represents a failure, both on the part of the individual and society.

* * *

Q Let me just see if I understand. As a matter of social policy, you oppose abortion?
A As a matter of social policy, professionally, I think abortion is a poor solution to the complex issues surrounding an unwanted pregnancy.
Q Now Dr. Rue, I'd like to read a quote from you from one of your writings and see if you would continue to agree with this statement. I'm reading a quote from the chapter five that was entitled, "The Familial Context of Induced Abortion" and it was in a book that was edited by James Bopp and which you wrote that article. And let me just read it to you and see if you agree at this moment with this statement:

"That abortion shreds the soul of humanity and the [183] fabric of relationships. It exists for women and yet it is against women, men and children. Like an anesthesia, abortion comfortably numbs all from experiencing the burden of pregnancy. Abortion has

become a social eraser, individually, quickly and secretly eliminating all traces of a problem that is pregnancy, and yet traces always remain within the depths of human kind, the indelible marks of violation appear." Do you agree with that statement?
A Yes, I do.
Q Is it your view that family problems can never be -- or it is your view, is it not, that family problems can never be a justification nor a basis for abortion?
A I don't think abortion ever resolves a family problem.
Q So in your view a woman is never justified in having an abortion because of a family problem?
A Well, I don't know what justified means. Women make the decision to have an abortion basically for what are known as elective social reasons. Wrong sex, wrong timing, career decisions, et cetera.
Q Now wait, that's not responsive to my question, sir. I asked you whether or not it was your view that a family problem can be a justification or a basis that a woman gives for having an abortion?
A It can be a justification.
[184] Q Do you agree with that justification, do you think it's permissible in your value structure for a woman to use that justification for having an abortion?
A Any professional opinion, an abortion will do nothing to solve a family problem.
Q Is it fair to say that you never believe that mental, psychological or emotional problems of any kind would be a justification for having an abortion?
A My opinion is basically based upon the review of Dr. Philip Ney and he has reviewed all mental health indications for an abortion and my --
Q No, I'm asking you --
A My decision is --
Q -- for your opinion.

A My opinion is that an abortion does not ever solve mental or emotional problems and in fact, the research is very clear, that it worsens it.
Q Would it also be fair to say that in your view, incest would never be a justification or a basis for abortion?
A Again, women elect abortion for a varied number of reasons, one of which may be incest, rape, domestic violence, et cetera. I do not believe that an abortion resolves the familial context or nature of the problem.
Q What about rape?
A Nor do I believe abortion resolves the trauma of rape. [185] In fact --
Q Okay, I'm not asking you whether it resolves the trauma. I'm asking you whether that's a permissible -- in your value, permissible justification for abortion?
A I don't think that capital punishment for a human fetus is warranted because of the irresponsible actions of the male.

THE COURT: May I say to the witness you are required to be responsive under our procedures. In other words, you should focus on the question and answer the question and not state some gratuitous information that is not responsive to the question.

I detect you have not been responsive in the last few answers. Would you ask another question. You are required to be responsive.

THE WITNESS: Yes, your Honor.

THE COURT: And I so inform you. Would you -- shall we continue?

MS. KOLBERT: Yes.

BY MS. KOLBERT:

Q Dr. Rue, it is true, is it not, that of pregnancy that is a result of -- in a situation where there's a pregnancy that's a result of marital rape, it would be your view that the marital rape is not a justification or a basis for an abortion?

[186] A It is -- it is my view that marital rape can be a justification, but that it is not in the best interests of the woman to obtain an abortion based upon a marital rape.
Q Now is it -- it's true, is it not, that you've never conducted any independent research on women seeking abortion -- scientific research?
A That's incorrect.
Q You've never -- have you -- it's true, is it not, you've never conducted any independent scientific studies on women seeking abortion? I'm not talking about a review of the literature, I'm talking about conducting studies.
A That's incorrect.
Q Okay and what are those studies?
A I referred to that earlier, in 1973, I was the associate project director of problem pregnancy decision making in North Carolina.
Q Other than that 1973 study, since that time period, have you ever conducted any scientific research?
A I assisted in the project for Dr. Koop --
Q No, I'm talking about not a review of the literature. I'm talking about independent, scientific research.
A Well, I'm trying to answer that, counsel.
Q Okay.
A A meta analysis and a systematic analysis of some 239 studies would be considered original research. And I have [187] conducted that in conjunction with Dr. Tim Rogers, Dr. Wanda Franz and Dr. Anne Speckhard in 1987 for the Office of the Surgeon General in his report to the President.
Q So this meta analysis is the only independent research that you've conducted; is that correct?
A That's correct.
Q It is correct, is it not, that other than the meta analysis of other people's studies, you've never conducted a scientific study about women seeking abortions?
A Well, that's not precisely correct.

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Q All right, I want to differentiate between the situation where you're reviewing and doing a meta analysis or a statistical analysis of other people's work from conducting your own research. It's true that you are not a clinical researcher; is that correct?
A That's correct. I'm -- I have been in the process of writing a text on post-abortion syndrome for the last seven years. I have been amassing clinical data and as you know, counsel, in the area of mental health formulation of diagnoses or mental disorders, there is a phase called the discovery phase. Sigmund Freud commenced a whole field of analytical literature --
Q Let me ask you to be responsive. I don't want to get into Sigmund Freud here. Let me ask you this. If -- other than amassing information from your own clinical practice, [188] have you ever conducted any surveys on a random basis of any women seeking abortion?
A No, I have not.
Q And how about conducting any surveys on a variable basis where you're bringing people together who have perhaps experienced a problem, other than from your clinical practice, and done tests -- psychological tests on those particular individuals?
A Yes, we're in the process of doing that at this very moment.
Q But you have not --
A I have not published on that.
Q Okay --
A Yet.
Q And it's also correct, is it not, that the testimony today, your expert opinion today is based solely on your experience within your clinic practice?
A No, that's not correct.
Q Well, would it be correct to say that it's based within

your experience from the patients you've seen within your clinical practice and the meta analysis that you did for Dr. Koop?
A No, that would not be correct.
Q Would it be correct to say that it is based on your clinical practice primarily?
[189] A No, that would not be correct.
Q Would it be correct to say that it is primarily based from the study of Dr. Koop?
A No, that would not be correct.
Q Okay, what is it primarily based on?
A It's primarily based upon three areas, basically my clinical practice, my research experience and my review of the literature.

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[191] Q Okay, now I also wanted -- didn't you also tell me that you were conducting a scientific research study with a random sample of people for your book?
A No, I did not say I am conducting a random sample. You asked me whether or not we were amassing information with respect to individuals other than my clinical practice and the answer is yes.
Q I'm just having a little hard time understanding it. My understanding of your testimony was that you had three bases. The first base was your clinical study. The second base was the 1973 research --
A Right.
Q -- as well as research for your book --
A Well --
Q -- that you are currently collecting?
A No, my testimony today has been based upon the following: [192] One, my clinical experience. Two, my review of the literature.
Q Okay.

A And three, my research experience.
Q Now I'm trying to understand the research experience.
A All right.
Q The first part of the research experience, the 1973 study I fully understand.
A All right.
Q The second study, what is that?

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Q That's fine. Dr. Rue, it's correct, is it not, that you were the director at Sir Thomas Moore Clinic in California?
[193] A I have been the executive director since 1978 of the Sir Thomas Moore Clinics in Southern California.
Q There are two offices to that clinic; is that correct?
A Yes.
Q Would it be safe to say that the Sir Thomas Moore Clinic has a reputation in the community for helping families and couples to stay together?
A I think it would be safe to say that the clinic has a reputation for providing counselling for couples and families who are in distress, with the hope of reconciling those problems and keeping those families together.

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[197] Q Now, you also testified that you saw a number of different kinds of patients. You saw patients in couples therapy and you saw patients in family therapy and you saw patients individually; is that correct?
A That's correct.
Q Would the couples that you were seeing -- let me just look at the population of couples -- would it be fair to say that you saw half of your practice were couples or

is it more than that?
A I would say slight under half would be couples.
Q And then the remainder was divided between families and individuals?
A Yes.

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[198] Q Would it be fair to say that the percentage of unmarried [199] is about 25 percent?
A 25 percent of all couples?
Q Yes.
A Okay.
Q Is it correct that the couples are coming to you for counselling because they're having an emotional problem and they want to solve that problem?
A An emotional problem or a problem with their spouse, that he or she is to blame.
Q And in the vast majority of these cases, they come to you because they want to stay together in the relationship?
A Some may, some may not. Some want to come to be vindicated that they are not the problem and that their partner is.
Q But the assumption is that they are coming to work on their relationship, that they would like to stay together, otherwise they wouldn't come to you, they would just separate; in that correct?
A Well, some come and say fix her, she's the problem. But yes, I think generally it's a reasonable assumption that when couples continue in therapy, they are seeking the remediation of their problems.

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[204] Q Now, among the patients that you see as

couples, it would be true that some of the people you see are women who become pregnant during the time of the couple's counselling and that they're not there because of the pregnancy, but because they happen to have other problems; is that correct?
A That would be correct.

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[205] Q No, what percentage come to you because she's pregnant, that is, that the problem that they're seeking help for is her pregnancy?
A I don't know that I could respond to that.
Q It's a small number?
A It's certainly not the majority.
Q Is it less than a quarter?
A I don't know. I don't know that I could characterize precisely for you. It's --
Q Is it less than 10 percent? Is it, you know, I want to know, is it a small amount or is it, you know, more than that?
A It's not the majority and it's certainly greater than two percent.
Q Is it less than 25 percent?
A I don't know. I mean, I haven't really done an assessment for you quantitatively of that. I simply can respond as honestly as I can, I don't know what that figure would be.

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[209] Q What percentage of individuals come to you because of a problem pregnancy, that they say I'm pregnant, I need help with my pregnancy, I'm going to see Dr. Rue.
A It would be a minority of individuals that I see.

Q So that the majority in the individual population would be people who you are seeing on an ongoing basis for other things?
A Correct.

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Q Now it was your testimony, I believe, that you had prepared a white paper for Dr. Koop; is that correct?
A That's correct.
Q And that was called The Psychological Aftermaths of Abortion?
A That is correct.
Q Are you aware that that white paper was submitted to researchers at the Center for Disease Control for peer review?
[210] A I was not aware of that.
Q Are you aware today that that occurred?
A I am.
Q Are you aware or would it be fair to say that the researchers at the Center for Disease Control did not come back with favorable reviews of your study?
A I am aware of that. These were blind reviews.
Q Blind reviews, that's right.
A Yeah.

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Q I'd like you to turn to Exhibit 67 and turn to page 11 of that study.
A Okay.
Q And in the fifth paragraph there's a statement by the Congressional Committee, when reviewing the peer review of your white paper, they said -- or in discussing your white paper, they said "in contrast, the right to life white paper misrepresented the study, quoting statistics

for divorce, separated and widowed women having abortions as if they applied to all women having abortions". And they were referring to the David study, as I recall.

Now, let me ask you this. The David study, which [211] was the study by Dr. Henry David, involving a review of psychological aftermaths of abortion; is that correct?

A No, that's not correct.

Q Well, can you describe for the Court what the David study was?

A It's the David, Rasmussen and Holst study and it's 1981 and it is a study that was done in Denmark, looked at 71,000 women who went to term delivery and 27,000 women who elected abortion.

Q Now in your white paper you had relied very heavily on the David study; is that correct?

A We found it to be methodologically the best study that has been done to date an it exhibited sufficient statistical power to predict that real differences were present between groups.

* * *

Q And you cited that study and relied on that study as the best study within your review of the literature; is that correct?

[212] A.We did.

Q But when your peer reviewers looked at your study, they said but you misrepresented the best study that was conducted; is that correct?

A That's not correct.

Q Well, it's correct that they said that -- that's that what it says in this report here?

A No, that's not correct at all, counsellor. First of all, we're blurring two things here. The white paper was

submitted to a peer review within the Federal Government. And generally when these things are done, as is true in any publication, that is resubmitted back to the original authors for a dialogue for discussion. In this case, the authors of the white paper were never treated with the courtesy of having the opportunity to respond to the complaints, if you will, of the peer reviewers. What you're citing here is material from this Congressional hearing, which is not the same thing.

Q Okay, well let me ask this.

A Yeah.

Q Let me go to the peer review. And would it be correct to say that Dr. Dever, who prepared an analysis for Dr. Koop from the Center for -- he's an associate professor, director of clinical epidemiology from the Department of Community Medicine at Macon, Georgia. And he reviewed your work as a [213] result of a request from Dr. Koop; is that correct?

A Yeah, I later found that out, yes.

Q And it would be correct, would it not, that he has said in his review that "the long term psychosocial consequences of abortion are difficult to study and at the outset a defined outcome -- that is difficult to study and require at the outset a defined outcome that is replicable and capable of study. The conclusions presented in the report on the psychological aftermath of abortion are based on an undefined outcome in a meta analysis with major flaws and a best study with major limitations. They should be viewed with "caution."

Is that correct?

A I recall reading that that was his opinion, yes.

Q And was it also an opinion of some of the other peer reviewers -- and I -- have been summarized in the Congressional report; is that correct?

A Generally, the reviews were skeptical of a meta analytic approach, which we found curious, because a

survey of the current scientific literature found some 458 applications of meta analysis in the psychological health sciences field, just within the last two years.

So why we were taking the brunt of criticism for applying standard statistical analysis techniques, we don't know, but...

Q But the criticism was focused on the fact that the way [214] you did the standard statistical comparisons was that they combined outcomes that were not well defined and probably not comparable. That's what the reviewer said; is that correct?

A Well, for example, that's what the reviewers implied, but that's not accurate.

* * *

[215] Q Okay, what were the findings of Mr. David?

A Dr. David's findings were twofold. One, that women who elected abortion as opposed to carried to term were at greater risk to be admitted to psychiatric hospitalization three months post event.

Two, that those women who were void of relationship support, either husbands not involved, divorced, widowed, separated, lacking a support system, they carried a four times higher rate of being admitted to a psychiatric hospital than women who delivered.

These findings are remarkable. They are suggesting that in the worst case scenario we can see public health [216] differences between women who elect two different outcomes. This is the worst case scenario as opposed to those women who seek out counselling. Those women who walk about wounded, who are depressed, suffering PTSD, et cetera. This outcome measure is one of the most defined that one could have. Admission to a psychiatric hospital

Q But it is true that the results of Dr. David's study

only went that the only significant difference that he found in that study went to the rates of admission among women who were separated, divorced or widowed and that this group of women accounted for only 5.5 percent of the entire population; is that correct?

A Dr. David found statistically significant differences in the second category that I responded to, but his findings were the two, that the rates were higher and he did not find statistical differences approaching a .01 or .05 level. But he did find that the rates were higher at all parodies, at all age levels for women who elect an abortion versus those who deliver.

* * *

[217] Q Well, is it accurate to say that the right to life white paper misrepresented the study, quoting statistics for divorced, separated, widowed women having abortions as if they applied to all women having abortions?

A Well, I don't think we ever intended, implied or otherwise suggested that all women throughout the world are going to be equivalent with Dr. Henry David found. It just so happens he has the largest population --

Q But he --

A -- of any groups that have ever been studied in history, to my knowledge, with respect to abortion.

Q Okay and are you --

A The largest.

Q And you also mentioned in your direct examination the study by Nancy Adler, entitled "The Psychological Responses After Abortion"; is that correct?

A That's correct, published --

Q And you consider this to be a valid and review of the [218] literature in this area?

A No, I do not.

Q But you would agree, would you not, that the review of the literature by these scientists, including Dr. David, disagree with your view that abortion is a post-traumatic stress disorder; is that correct?
A They would not only disagree with that, they would disagree that it causes any psychological lasting negative sequelae.
Q And they would -- it is their view "after a review of the psychological literature, that although there may be sensations of regret, sadness or guilt, the weight of the evidence from scientific studies indicates that legal abortion of an unwanted pregnancy does not pose a psychological hazard for most women"; is that correct?
A Well, they say that, but they also say that the long term health risks of an abortion in the psychological area are unknown. They further say, and we quite agree, that the literature is flawed. It is flawed methodologically. 95 percent of the 239 studies we reviewed had inadequate sample size, suffer from sample attrition, where the sample just drops out in the study.

Even Dr. Koop testified on March 16th himself and he said, if you studied women the way the literature has, you can be very badly misled. And that means anywhere from three [219] hours to three weeks to three months post event.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, et al.	:	**CIVIL ACTION NO. 88-3228**
v.	:	
ROBERT P. CASEY, N. MARK RICHARDS, et al.	:	**Reading, Pennsylvania August 1, 1990 9:30 o'clock a.m.**

. . . . . .

NON-JURY TRIAL - DAY 3

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BY MS. KOLBERT:
[6] Q . . . Dr. Rue, is it your experience -- let me ask you this-- that a woman who decides not to tell her husband of an abortion decision does so on the basis of her best thinking that telling her husband would be in her best interest or would be harmful to her?
A I believe my testimony characterizes spousal notification as beneficial for the woman, that is the wife.
Q No, let me just ask you this.
A I'm sorry.
Q Is it your experience that a woman who decides not to [7] tell her husband about an abortion decision does so because she believes that telling him would be harmful to her?
A Uhm, in some way it would be detrimental, I believe, would be her understanding.
Q But --
A Yes.
Q And she is trying to protect both herself and her

husband from the resulting trauma, is that correct, when she decides not to tell him?
A Not necessarily. She may be trying to protect herself.
Q Okay. And you would also agree that sometimes in a violent marriage forced notification of an abortion could trigger another violent episode?
A It is possible.
Q Would you also agree that if a -- well, let me see if I can characterize your testimony yesterday -- that a woman who checks off the box that says I'm a battered woman and therefore I'm exempted from the provision of the act commences on the path of recovery. Now, you'd agree, would you not, that there are some women who can't check that box and decide that they will not commence on the path of recovery?
A There are women who would choose not to do that, yes.
Q And you would also agree that sometimes the resulting physical injury that would occur when she notifies her [8] husband could include serious injury or death?
A Well, anything is possible.
Q And that sometimes it's true that husbands could use physical or economic coercion to stop an abortion from taking place?
A They can exert great or grave physical violence against her to stop an abortion or to insist on one.
Q And it's your view that -- let me ask this -- it's the primary benefit of forced husband notice that the wife doesn't have to shoulder the burden alone, that she has the benefit of discussion with her husband about the abortion?
A I wouldn't say that that's all that I said; that's part of what I said.
Q Would you agree -- let's just take the first part of

that-- that the benefit is that she wouldn't have to shoulder the burden alone. Would you also agree that that woman could shoulder the burden, that is share the experience, with someone other than her husband and that would meet that criteria?
A No, I would not.
Q It's only her husband that she can shoulder it with?
A Well, presumably he's the one that she loves and has the most intimate relationship with and relies upon his knowledge, his values, his affections, his understandings in a primary way; that's why we call marriages primary [9] relationships.
Q So it would not be your view that that woman could share it with somebody else and shoulder the burden?
A Well, I'm not saying she couldn't and that it never could be. I'm saying that she is married to him, he is the primary love-giver in her life and it would seem reasonable because her life is dedicated in marriage as an institution to be in communication with him and that that would be to her advantage. She certainly could share with a friend, a counselor, whomever, and have support for her decision.
Q And you would acknowledge, would you not, that discussion with the husband is not necessarily an outcome of the statute, that the statute, even though that's perhaps its purpose, could not guarantee that discussion would occur?
A Yes, I think guarantees in life are very limited.
Q And you would agree, would you not, that in some marriages wives don't communicate with their husbands?
A Well, even when they don't communicate, they're communicating.
Q But there wouldn't be a discussion between them, you'd agree about that?
A Well, in terms of an open discussion based upon honesty, the issues at hand, that does not necessarily

follow, but it is certainly the -- the intent of the statute.
Q But you would agree, would you not, that discussion [10] between marital partners is good for both the husband and the wife?
A Indeed I would.
Q And you would agree that it's unjust for a wife to exclude her husband from an important decision, as well as it's unjust for the husband to exclude his wife?
A I agree.
Q In your practice have you ever had an opportunity to counsel a man who has decided to have prostate surgery or perhaps sterilization?
A Yes, I have.
Q And in any of those counseling experiences has the man refused to tell his wife about the experience?
A Well, I can think of a couple of cases where he, for various reasons, did not want her to know.
Q Okay. Now let's think about those situations. Did you encourage the husband to involve his wife?
A You bet.
Q Did he ultimately do so?
A Yes, he did.
Q Assume that he hadn't, assume that he refused to involve his wife. If he refused to do so, would you have told his wife?
A No, I would not have breached the confidentiality of the patient-doctor relationship.
[11] Q And you would agree that in that instance the State should not force the husband to tell his wife?
A I would not agree. I think that the State should require something on that level.
Q But you wouldn't do it as part of your professional relationship?
A Well, I couldn't do it as a psychotherapist. It's beyond the scope of my practice.
Q And that comes from your ethical obligation to your

client?
A And legal responsibility.
Q And you would agree that all the practitioners in the field would have the same ethical obligation?
A I believe so.
Q Psychiatrists would have the same obligation?
A Yes.
Q Psychologists would have the same obligation?
A Yes.
Q Counselors would have the same obligation?
A Yes.
Q Now, you testified yesterday that you also counsel women having abortions, is that correct?
A I counsel women who are confronted with an unwanted pregnancy which may eventually end in an abortion.
Q And you encourage these women to notify their husbands [12] about the abortion, is that correct?
A I encourage these women to participate in the dialogue with their husband about the options that they are looking at.
Q And if she doesn't -- let me ask you this -- if for some reason she does not care if the husband's notified but doesn't want to do it herself, would you do it for her?
A No, I would not.
Q And you would not do that because of your professional obligations as a therapist, is that correct?
A That is correct.
Q And what if the wife refused to notify her husband without, even though you strongly encouraged her to do so, would you do it?
A Absolutely not.
Q And you wouldn't notify her husband about the abortion because of your professional obligations as her therapist?

A That's correct.
Q But nevertheless you believe that the States ought to force notification, is that correct?
A Well, there are times as a professional that I am forced to violate confidentiality. One of those is a duty to report intentional harm that is reported to me --
Q No, all right, my question --
A -- child abuse, et cetera.

* * *

[16] Q Let me give you an example here. Assume that a woman comes to you before she has an abortion and she gets [17] counseling from you and you have provided her personally with information about fetal development, and you've given her all of the information which you think is likely to reduce her stress on the other end.
A Mm-hmm.
Q You've strongly encouraged her to look at pictures and she's looked at those pictures and she's got information about fetal development that you've given her. Then she goes to the abortion clinic, she decides she's still going to have the abortion, she goes to the abortion clinic and she gets information for informed consent, she requests pictures, she sees them, she sees them all again, she gives her informed consent. You'd agree, would you not, that there is no benefit at that point for her to wait an additional 24 hours?
A No, I would not agree with that.
Q Would you agree that there is no benefit that her choice is more likely to be informed?
A I would not agree with that characterization either.
Q You've given her all the information that you think is satisfactory, the clinic has given it to her again, you would not agree that there's an additional -- you would not agree that there is no benefit at that point for her to

go ahead and have the procedure?
A I would not agree. As I testified yesterday, it's one thing to obtain information and it's quite another to [18] assimilate that, to make the experience real and personal. Some people --
Q Well, assume --
A -- function cognitively.
Q -- let's go this far. Let's go this far, let's say that she has had the information from you, she waits a week before going to the abortion clinic. It's at the abortion clinic she gives the legal informed consent.
A Correct.
Q She's had an opportunity to assimilate the information that you've given her. At that point would you agree that there's no benefit in waiting an additional 24 hours?
A No, I would not.

* * *

BY MS. KOLBERT:
[21] Q Dr. Rue, it's correct, is it not, that you've never counseled any women who have had abortions here in Pennsylvania?
A That's correct.
Q And is it also true that you've -- now, you stated earlier that women may suffer physical harm if they notify their husbands in some instances. Would you also agree that women would suffer economic coercion if they notify their husbands or may suffer some psychological coercion, in some instances?
A I don't understand your characterization of economic harm.
Q For example, if a woman was making, with her husband their standard of living was, say, $200,000 a year and she suffered some -- say he threatened to leave and

remove that source of income from her?
A Because she were to have an abortion?
Q Because she notified him that she was pregnant and [22] intended to have an abortion?
A Mm-hmm.
Q You would agree that that's a possible outcome?
A It's certainly possible.
Q You would also agree, would you not, that psychological harm is a possible outcome?
A Anything is possible.

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REDIRECT EXAMINATION

BY MS. MERSHIMER:
Q Dr. Rue, Ms. Kolbert gave you an example of a situation where a woman came to you for counseling and you provided her information concerning fetal development, perhaps Medical Assistance benefits, whatever like that, and then a woman has a week to think about it, she goes to an abortion clinic, she's provided additional information at the abortion clinic and then she asked you whether you still felt there was a benefit to wait 24 hours and you said yes. Now, you're not a medical physician, are you?
A No, I am not.
Q So you don't provide information to the woman in counseling session regarding the medical risks and nature of the abortion procedure and alternatives, do you?
[23] A No.
Q And that would be the additional information that would be provided at the abortion clinic?
A Well, that could be part of it. The additional part of it could be misinformation erroneously provided by an abortion counselor.

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[24] Q Have you ever had occasion to have additional counseling sessions with patients you counseled prior to having an abortion?
A Yes, that's frequently the case.
Q And why would that be?
A This area is subject to tremendous pressure, tremendous [25] anxiety, tremendous shock. There may be relationship conflict, there may be familial conflict, there may be moral conflict. To expect a woman to resolve these weighty matters in the course of a 50-minute session, one 50-minute session, would be completely irresponsible and impossible, in my opinion.

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THE WITNESS: My name -- excuse me -- my name is Watson A. Bowes, Jr., and that's spelled W-a-t-s-o-n, middle initial A, last name is spelled B-o-w-e-s.

MS. MERSHIMER: Your Honor, Dr. Bowes' curriculum [26] vitae is attached as Plaintiff's Exhibit No. 61. To summarize, Dr. Bowes received his Bachelor of Science from Washington and Lee University in 1955. He received his Medical Degree from the University of Colorado School of Medicine in 1959. He was a resident in general practice at the University of Colorado from 1960 to '61 and was a Fellow in obstetrics and Gynecology, Reproductive Physiology Lab at the University of Colorado from '61 to '62 and then a resident in Obstetrics and gynecology at the University of Colorado from 1960 to '65.

He is presently a Professor in the Department of Obstetrics and Gynecology at the University of North Carolina. From 1965 through 1982 he taught obstetrics and gynecology at the University of Colorado as an

Assistant Professor, then Associate Professor and then as a full Professor.

He is Board Certified by the American Board of Obstetrics and Gynecology since 1967. He is Board Certified with the American Board of Obstetrics and Gynecology Division of Internal Fetal Medicine since 1981.

He is licensed to practice medicine in North Carolina and Colorado. He is a member of various professional societies, he has written extensively in medical journals on the topics of fetal maternal medicine and high risk obstetric issues. He has approximately 80 articles published, a vast [27] majority of which are peer review articles. He has a special interest in high risk obstetrics and has written a number of chapters in medical texts on high risk obstetrics and obstetrical emergencies.

DIRECT EXAMINATION

BY MS. MERSHIMER:

Q Dr. Bowes, what does your present practice at the University of North Carolina entail?

A Excuse me, my current practice entails the care of patients, the education, teaching and education of medical students and residents and postgraduate fellows in obstetrics and gynecology and in research in topics in fetal and maternal medicine and high risk obstetrics.

Q Could you explain your teaching responsibilities?

A My teaching responsibilities involve the teaching in all, in all four years of our medical school, there's approximately 160 students per class. Teaching is more intense in the third year when students are in the clinical years of their education. We also have 20 residents in obstetrics and gynecology which are with us for four years and we are primarily responsible for their education and we also have fellows, post-residency fellows who spend two years with us in education in

maternal and fetal medicine and we're also involved in the education of our graduate -- graduated physicians who are in practice and are continuing educational [28] courses.

Q Could you describe your clinical practice, the number of patients, type of surgery being performed?

A My practice is -- I'm a member of a multi group -- of multi-member practice, all of whom are faculty members at the University of North Carolina in the Department of Obstetrics and Gynecology. And my practice at the present time is confined primarily to obstetrical patients, about half of which are considered to be high risk obstetrical patients.

Q And could you describe the research that you've done, briefly?

A The research I do is both supervisory in the sense of supervising our residents and fellows in their research and in conducting my own research in areas of high risk obstetrics and maternal fetal medicine.

Q Now, how does Board Certification in Maternal Fetal Medicine differ from general Board Certification in Obstetrics and Gynecology?

A The subspecialty of maternal fetal medicine involves more intense training and education and expected experience in such things an fetal therapeutic procedures, fetal diagnostic procedures, genetics and ultrasound examinations, a more extensive experience than would be expected of a practicing obstetrician-gynecologist.

Q And could you describe the practice of maternal fetal [29] medicine?

A Well, the practice of maternal fetal medicine involves providing consultation to obstetricians and gynecologists about high risk pregnancies, it involves the care of patients who've been referred for high risk obstetrical problems, fetal abnormalities and often involving fetal therapeutic procedures.

Q Does your practice involve emergency obstetrical procedures?
A Yes, it does. It involves operative obstetrics, including cesarean deliveries, forcep deliveries, procedures to prevent pre-term birth such as cerclage of the cervix, to be specific about one procedure.

THE AUDIO OPERATOR: Would you spell that for me?

THE WITNESS: That's c-e-r-c-l-a-g-e.

MS. MERSHIMER: Your Honor, I would offer Dr. Bowes as an expert in maternal fetal medicine and high risk obstetrics.

THE COURT: Any questions or objections?

MR. ZEMAITIS: I have a few questions on clarifications, your Honor.

THE COURT: Very well.

VOIR DIRE EXAMINATION

BY MR. ZEMAITIS:
Q Dr. Bowes, do you perform abortions?
[30] A I have, yes.
Q Under what circumstances would you perform an abortion on one of your patients?
A If the -- if the pregnancy involved a complication, an obstetrical or a medical complication that has threatened the life of the mother.
Q When was the last time you performed an abortion
A In that context, approximately a month ago.
Q And the time before that?
A I would be involved in those once or twice a year.
Q Now, would you perform an abortion for a victim of rape who became pregnant and chose to end her pregnancy?
A No.
Q Would you perform an abortion for a victim of incest who became pregnant and chose to terminate her

pregnancy?
A No.
Q Are you licensed to practice medicine in Pennsylvania?
A No.
Q You've never been licensed in Pennsylvania, have you?
A No, I have not.
Q And you've never practiced medicine in Pennsylvania?
A I have not.
Q And you are not certified as a specialist in emergency medicine, are you?
A No, I am not.
[31]Q Now, I notice in your curriculum, Dr. Bowes, that you are a member of the American Association of Pro-Life Obstetricians. Could you tell us what that organization is?
A That organization is a nationwide organization of obstetricians, gynecologists who are, in their general approach to obstetrics and gynecology, defined as interested in the fetus, primarily in the well-being of the fetus and mother as two individuals.
Q Are members of that association, generally speaking, philosophically opposed to abortion, except where necessary to save the life of the mother?
A Yes, there are.
Q How long has that organization existed?
A I can't tell you exactly how long that organization has existed.
Q How long have you been a member of that organization?
A Well, I've been a member of that organization probably for eight years or nine years.

* * *

[32] MR. ZEMAITIS: I have no further questions on qualifications, your Honor. We have no objection to Dr. Bowes testifying as an expert in the subjects mentioned by Ms. Mershimer.

THE COURT: Very well, shall we proceed then?

DIRECT EXAMINATION (Continued)

BY MS. MERSHIMER:

Q Dr. Bowes, are you also a member of ACOG?

A The American College of Obstetricians and Gynecologists, yes, I am.

Q Dr. Bowes, in front of you in a manila tabbed binder is Defendant's Exhibits. On Defendant's Exhibit No. 62 is the tab marked "The Act," do you see that? You can shut that other book, if you want to. Behind Defendant's Exhibit 62 is a document marked "The Act," do you see that?

A Yes.

Q Could you turn to Page 5 of the act? And do you see the definition of "medical emergency"?

A Yes.

Q Have you reviewed that definition before?

A Yes, I have.

Q Now, there has been testimony previously that this definition in vague and confusing. In your practice of [33] maternal fetal medicine and high risk obstetrics, do you agree with that opinion?

A No.

Q Why?

A This seems to me to be a definition of medical emergency that allows, because of its statements about clinical judgment being allowed in which the physician is allowed to assess risk of impairment of bodily functions, to be a definition which would allow practice consistent with the good standards of care.

Q Now, in this case Dr. Bolognese testified that the

term "Serious" in the phrase "Serious risk" is vague and not a medical term; do you agree with that statement?

A No, I don't.

Q Why is that?

A In the practice of medicine we are always called on to judge risk in almost every situation we encounter and it's, it varies from very mild risk to very serious risk, based upon the estimate of the physician about the consequences of the condition, consequences of the treatment. And that's a well known, that's a well known quality of a good physician, to be able to judge those risks and it's not vague. There is also testimony regarding the phrase "substantial and irreversible impairment of a major bodily function." Do you have a problem understanding that phrase?

[34] A No.

Q Within the context of performing abortions?

A No.

Q Why not?

A The risk of substantial and irreversible impairment in any medical or obstetrical condition as it might relate to abortion is the -- what is being judged all the time in the evaluation of a patient with those problems, that is to say, what might happen if these conditions went untreated what bodily organs might be impaired, what functions of those organs might be impaired. That's a very straightforward medical assessment.

Q Do you know what the term "substantial impairment" means?

A Yes, I do. Substantial impairment implies that that impairment will either be to conditions that are irreparable, which organs actually die in which the patient is placed at serious risk of death or where this patient is placed at significant risk of being -- of having some irremedial organ damage.

Q And do you know what the term "irreversible

impairment" means?
A Irreversible means that it is not reversible; that is very straightforward.
Q How about "major bodily function"?
A Well, the major bodily functions are, I think, those [35] which involve the vascular systems of the body, the nutritional systems of the body, the excretory systems of the body, the cardiovascular systems and the central nervous system. All of those are -- function in a way to maintain a person's life and well-being.
Q Do you have an opinion whether the phrase "serious risk" is an important component of the act's definition of "medical emergency"?
A That's a very important component of this definition because it is risk that is always being assessed in a medical context, the risk of a condition progressing to serious injury or to irreparable, a state where it's irreparable.
Q And do you have an opinion on whether the "good safe clinical judgment" phrase is an important component of the act's definition?
A This is also a very important phrase because it allows the physician to use what he or she has been trained to use, which is the collection of data, assessment of data and the extraction from those assessments of the possibility of problems occurring that must be prevented by treatment, et cetera. This is the daily behavior of a physician, that this in what a physician is involved in doing.
Q Do you have any trouble understanding or applying the phrase "good faith clinical judgment" in the act?
A No.
[36] Q Why is that?
A Well, good faith clinical judgment simply means that the physician is using the education that's been provided, the data that is provided and the clinical experience

which has been accumulated and using it to the best of her or his ability to provide care for a patient.
Q In the performance of abortions can you think of any medical situation where a woman would need an immediate abortion that would not fall within the act's definition of medical emergency?
A No.
Q Now, there's testimony by Dr. Davidson regarding inevitable abortions which he characterized as vaginal bleeding, some lower abdominal cramping and the dilation of the cervix. Do you agree that pregnancies such as these ultimately must be terminated?
A Yes.
Q Now, he also said there was a variation of inevitable abortions that depends upon the urgency of the procedure and that the urgency depends upon the extent and amount of bleeding that the patient is suffering. Would you agree with that?
A I would agree with that.
Q Now, he said that such a situation required immediate attention within a few minutes to a few hours; would you [37] agree?
A It would depend upon the extent Of the bleeding and the, especially the extent of the bleeding and hemorrhage, as to how quickly one would have to respond to that situation.
Q Would you be able to wait 24 hours to perform an abortion in the case of inevitable abortion?
A The very fact that it is inevitable means that it is going to occur sometime within the next few hours or possibly even day or two, but in the standard medical practice, when an abortion is recognized as being inevitable, the termination of the pregnancy is recommended. Now, that doesn't mean it has to be done in the next ten minutes, but because it will be inevitable and there are risks to allowing the pregnancy to proceed

to the point where there is major hemorrhage occurring, those pregnancies are usually terminated.

Q Would inevitable abortion fa11 within the act's definition of a medical emergency?

A It certainly would when there is hemorrhage, serious hemorrhage occurring to the patient.

Q And if an abortion was not performed, what would be the outcome?

A Well, in most cases there might be extensive hemorrhage and blood loss and shock, if the -- if the spontaneous abortion at that point proceeded to those stages. If the [38] pregnancy was not terminated and products of conception remained, an infection could occur, the patient could become septic. There are consequences of infection that would have to be taken into consideration.

Q Now, there's testimony regarding preeclampsia in this case. Could you tell the Court what that is?

A Preeclampsia is a condition which occurs in pregnant women and is defined by really three manifestations: high blood pressure, protein being excreted by the kidneys in abnormal amounts and often swelling or edema or fluid retention.

Q And when does preeclampsia normally occur?

A Well, it can occur throughout pregnancy. It is more commonly found in the third trimester or the last third of pregnancy, but it can occur as early as 18, 19 or 20 weeks.

Q And is termination of the pregnancy required in such cases?

A Termination of pregnancy is the treatment, is the ultimate treatment for preeclampsia, yes.

Q And would preeclampsia fall within the act's definition of a medical emergency?

A Yes; it would.

Q Why is that?

A Well, in the cases in which it becomes severe, that is to say that the patient's blood pressure is very high and other [39] complications of the preeclampsia are occurring, such as liver involvement, central nervous system involvement, this would clearly fall within the definitions of emergency, a medical emergency because it has the significant risk of impairing bodily functions in a permanent way or leading to the patient's death. Eclampsia and preeclampsia are still recognized as among the leading causes of maternal mortality.

Q Now, there is prior testimony at a preliminary injunction hearing by Dr. Dratman and she gave the following example and statement, and I quote: "Let's say a 16 year old woman comes into the emergency room, she's pregnant, she is about 18 weeks pregnant, she is swollen, her blood pressure is 210 over 160, normal being between 100 and 120 over 60 to 80 in that age range and her urinalysis shows a considerable amount of protein in the urine and her reflexes are very brisk. This is a clinical syndrome known as preeclampsia or toxemia of pregnancy. This is in obstetrical terms a medical emergency." Do you agree with that statement?

A I would agree with that.

Q And then she went on to say "However, under this statute, before I could operate as if this were a medical emergency, I would have to prove that irreversible major bodily harm would come to this patient if I were not to wait for a judicial bypass to go through." Now, do you agree with that statement?

[40] A I do not agree with that statement.

Q And why is that?

A Well, given the case that's been described, there is serious risk present of major bodily injury, there's even serious risk of death, and that's all that's required to allow this to be interpreted as one of those cases that would clearly be covered by medical emergency and the

pregnancy could be and should be terminated promptly.
Q Do you have an opinion of the consequences of if a physician in such a circumstance would fail to terminate the pregnancy?
A I think that could be considered negligent care.
Q Now, there's also testimony about HELLP Syndrome. Could you describe that?
A HELLP Syndrome is an acronym which describes some of the consequences of very severe preeclampsia. It involves abnormalities in the coagulation system, abnormalities of the liver function primarily and severe anemia because red blood cells are being broken down rapidly. This is a state of very severe preeclampsia.
Q And when does HELLP usually occur?
A Again it can occur throughout pregnancy at any time preeclampsia can occur, being one of the, if you will, serious complications of preeclampsia.
Q Does it usually occur when a person wants the child?
[41] A Well, to the extent that preeclampsia is usually occurring when pregnancies are wanted, if you will, the pregnancies are well into the latter part of pregnancy, most cases of HELLP Syndrome in fact do occur in women who want their pregnancies.
Q And what is the treatment when a woman has HELLP?
A It's delivery of the pregnancy.
Q And how quickly?
A It needs to be terminated within a few hours. By that I don't mean within ten minutes or within an hour, there is certainly time for -- to be sure that the diagnosis is correct, there is certainly time to provide those -- that type of intensive care that would be necessary in a patient such as this and that could be done within a few hours.
Q Does HELLP fall within the act's definition of medical emergency?

A It clearly falls within the definition of emergency.
Q Now, there was also testimony about spontaneous ruptured membranes. Now, if that -- do you know when that typically occurs in a pregnancy?
A Again, a spontaneous rupture of the membranes can occur literally at any time in pregnancy. It is most frequent near term, at the end of pregnancy, but it can occur to a patient any time throughout pregnancy.
Q Now, if a membrane has just broken but there's no fever, [42] what's the course of treatment?
A In -- late in pregnancy, very near term, often the patient would be delivered simply to avoid any complications. Earlier in pregnancy, let me say around 24, 25, 26 weeks gestation, the usual treatment of that is expectant management, meaning that you simply allow the patient to remain generally in the hospital under close observation, to allow the fetus to gain more gestational age and grow.

Now, if it's even prior to the time when the fetus might be viable if delivered, the treatment of premature ruptured membranes is open to a lot of debate and certainly involves a discussion with the patient at that time of the risks of proceeding in an expectant manner, that is to say not delivering the baby, or having the pregnancy terminated at that time and those decisions are based on the patient's evaluation with her physician of the risks involved in each of those courses of action.
Q Is there discussion of the risks with the patient regardless of whatever the gestational age of the fetus is?
A Yes, there is.
Q And would such a situation fall within the act's definition of medical emergency, where there's no fever?
A Well, if we're talking about just ruptured membranes without evidence of other complications such as infection, fever, infection, it would not be an emergency. If on the [43] other hand the patient has developed a

fever and there are other -- and there are signs of infection, the infection in, within the uterus involving the fetus, the fetal membranes, the placenta, that becomes an emergency and would certainly be included within the definition of medical emergency in this act.

Q If there is a fever involved or an infection with a ruptured membrane, how promptly should one perform an abortion or a termination of pregnancy?

A Within several hours this patient should be delivered.

Q Now, do you know what an ectopic pregnancy is?

A Yes.

Q And could you tell the Court what that is?

A An ectopic pregnancy is a pregnancy which has occurred outside in which the embryo is really outside of the uterus, intrauterine cavity. The most common ectopic pregnancies occur in the fallopian tube and are often called tubal pregnancies.

Q Now, when an ectopic pregnancy is discovered, what is the usual course of treatment?

A The usual course of treatment is to terminate the pregnancy.

Q Does that fall within the act's definition of medical emergency?

A Yes, it does.

[44] Q Now, in your experience are physicians called on daily to make decisions where medical conditions are life-threatening with great serious risk to the patient's health?

A Physicians are called on to make those decisions, yes.

Q Now, do you find it burdensome or confusing to apply Pennsylvania's definition of medical emergency in the context of abortions and in your medical practice of obstetrics and gynecology?

A I do not.

Q An why is that?

A It seems to me the definition of medical emergency

allows two very important things for the physician, first of all, to exercise a good faith clinical judgment and to do that in assessing risk of any condition leading to serious injury or to death. And those are complements of a physician's practice in almost any area of emergency medicine.

Q Now, have you reviewed Pennsylvania's act prior to today?

A Yes.

Q Are you aware that there are various sections that require certain procedures to be done unless there's a medical emergency present?

A I am.

Q Now, could you please turn to the act again, Page 6, and focus on Section 3204 regarding medical consultation?

A All right.

[45] Q Now, Section 3204(B) requires that except in a medical emergency, a physician is to refrain from performing an abortion upon a woman until he or she or a referring a physician is consulted with the woman to determine whether the abortion is necessary, based on all factors relevant to her well-being. Is that correct?

A That's correct.

Q Is it standard medical practice for a physician, a referring physician to consult with the patient prior to performance of the surgical procedure upon the patient to determine whether the procedure is desired and necessary?

A Yes.

Q Absent a medical emergency as defined in the act, would you terminate a pregnancy without first consulting with the woman to determine whether she wished to have her pregnancy terminated and whether the termination is medically indicated?

A No.

Q Why is that?
A Because, like any medical procedure, it involves certain risks and the patient should be apprised of those risks and the alternative procedures which can be performed or are available. That's simply part of normal informed consent to which every patient is entitled. Now, would you turn to Page 7 and look at Section 3205 [46] regarding informed consent. Have you reviewed Section 3205 before today?
A Yes, I have.

* * *

Q Now, absent medical emergency as defined in the act, is it standard medical practice to assure that the patient is informed of the risks and alternatives involved in a surgical procedure prior to its performance?
A Yes.
Q Now, does the act require a physician's delay in abortion by 24 hours when a medical emergency exists?
A No, it does not.
Q Can you conceive of an obstetrical situation in which a delay of 24 hours would increase the risk of the patient yet not qualify an a medical emergency within the act's definition?
A I cannot conceive of such a situation.
Q Now, do you have an opinion on whether the act's reliance-- excuse me, strike that.

Would you focus on Section 3206 on Page 10 of the [47] act? And that's a provision concerning parental consent?
A Yes.
Q Have you reviewed that section before today?
A Yes, I have.
Q Now, absent a medical emergency, is it standard medical practice to notify and obtain the consent of a

parent prior to performing a surgical procedure other than an abortion on a minor?
A Yes, it is.
Q Do you know of any conditions that would require an immediate abortion without a parental consent that would not fall within the act's definition of medical emergency?
A No, I do not.
Q Now, please turn to Page 20, focusing on Section 3209, spousal notice? Have you reviewed that section before today?
A Yes, I have.
Q Is the act's definition of medical emergency sufficiently clear and flexible enough, given the reliance upon the physician's good faith judgment, to allow a physician to determine whether or not an abortion must be performed immediately prior to notifying the spouse?
A Yes, it does.
Q Now, why do you say that?
A It seems to me that the physician's judgment about medical emergency involves an assessment of the time that is [48] involved in responding to and correcting the situation and if it's pregnancy termination of abortion that's necessary, and it must be done prior to the notification of the spouse to prevent serious injury to the patient or to prevent death, it's within that patient's -- that physician's good faith judgement to make that assessment and carry out the abortion, it's very straightforward.
Q Now, on Page 22 of the act, there's Section 3210 regarding determination of gestational age. Have you reviewed that section before today?
A Yes, I have.
Q Is it standard medical practice to determine gestationallage prior to performing an abortion?
A Yes, it is.

Q Why is that?
A Well, there are at least two reasons, one is that the type of procedure which is performed in abortions may change with the gestational age of the pregnancy and so it's important to know the gestational age for that reason.

Secondly, particularly in late abortions, it's important to know whether the pregnancy has reached the state where the fetus, if born, would be viable, so that's another important reason for making that determination.
Q In the context of a medical emergency does the physician have the flexibility to determine whether delaying an [49] abortion to determine gestational age will result in the woman's death or will create a serious risk of causing substantial and irreversible impairment of a major bodily function in determining gestational age?
A I'm sorry, I didn't quite understand that question. Could you repeat it?
Q Certainly.

Let me put it this way: Where an abortion must be performed so quickly that a physician does not have adequate time to make a determination of gestational age of the fetus, will the woman's condition fall within the act's definition of medical emergency?
A Yes, it would, although that would be a very rare situation, but it would certainly fall within that definition.
Q And could you give us examples of that?
A Well, it would be possible that a woman would enter an emergency room bleeding from what we previously stated would be an inevitable abortion and it might, under those circumstances, she might not know precisely how far along she was in her pregnancy. But the treatment for that patient who is hemorrhaging is to terminate the pregnancy and it wouldn't matter whether she was four weeks or nine weeks or twelve weeks and it wouldn't necessarily -- and it wouldn't be necessary to

postpone the procedure to terminate the [50] pregnancy to do such things as ultrasound, if it wasn't immediately available, or such, because the determination of gestational age within those ranges in that patient would make no difference about the treatment. So in that situation, clearly, the physician would be advised to proceed directly to terminating the pregnancy.
Q Now, turning to Page 23 of the act regarding Section 3211, that prohibits abortions of fetuses of 24 weeks gestational age or more unless a physician reasonably believes that the abortion is necessary to prevent the death of the woman or substantial or irreversible loss of a major bodily function will occur. Are you familiar with that section?
A I am.
Q Now, in such situations is it standard medical practice to perform the pregnancy termination in a hospital if at all possible?
A Yes.
Q And is it standard medical practice in those situations of abortions, 24 weeks or more gestational age, to have a second physician in attendance to resuscitate the infant?
A It is and if I could just interject here, I think the term "abortion" used for terminating a pregnancy after 24 weeks gestation is -- is problematic because although we're terminating the pregnancy, clearly after 24 weeks gestation [51] there is a high probability, with proper care, that the fetus will survive, once born, and those are then not by definition abortions. They're pregnancy terminations, but not abortions, as I understand it.

But the point about the second physician is that the care of that infant, when it's born, requires a substantial amount of intensive care and would require another physician.
Q Are obstetricians faced with liability concerns these

days?
A Yes.
Q Can you tell us a little bit about that?
A Well, obstetrics and gynecology and obstetrics in particular has been among those specialties where some of the highest instances of litigation and some studies show that 50 to 75 percent of obstetricians will at one time or another be involved in some liability issue.
Q Now, in light of liability concerns, is it common to have a second physician occur in the need for immediate pregnancy termination, is that practical?
A If -- a second consultation is -- is advisable in any situation where there is potential liability risk where another opinion is not only helpful in determining the appropriate medical care, but it's helpful in providing good evidence that the physician was acting in the best, you know, in providing good standard care, if I understand your [52] question.
Q And that would apply with pregnancy terminations of fetuses 24 weeks or more gestational age?
A Especially in those cases because this is an area where there can be a lot of controversy about the -- about the degree of viability, et cetera, et cetera.
Q And is it also common in such situations for the physician to record the basis of his medical judgment to perform the procedure in the patient's medical chart?
A Absolutely, that's simply good medical -- that's simply good documentation of the medical care.
Q Now, in your opinion does the act's definition of medical emergency permit a physician to rely on his or her good faith clinical judgment and provide sufficient flexibility to determine whether there's sufficient time to perform any of the requirements set forth in Section 3211(C)?
A I believe it does that, yes.
Q Now, Dr. Bowes, if a physician could determine that

a pregnancy termination of a 24-week or more gestational age fetus is necessary to prevent the death of a pregnant woman or substantial and irreversible impairment of a major bodily function making its performance permissible under Section 3211(A) and (B), should that physician similarly be able to determine whether medical emergency exists?
A Yes.
[53] Q Why is that?
A Because these conditions, be they a medical complication to pregnancy or an obstetrical complication, fall within that range of expertise of an obstetrician gynecologist to determine whether the patient is at substantial risk of bodily injury. That's what high risk obstetrics in particular deals with all the time and those judgments are made frequently and commonly.
Q Now, there's been testimony in this case that the definition of medical emergency contained in the act is different from other definitions of medical emergency. Do you agree with that?
A Yes, because I suspect that there's many different definitions of medical emergency.
Q Now, in the context of performing abortions, do you find that difference to be burdensome, confusing?
A No, I don't find this definition confusing.
Q Now, why is that?
A It seems to me that the definition is straightforward because it contains two very important elements, and that is that the physician is allowed to use judgment, good faith judgment, and to assess risks, and those are really the essence of a physician practicing, especially in an emergency situation those kinds of decisions have to be made using both the judgment and the assessment of risks, and that, both [54] those things are contained in this definition. That's very important.
Q Does the act's definition of medical emergency

permit a physician to act consistent with good medical practice in your opinion?
A It certainly does.
Q Now, Dr. Bowes, there's been testimony in this case concerning the mortality risks of performing an abortion for each week after eight weeks gestation and the testimony was that mortality increases by 50 percent each week. Do you agree with that testimony?
A I think the data would show that there is a gradual increase of -- of abortion risk -- of mortality risk with abortions at each gestational age, but the way the data is collected, it is collected by groups of weeks of gestation. For example, under seven weeks, eight to ten weeks and so forth, and there is an increase between those blocks of gestational age that would amount to about 50 percent of a very tiny risk of mortality increasing by 50 percent to another very tiny risk of mortality. So that statement with -- I'm not sure it's absolutely true week by week, because I know of no one that's actually done the data that way, but it does increase as gestation increases.
Q But you're saying that it doesn't increase necessarily 50 percent every single week?
[55] A I don't think it increases 50 percent each week, at least I know no data that shows that. I know the data that shows, collected by the CDC, that shows that it increases by blocks of weeks, by periods of gestation, but those are not necessarily individual weeks.

But let me expand on that. Even if I were to find that if that data showed week by week increments, we're talking about very, very small, absolute mortality risks. Even though the risk may increase by 50 percent, it's increasing by a very small absolute number.
Q And do you know what that number is?
A Could I refer to the CDC data?
Q Certainly.
A Okay. This is the report issued in November of 1985

by the Centers for Disease Control and Abortion Surveillance from the U.S. Department of Health and Human Services, and in that data on Page 40 it shows that the risk of mortality per 100,000 procedures performed under eight weeks of gestation is 0.5, 0.5 deaths for 100,000 procedure performed.

Now, the next block of data is the nine to ten-week gestational age range and at that point the risk of maternal mortality is 0.8 per 100,000 abortions performed. To illustrate my point that these are increases but we're talking about absolute numbers of deaths that are very, very small.
[56] Q Could you provide the rest of the risks by gestational weeks in that report?
A All right. At 11 to 12 weeks of gestation, the risk of maternal death per 100,000 procedures is 1.1. At 13 to 15 weeks it's 1.5 and at 16 to 20 weeks, well, you now see a fairly significant jump in the risk, it's 7.8 per 100,000 and that's where we're well into the second trimester of pregnancy.
Q Is that a four-week block of time?
A That's a four-week block of time and then over 21 weeks gestation it's 3.6 deaths per 100,000 procedures.
Q And could you tell us what years of data were used in that study?
A These, the years included in this particular data set was 1977 to 1981, and that's the most recent data.
Q And do you have any data concerning the risk of complications?
A Yes, the risk of complications I have of abortions comes actually again from the CDC and I am reporting from a publication entitled "Abortion Practice" by Dr. Warren Hern, which was published in 1984, and in that on the chapter of -- that regards complications of abortion, he has a table summarizing the data from the Centers for Disease Control from 1975 to 1978. Now,

these are what they call major complications of abortion, these would be major hemorrhage [57] requiring transfusion, perforations of the uterus, other complications requiring hysterectomy, those are -- but these are major complications. It shows actually that the incidence of these major complications goes down between six weeks and the block of time between seven and eight weeks and the block of time between nine and ten weeks. Now, even at that, these complications never increase above 0.5, that's one-half of one percent, until one gets over 13 weeks gestation. They remain in that very low range and in fact are decreasing throughout the first trimester of pregnancy, the incidence.

Q So the overall risk by week that then increases either by morbidity or complications is very low?

A It's very low. It remains very low. In fact, the major jump in complications occurs at 15 weeks gestation where at during the time of those -- this data was collected, the type of abortion had necessarily changed from the curettage-type of abortions to the installation of saline and of prostaglandin, and there the complication rate is listed at 1.4 percent.

Q Are you aware or is it possible to measure the increased risk on -- excuse me -- morbidity or complications for a 24-hour period of time?

A No, it's not because the increase in risk does not occur in that short period of time and the ability to precisely [58] time or date a pregnancy within a 24-hour period is impossible, you can't make that distinction within a 24-hour period.

Q And would you consider abortion a safe procedure?

A As compared to other medical procedures and particularly in the first trimester, it's a very safe procedure.

* * *

Q Dr. Bowes, in your clinical practice at the University of North Carolina do you counsel women regarding the issue of abortion?

A Yes.

Q And how many women a week do you counsel?

A It would vary, but probably average one or two.

Q Okay, and in what context do you counsel women?

A It's in the context usually of pregnancies which are involved in high risk situations, complications of their pregnancies and their either medical or obstetrical [59] complications.

Q And does it ever occur where it's not in the context of high risk?

A Yes, on occasion it does.

Q And when you counsel these women is that in the context of providing women information to obtain so that they can provide their informed consent to have an abortion?

A Yes.

* * *

[60] Q What does informed consent mean or involve in your opinion?

A Informed consent involves providing the patient with the -- with information about the risks of the condition that she happens to have at the time, the risk of the -- any medical or surgical procedures or therapies which are advised and the risks of alternative therapies or alternative procedures.

Q Now, would you turn to Page 7 of the act, in reference to Section 3205(A)?

* * *

Q And I believe you testified that you've reviewed this

section before?
A Yes I have.
Q Now, one provision of Section 3205(A) requires a physician to tell a woman the gestational age, probable gestational age of the fetus and it also provides that the woman be told that the Department of Health has materials describing fetal development and that those materials are [61] available for the woman to see, if she chooses to; is that correct?
A That's correct.
Q Now, in your experience or practice, do you have an opinion whether this requirement is beneficial to the woman?
A I think providing them the option of reviewing this material is beneficial and is part of a reasonable informed consent.
Q Now, why do you believe that?
A The period of gestation, the duration of gestation is important because it may affect how the patient views the, not only the risks which should be provided by the physician, but the development of the fetus. She may not be aware of the nature of fetal development and I think that's part of her having a fully -- being able to make a fully informed decision about pregnancy termination.
Q Now, when you counsel women regarding informed consent, do you offer them the opportunity to see pictures regarding fetal development?
A Yes.
Q And in your experience have women wanted to see those pictures?
A Yes, it often is helpful in really making more clear than just a simple description of fetal development. If I can give you an example, we recently had a young woman with a [62] fairly far advanced tumor, it's called a neuroectodermal tumor, which is a highly malignant

tumor, was referred to us because she became pregnant -- during her course of therapy. And the oncologist, the physicians who were caring for the patient and treating her, recommended that an abortion be done. And in counseling this patient, she in fact wanted to see this material and elected to review it and, after doing so, was inclined and in fact chose to continue her pregnancy, in spite of considerable risks to her. But all of the options were provided to her and she was very grateful for having that opportunity. So there are occasions when it can make a very big difference.
Q Now you said that you offer women the opportunity to see pictures. Do you offer the opportunity to see pictures of fetal development regardless of whether they ask for it or not?
A Yes, I tell them that it's available and we have fetal, actual pictures of fetal development. In many cases we even offer them the option of seeing an ultrasound, if they want to see that.
Q And some women accept the offer and some women don't?
A Yes, that's true.
Q And do you ever force them to look at those materials?
A No.
Q Now, why is that?
[63] A Well, I -- you don't-- it would be unreasonable to force a patient, you can't force a patient to do anything. I think you advise patients, you offer them information, You provide them the opportunity, but you don't force the patient to review this material, nor would I under other circumstances providing informed consent for other -- other procedures.
Q Do you try to force a woman to make a choice whether to have an abortion or not, either way?
A No.

Q And why is that?
A Well, it's the patient's prerogative and option to make a decision about abortion pregnancy termination, but I believe she needs to make that decision after being fully informed about the alternatives, about the risks and about what is involved in the procedure.

Now, there's a provision in the act that requires a woman to be advised of the risks of treatment of the nature of the procedure and alternatives. Do you do that in an informed consent procedure?
A I do.
Q And do you consider that a standard part of informed consent?
A I think that's a standard part of informed consent in this situation and in all others.
Q Now, another section of the act requires to advise the [64] woman of the risk of carrying the child to term. Do you do that in your practice of an informed consent?
A I do.
Q Now, why is that?
A Well, one of the alternatives to pregnancy termination having an abortion and the obvious alternative is to not have abortion, which involves the patient continuing the pregnancy on throughout the natural period of gestation. And a woman needs to be advised of the risks of doing so before she can make an informed decision about whether the pregnancy should be terminated.
Q Now, there's been testimony that advising a woman of the risks of treatment or the risks of carrying the child to term or the availability of fetal development information could increase a woman's anguish in the decisionmaking process; do you agree with that?
A No. A qualified no. It might increase in some cases, but I think it's been fairly well established that the decision about abortion itself is a anxiety-provoking

situation. The woman is already in a period of considerable concern and anxiety and anguish over the decision about terminating pregnancy and I know of no way of quantitating whether the -- that additional information increases anxiety, but it's certainly necessary for her to make an informed choice.
[65] Q Now, an argument has been made that when they're advised of this information and it increases their anxiety, that that will also increase their risk of complications, the performance of abortion. Do you agree with that?
A Well, I know of no evidence to prove that statement. I just -- no.
Q Now, the act requires that a woman be advised that material exists, that she may be entitled to Medical Assistance benefits, that there are optional organizations that offer alternatives to abortion and that the father may be liable for support payments and that if the woman wants to review those materials, she may, but she does not have to.

Do you believe information that I just described like that should be part of informed consent procedure?
A I think it's part of the information a woman is entitled to.
Q Why is that?
A Well, it simply is involved in the assessment and in the -- of the alternatives to abortion, which is carrying the pregnancy on, which would require her to evaluate her means, her -- her resources or financial and other support.
Q Do you believe it is traumatic to tell a woman that such materials exist and give her the option of choosing to review them?
A Not to tell her that those information -- that that [66] information is available; I don't see that that's traumatic at all.

Q Now, there's been an argument made that by having either the physician or counselor advise the woman that this information exists, particularly in the context of alternative organizations that offer an option -- an alternative to abortions, that this would create an impression that the physician approves of the list of facilities and interferes with the doctor-patient relationship. Do you agree with that?
A No, I don't think it means that the physician necessarily approves of it and the physician can qualify the information in any way he or she chooses in the provision of that information.
Q Does your reading of the act prohibit a physician or abortion clinic from disagreeing with the Department of Health's information?
A No, it doesn't.
Q Does it prohibit an abortion clinic or a physician from offering additional information?
A It does not.
Q There's also been an argument made that Section 3205 of the act discourages physicians or counselors from giving additional information beyond what is required in that section; do you agree with that?
[67] A I do not.
Q Why is that?
A Well, it seems to me the act simply provides the minimal things that must be offered to the patient. It does not exclude other counseling, it does not inhibit or exclude other information being given to the patient at the discretion of the counseling physician or health provider.
Q If a physician or counselor believed that additional information should be provided to a woman, other than what's contained in the act to obtain her informed consent, would it be ethically proper to not provide that information?

A No, it would be ethically proper to provide it, if I understand the question. That information should be provided if the counselor or physician feels that's important information for the patient.
Q And do you feel it's ethically improper if that information then wouldn't be provided?
A I do.
Q The pieces of information we've discussed such as the risk of procedure, telling the woman that information about fetal development exists, medical system, benefits may be available, there are organizations that offer alternatives to abortion and the father may be liable. Now, in your experience counseling women, have you had some women that have found any of those pieces of information important?
[68] A Yes.
Q Have some women found each -- each one of those or all of them important?
A Uhm, I'll have to be -- being precise about it, I can't tell you in each specific type of information, but most commonly, the knowledge that there are organizations which will provide support for them and assist in carrying the pregnancy to term, both financially and with counseling support and so forth, have often been important to patients. The specific notification of a -- the husband, not the husband or the father of the child's requiring support, I simply have not been in a situation where I have counseled about that, I have not been aware of that, but that doesn't mean it wouldn't be important information.
Q There's been an argument suggested that if you give a woman too much information in the informed consent procedure that this disempowers the woman. Do you agree with that?
A I do not.
Q Why?

A Well, it seems to me information and especially information about risks, about alternative procedures, about what's involved is essential to an adequate decision about an important event such as termination of pregnancy, and it doesn't disempower but it empowers a patient to make that appropriate decision, so I cannot agree with that statement.

[69] Q Now, you're aware that the act requires physicians to provide certain information 24 hours before an abortion procedure?

A Yes.

Q And you generally agree that informed consent is best face to face?

A In -- yes, whenever possible I think it is.

Q Now, if a Court would hold that the act does not require the initial provision of information under Section 3205(A)(1) to be face to face, but there is -- but is provided by telephone and then the woman would come to the abortion clinic and see either a counselor or doctor the following day and then meet face to face to review informed consent materials, do you believe that would satisfy the informed consent preference to have a face-to-face meeting?

A I think it would probably suffice -- it would -- it would fulfill that qualification. Let me qualify that by saying as long as the patient had been provided with the facts and the information ahead of time and that the face-to-face presentation eventually occurs, which it should, in some setting and if it's with the physician or health care provider in the second situation, I think that would be appropriate.

Q With an informed consent do you consider a 24-hour waiting period to be beneficial?

[70] A Yes.

Q Why is that?

A I think that there is a very serious decision having to

be made and the time to assimilate and digest, if you will, and consider the information that's been provided is beneficial to making that, to making an appropriate decision. One example of a similar type of situation when the -- the Medicaid provisions require that women having sterilization procedures must wait 30 days from the time they have initially made a decision and been informed about it until they make a final decision before they can have a sterilization procedure. Now, that's a 30-day waiting period because it's felt to be an important -- a decision of such importance. And that's regarded as being very straightforward now, we do that all the time.

Q So do you consider time to be an important part of informed consent?

A Yes, time to consider the facts.

Q Now, if you performed abortions in non-life-threatening situations, if a woman arrived at -- before you and she made up her mind to have an abortion, would you still go to informed consent materials?

A Yes.

Q And why is that?

A Well, if I were performing the procedure, as in the case [71] of performing any procedure, I would want to be confident myself that the patient understood the facts and had had access to the information. An exam-- if a patient came in for a -- I'm not talking about abortion now, but a procedure in which she had made up her mind, let's say a mammoplasty or a procedure which she felt certain that she wanted, I still think she's entitled to know all of the facts and risks and alternatives to that procedure before it's performed. And it's incumbent on a physician to perform -- to provide informed consent in that way.

Q You said mammoplasty, could you tell us what that is?

A Well, this is -- I used that procedure only because it's

a procedure which a patient may have decided, it's a cosmetic procedure, a breast augmentation, but a patient may be very much convinced in their own mind that they want that done, but they're entitled to knowing before it's done what the risks are of having it performed.

Q Now, does Pennsylvania's informed consent requirements in its Abortion Control Act a departure from the usual practice, the informed consent?

A Yes, it is. It involves things which are not required in other informed consent.

Q Do you consider that departure to be unnecessary or burdensome?

A No.

[72] Q Why is that?

A It seems to me by the -- by virtue of what is stated very early on in the act, that the State of Pennsylvania has an interest in the health of the mother and the unborn child, that this decision by the patient is of such importance that these additional requirements are certainly reasonable and not burdensome in providing medical care to that patient.

Q Now, Monday Dr. Grodin testified regarding therapeutic privilege where it is proper in some cases to withhold certain information in informed consent process where a patient might have a serious reaction to that information. Are you familiar with that doctrine or privilege?

A I think I understand what -- what you're referring to.

Q What is you understanding of when the therapeutic privilege is applied?

A Well, I think it's -- a physician must make a judgement in some cases about whether informed consent to its fullest extent would really be beneficial to the patient. Let me give you an example. If a patient is -- has, let's say, serious preeclampsia, which we have described before in this testimony, and had it so seriously

that the alternatives of allowing the pregnancy to continue to term would be almost certainly, meant the death of the mother, it seems to me at that point that it is the physician's prerogative to modify the informed consent and not go into all of the risks of [73] continuing pregnancy, which are death. See, he doesn't have to -- that's a very limited informed consent, but it's sufficient, it seems to me. And that I would see as therapeutic privilege in modifying the informed consent, based on the risks involved in providing it.

Q Now, in the context of abortion, do you have an opinion whether therapeutic privilege should apply in non-life-threatening situations?

A Well, in non-life-threatening situations I believe that the patient's entitled to all the information to make an informed consent. I don't see that it would necessarily apply there.

Q Could I have you look at Page 10 of the act, Section 3205(C)? The last line of Section C and it reads: "No physician shall be guilty of violating this section for failure to furnish the information required by Subsection (A) if he or she can demonstrate by a preponderance of the evidence that he or she reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient."

Does that provision offer the therapeutic privilege in those cases which would apply in abortions?

A It certainly does.

Q And could you explain that?

A Well, I think again it's providing the physician the [74] option of exercising good judgment in the care of a patient and to assess the patient's -- the effect of this information upon the patient's physical and mental health. That seems to me a perfectly reasonable exception which provides the physician the opportunity in

some case to not provide all the information, and that certainly is a very reasonable exception here. Now, physicians might disagree about what is or is not to be included, but it allows the physician, under good faith, to use his judgment to do so or her judgment.

Q And just briefly going back to the issue of fetal development and informed consent, does a fetus at nine weeks gestation, LMP, measured from the last menstrual period, have hands and fingers?

A Yes.

Q Could you say when there's the beginning of development of organs in a fetus?

A Well, the development of a fetus is a continuum, if you will, and organ development is occurring really from quite an early stage after the -- after conception, but virtually all of the organ systems have developed to the point that they cannot be altered in a major way by chemicals, by radiation and so forth, by the 56th day of embryonic life, that's eight weeks.

And up to that point they are in various stages of development to the point, but even by five to six weeks of [75] life, fetal heart motion can be detected. At six to seven weeks we can see with an ultrasound scanner a great deal of detail of fetal development, fetal motion, fetal movement, fetal heartbeat, the gastrointestinal system is intact. The central nervous system is developing, it is not completely developed, it isn't even completely developed at the time of birth. But all of these things are in various stages of their development.

Q And would there be a time when the feet and toes are also developed?

A Well, they are developing in this continuum. The limb buds by four weeks are evident and by six weeks the definite fingers and feet and arms and legs are quite distinguishable as separate entities.

Q Now, regarding informed consent regarding a minor

and a parent, there has been testimony it is best to have that parental consent face to face; do you agree with that?

A I would agree with that.

Q Now, if a parent can't come, however, and the law permits consent by telephone or unsworn declaration, would that be acceptable?

A I think it's acceptable in circumstances, yes.

Q Why is that?

A Well, there may be situations where the parents are not immediately available in person, just as there are when we [76] care for children in other settings and we have to proceed with medical care, an accident in which a child is seen and the parents may be away, a child at camp, let's say, has to be treated.

We often are in situations where information must be gained from the parents or their consent by phone. It's simply a situation where the parent is not immediately available and can't be available for a face-to-face presentation of the facts.

Q There has been testimony that if the act goes into effect that there will be stress upon physicians. Do you agree with that statement?

A It's how the act is perceived by physicians, but it seems to me that physicians work under stress all the time. Their very daily care of patients, particularly in obstetrics and gynecology, is fraught with stress.

The decisions about -- are all subject to peer review, they're subject to liability concerns and that's a stressful situation. It's my opinion that this act would not substantively increase that, unless it is how a person individually would interpret them, which I think is a misinterpretation.

* * *

[78] Q Now would a pertinent physician always perform a sonogram in determining gestational age?
A No.
Q Dr. Bowes, is the practice of obstetrics and gynecology, maternal fetal medicine any different, to your knowledge, in Pennsylvania as it is in North Carolina?
A No.
Q Anywhere in the United States?
A No, the standard of care prevails throughout the United States.
Q There was questioning by Mr. Zemaitis about whether you belong to the Association of -- Pro Life Association of Obstetricians and Gynecologists?
A Yes.
[79] Q Would your personal views regarding the issue of pro life ever effect your professional judgment for the provision of medical care?
A No.
Q Would it ever effect how you testify?
A No.
Q Would it ever effect how you teach medical students?
A No.
Q Have you been able to publish medical articles and peer review journals?
A Yes.
Q And your personal views have never interfered with those publications?
A It never interfered with the -- no, the publications of journals, no.

* * *

[80] BY MR. ZEMAITIS:
Q Dr. Bowes, you do practice currently in North

Carolina?
A Yes, I do.
Q North Carolina doesn't have a law making it a crime to fail to give specific pieces of information for informed consent to abortion patients; does it?
A No.
Q North Carolina doesn't have a law making it a crime to fail to delay 24 hours between the time of giving information and performing an abortion; does it?
A No.
Q North Carolina doesn't have a law making it a crime if a counsellor and not a physician gives information for informed consent; does it?
A No.
Q North Carolina doesn't have a law mandating the suspension of a physician's license if he or she fails to get a written statement from a woman stating that she notified her husband of her intent to get an abortion?
A No.
Q North Carolina doesn't have a law mandating the suspension of a physician's license if the physician fails to get the informed consent of both the parent and the minor woman before the minor woman could obtain an abortion; does it?
[81] A No.
Q North Carolina doesn't have a law requiring suspension of the license if the physician doesn't make an accurate determination of gestational age or fails to report the basis for that determination to the State of North Carolina; does it?
A No.
Q North Carolina doesn't have a law making it a felony for a physician to fail to take the specific steps outlined in the Pennsylvania statute when abortion occurs after 24 weeks of gestation; does it?
A No.

Q Now Dr. Bowes, North Carolina doesn't have a law making it the criminal liability of the physician depend upon whether or not medical emergency exists; does it?
A No.
Q You would agree that the definition of medical emergency -- in fact, you did in direct examination agree that the definition of medical emergency in the Pennsylvania statute differs from other definitions commonly used in the medical profession?
A Yes.
Q Have you ever seen a definition that makes a set of circumstances an emergency when a major bodily function is involved, but not a minor bodily function?
[82] A I don't know.
Q Are you aware of any situation where the criminal liability of a physician depends on the major bodily function and minor bodily function?
A No.
Q Have you ever seen a definition that makes a set of circumstances an emergency when it threatens an irreversible impairment, but not a reversible impairment?
A No.
Q Are you aware of any situation where the criminal liability of the physician depends on the determination of whether an impairment will be irreversible?
A No.
Q Have you ever seen a definition that makes a set of circumstances a medical emergency when it threatens a substantial impairment but not an insubstantial impairment?
A No.
Q How do you distinguish between a substantial impairment and insubstantial impairment?
A I think that's a matter of a physician's judgment and experience.

Q Are you aware of any situation where the criminal liability of a physician depends on the physician's determination of whether impairment will be substantial?
A No.
[83] Q Have you ever seen a definition that makes a set of circumstances a medical emergency when it threatens a serious risk of substantial impairment, but not a less than serious risk?
A Well, the -- I can't tell you the specific example, but certainly a medical emergency does involve the assessment of the degree of risk. By it's very nature, emergency involves how quickly and to what degree care must be provided. And that is based on the seriousness of the condition or the seriousness of the potential complications of the condition.
Q So you would agree, Dr. Bowes, that determining the seriousness of the risk is a judgment call for the physician?
A Yes, by all means.
Q Now I think you testified in your direct examination that doctors have gotten concerned and somewhat more cautious in the practice of medicine as a result of liability for malpractice --
A Yes.
Q -- is that a fair characterization?
A That's a fair characterization.
Q Wouldn't you agree, Dr. Bowes, that the imposition of criminal liability for practice of medicine in certain situations would make doctors even more cautious?
A It might make them more cautious, yes.
Q And wouldn't you agree that the additional imposition of [84] criminal liability would increase stress on the practice of medicine which you agree is already a stressful profession?
A It might increase stress, yes.
Q Now you talked about the benefits that you see for a

24 hour waiting period. Is there any medical reason to delay a procedure -- any medical procedure -- for 24 hours once the patient has given informed consent?
A There might be medical reasons to delay based on availability of operating rooms, the availability of care, but apart from that, no.
Q Are you aware of any procedure other than sterilization, which you mentioned, where patient should be forced to delay the procedure once the patient's informed consent is given?
A No.
Q What about a caesarian section?
A The situation -- let me be more specific. The situation where a patient has a choice, there are risks of a vaginal delivery and there are risks in the caesarian section, it's not a situation where you must do a caesarian section. But the patient has a choice. Would you agree that the patient should be required to wait 24 hours if the patient elects to have a caesarian section?
A No, under those circumstances, I wouldn't.
Q would you agree that in a counselling situation, the information provided to a patient should be balanced?
[85] A Yes.
Q Would you agree that the physician or counsellor should not try to persuade the patient toward one decision or another?
A Yes.
Q Would you agree that the physician or counsellor should not give the patient irrelevant information?
A Yes.
Q So for example, if you had a patient with preeclampsia, you would agree that it's not relevant to tell that patient that she might be entitled to medical assistance benefits if she chooses to carry the pregnancy to term?
A I would agree with that.

Q And you would agree that it's irrelevant for that patient to tell her that the father might be liable to support the child?
A Yes.
Q Dr. Bowes, I believe it's your testimony that parents should be involved in the abortion decision with their child; is that correct?
A Yes.
Q Would you agree that parents should be involved in the decision if the child is about to choose a caesarian section?
A Yes.
Q Are you aware that under Pennsylvania law that a pregnant [86] minor can consent to any medical treatment connected with her pregnancy?
A No.
Q Are you aware that under Pennsylvania law a minor who has already had a child can consent to any medical treatment for herself and for her child?
A I wasn't aware of that.
Q Do you believe, Dr. Bowes, that there are any circumstances in which a woman should be forced to have a caesarian section against her will?
A No, although I will tell you, I don't believe she should be forced by the medical doctor. She may be forced by the courts to have a caesarian section.
Q Under what circumstances should a woman be forced by the courts to have a caesarian section against her will?
A I think if it's decided by the courts that the woman is choosing to not have a caesarian section and that it would seriously impair or eventually result in the death of the fetus and the consequences of the decision would result in that sort of impairment to the fetus, the court might find in behalf of the baby that the woman should have a caesarian delivery.

Q So you believe that there are situations where the life of the fetus should control what medical risks a woman has to expose herself to?
[87] A Yes.

* * *

PATRICIA POTRZEBOWSKI, Defense Witness, Sworn.

DIRECT EXAMINATIQN

BY MS. MERSHIMER:
Q Dr. Potrzebowski, can you tell us who you are employed [88] by?
A Yes, I'm employed by the Pennsylvania Department of Health.
Q And what's your position?
A I'm the Director of the Division of Health Statistics and Research.
Q And how long have you held that position?
A Since 1976.

* * *

Q And can you generally tell us your duties?
A Yes, I supervise the activities of the Division of Health Statistics and Research. Those activities include operating several major data collection systems for the Department of Health, producing statistical reports and responding to data requests and providing statistical support services to other programs within the Department of Health.
Q And before we proceed any further, could you just briefly tell us about your educational background?
[89] A Yes, I have a Bachelors Degree of Science in Biology from Shimer College in Illinois. I received that in 1867. I also have a PhD in Human Genetics from the

Graduate School of Public Health at the University of Pittsburgh and I received that degree in 1974.
Q Now as division director, are you responsible for two sections?
A Yes, the division is organized into two sections. Those are the Statistical Registry Section and the Statistical Support Services Section.

* * *

Q Now what's the role of those two sections as they relate [90] to the Abortion Control Act?
A The Statistical Registry Section is responsible for collecting data under the Abortion Control Act and the processing of that data. The Statistical Support Services Section is responsible for analyzing that data and preparing the annual statistical report.

* * *

[91] Q Now can you tell how the individual form is presently maintained and processed physically within the Department of Health?
A Yes, the individual form, when they are received from the facilities, they're opened by a secretary in the division. She date stamps the cover sheet of the form and puts them back in the envelope. They are then taken to the desk of the person in the division who is responsible for processing those forms. Do you need her name?
Q No, it's not relevant.
A Okay, anyway, this person keeps the -- she will review the forms upon arrival. She will check them off on her master list to make sure that each facility has reported -- has submitted their forms that are required on a monthly basis. She will review the forms for

completeness.

She will then enter the forms on a personal computer at her desk, and while she's entering that data, if any questions or problems arise, she may call the facility back to do what we call a query, to obtain additional or clarifying information.

[92] After she is finished entering the data into the personal computer, she would put the forms in a locked cabinet. And anytime that she is not working on those forms, those are kept in a locked cabinet.

Q As to the personal computer, is that password protected?

A Yes, no one may log onto the computer unless they know the password.

Q And how many people know that password?

A In my division, there are currently four people who know that password.

Q And who would that include?

A The person who is doing this work, her supervisor, myself and one other person in the division who is responsible for maintaining a list of all passwords in the division.

Q And am I correct that she uses diskettes with the personal computer?

A That's correct. When she enters the information into the personal computer, that information is put on to diskettes and those diskettes then are also kept in the locked cabinet.

* * *

[93] Q Now what about -- are there any security precautions in preparing the statistical reports so that individual data is not released?

A We would never release any identifiable data on the statistical reports.

Q Well, when it is prepared in the department -- I mean, in the division, I mean, who actually does the statistical report?

A The statistical reports are prepared by the support services section and the people who are involved in doing those preparations would have access to the diskette. As the data were entered onto their computer, again, their computers are password protected so that the information would not be available to anyone other than those -- I believe it would be three people who would be involved in preparing those statistical reports.

Q Now how are the quarterly facility reports physically maintained in the division?

A The quarterly facility reports, again, the envelopes are opened and stamped in by the secretary, put back in the envelopes. The forms are put back in the envelopes. And the envelopes are given to the same person that we discussed before, who processes the individual forms.

She, again, checks off that information to make sure [94] that each facility that is required to file has filed the forms on a quarterly basis. She then keeps those forms -- she checks over the forms to make sure that they are filled out completely and she might contact a facility if the information -- if there is blank information or missing information.

But at that point, then she would put those forms in a locked cabinet and they would not be processed then or analyzed until the end of the year.

Q And how are the complications reports physically maintained?

A The complications reports, again, the envelopes are opened, the forms are date stamped by the secretary, put back in the envelopes, taken to the same person's desk. She again opens them.

In this case, since we don't -- there is no specific -- we do not have a specific number of forms that we

would expect on a regular basis, she doesn't check them off of a list. But she does review the forms for completeness. She conducts any kind of telephone query if the information appears to be incomplete. She keeps the forms in a locked cabinet.

* * *

[95] Q Does the Department of Health have any procedures or guidelines regarding confidentiality in revealing information?
A Yes, the department has general policies and procedures [96] for confidentiality and data release. And in addition, our division has a specific staff manual.
Q Now I'd like to ask you to look at Defendant's Exhibits 41 and 42. Have you seen Defendant's Exhibit 41 before?
A Yes, I have.
Q And could you identify what that is?
A Yes, that is the department's policies and procedures for confidentiality and data release.
Q And could you look at Defendant's Exhibit 42?
A Yes, that is the -- those are selection -- selected pages that relate to confidentiality from our division's staff manual.
Q And are these materials or documents that are used by division personnel in maintaining the confidentiality of information regarding abortion reporting?
A Yes, they are.

* * *

Q Now is your division responsible for maintaining the [97] confidentiality of data in other areas?
A Yes, we are. We are responsible for maintaining confidential information under the Cancer Control Act,

Vital Statistics Act and the Disease Prevention and Control Act.
Q Are you aware of any division employee ever releasing the identity of the attending or referring physician where the woman who had an abortion or facility to the public?
A No, I am not aware of that ever occurring.
Q Now the division releases annual statistical reports; is that correct?
A Yes.
Q Will the division release or reveal the name of the referring or attending physician, a woman who's had an abortion or the facility that's reporting on the individual form in its annual reports?
A No, we would not.
Q Would you ever release that information to anybody else?
A I believe we would not except as the act requires, I believe, under certain circumstances we might release certain information to law enforcement agencies or to the State Medical Board. But I don't believe that information is from the individual form.

* * *

[109] Q Would it be correct to say that Defendant's Exhibit 45 and 46 are the forms that will be available for public [110] inspection if the facility receives Commonwealth appropriated moneys if the injunction is lifted?
A Yes, that's my understanding.

* * *

[111] Q Defendant's Exhibit 49, can you identify that document?

A Yes, this is the directory of social services organizations that was prepared by the department as required by the act.
Q Is this a proposed document if the injunction is lifted?
A It is my understanding that this is the document that would be used, yes.
Q Do you know whether if the department finds out that information was omitted, that it can add to that list?
A I believe that the department would probably update this list and revise it if incorrect -- if there is incorrect information or incomplete information.

• • •

[112] Q Now those additional materials I gave you, Dr. Potrzebowski, can you identify what Defendant's Exhibit 50 is?
A Yes, this is the medical assistance benefits notice that's required under the act.
Q Is this what -- is this a proposed document that will go in effect if the injunction is lifted?
A Yes, this is what would be utilized if the injunction is lifted.
Q And would you turn to Defendant's Exhibit 51? Could you identify that document?
[113] A Yes, these are the other notices that are required by the Abortion Control Act that were prepared by the Department of Health and that the department would plan to use if the injunction is lifted.
Q Is that required by Section 3208 A1?
A I would have to the --
Q Do you know?
A -- act to check the section number, but I know that it's required by the act.
Q So Defendant's Exhibits 48 through 51 are forms that

the Department of Health will use if the injunction is lifted against the act?
A Yes, that is correct.

• • •

BY MS. MERSHIMER:
[124] Q I'd like to ask you a few questions about those. I'd like to ask you, first of all, Ms. Potrzebowski, does the CDC recommend collection of the information that appears on the right hand block of number 13, which is determination of gestational age, type of inquiries, examination, tests utilzed and basis for diagnosis?
A No, I don't believe that the CDC recommends that item. I believe that that was an item that's required by the act.
Q Does the CDC recommend item 14 regarding a medical emergency in its suggested report?
A No, again, that information is required by the act.
Q Now the CDC does recommend that you collect information as to whether or not the patient is married?
A That's correct.
Q But the CDC doesn't recommend information regarding [125] husband notification; does it?
A No, the CDC's information is primarily statistical and so it does not. This, again, is an item that is required by the act.
Q And the second page of that exhibit has three items, 18, 19, 20 -- actually four items -- and 21. None of those items are recommended for collection by the CDC, are they?
A No, all of these items would be required only by -- would be required by the act, but are not recommended by CDC.
Q So the reasons that CDC collects data wouldn't apply

to these items; would they?
A No, well, the CDC doesn't collect data, but the CDC recommendations for collecting data are for statistical purposes and they would not apply to these items.
Q But you referred to the -- I think it's Exhibit 43 --
A The CDC recommended.
Q So to the extent the CDC doesn't recommend these items, the reasons that the CDC offers for its recommendations wouldn't apply to these items; would it?
A That is correct.
Q And you don't intend at this point to make any statistical compilations of determinations of gestational age or the methodology for the determination of gestational age?
A We would plan to make some statiscal compilations relating to gestational age. We do now and we would continue [126] those.
Q And that --
A Though not for the methodology of determining gestational age.
Q And you don't plan to make any statistical studies with respect to the methodology or the bases for the judgment, for example in number 18, the basis for the judgment that abortion was necessary to prevent the patient's death or substantial and irreversible impairment of a major bodily function?
A Well, given that we don't even ask these questions now, I must answer that no, we do not currently have plans. But that does not mean that we would not, in the future, ask -- have plans for statistical compilations for any of these items.
Q But you don't have any at present?
A But we do not have them at present because we are not collecting the information at present.

* * *

Q . . . What have you done now with the 1989 -- the physical reports that were collected for 1989, the individual abortion report?
A The physical forms are currently being kept in -- they have been moved out of the locked cabinets. There were too [127] many of them. They are currently being kept in a secure area, a locked room in -- within the Commonwealth.
Q Within the Department of Health?
A Yes, within the Department of Health but in a different building.
Q Why are they being kept at this point in time?
A They are on our records retention schedule and under our records retention schedule, we are required to keep the hard copy documents for two years.
Q Two years. Do you --
A And then we would -- then we would give them to the records center -- the State records center.
Q Do you know how long the State records center maintains them under the retention schedule?
A I don't recall.
Q Is it -- do they retain them for a number of years beyond the two years?
A Oh, yes, yes.
Q What about the quarterly reports, what happens to those after you draw the information off of them?
A Well, the '89 reports we still have in our office because we're still using them. But they would follow the same records retention schedule. We would maintain them in another locked area for two years and then they would go to the records center.
[128] Q You realize, of course, that the CDC doesn't recommend retaining those documents; don't you?
A I am not aware that the CDC makes that

recommendation.
Q Well, why don't you turn to the page number three. It's the fifth page of Exhibit 43. Do you see at confidentiality?
A Yes, I see it under confidentiality. However, my only concern about that would be that under the act, I believe that we have to make the hard copy documents available to the State Medical Board. And if we would destroy the documents, we could no longer make the hard copy documents available to them.
Q I understand that, I'm just saying though, you would agree, wouldn't you, that that's inconsistent with the CDC recommendation?
A In so far as that the CDC only deals with statistical uses of the records and not any other uses, that is inconsistent.
Q What are the other uses, besides statistical?
A Well, I assume that the medical board would use them. I mean, I cannot tell you for certain what the intent was in putting that provision in the act, but there must have been a reason for requiring them to be released to the medical board upon their request.

• • •

[131] Q You testified that you need information from three reports to get the total number of pregnancies that are occurring. Even that information, though, doesn't help give you the total number; does it?
A You're correct, that does not include the fetal deaths that occurred prior to 16 weeks of gestation.
Q So if a woman has a spontaneous abortion prior to 16 weeks --
A In the first trimester, yes. Or --
Q Your statistical compilation wouldn't gather that information?

A That's correct.

• • •

[132] Q You testified about the process of a query when a report is filed with the Department of Health and that the person who receives the report would contact the facility for additional information.
[133] Isn't it true that each facility has a contact person that the Department of Health deals with for that information?
A Yes, that is correct.
Q And isn't it true that the Department of Health doesn't deal directly with physicians at those facilities for that information?
A We have had to contact physicians directly upon occasion. In general, we generally deal with the contact person in each facility.
Q Have you ever had to contact a physician at a facility where you had a contact person?
A Yes, we have.

• • •

[134] Q Can you tell me why the Department of Health feels it's necessary to state above the signature line, "I understand that any false statement made herein is punishable by law" and then below the signature line, in all capitals "notice, any false statement made herein is punishable by law"?
A My understanding of that is that the law requires that that specific quotation be on the form, but that it was felt that it should also be above the signature.
Q And this Exhibit 48, this is the form that a woman has to sign with respect to husband notification; isn't it?
A That is correct.

Q So the Department of Health thought it was necessary to [135] state twice to a woman in filling out that form that if she provides false information it's punishable by law?
A I don't believe that the Department of Health felt that it had to be stated twice, just that the Department of Health felt that the statement should be made above the signature line, but that the law also required that the specific, exact words "notice" and the rest of that statement be included.
Q And that would have to go below the signature line?
A I don't know where it would have to go.

• • •

[143] JEAN A. DILLON, Plaintiff's Witness, Sworn.

DIRECT EXAMINATION

BY MS. KOLBERT:
Q Ms. Dillon, have you ever been married?
A Yes, I have.
Q And when were you married?
[144] A I was married from 1973 till 1989.
Q Have you ever been a victim of domestic violence?
A Yes, I have.
Q And can you tell the Court when that domestic violence began?
A The domestic violence began in -- around 1976.
Q And how are you -- how did the domestic violence begin, can you explain?
A Yeah, I was -- well, I had been married in '73. I had a child prior to my marriage that my husband adopted. We had a baby together that we both wanted and in 1976 I became pregnant with what would be our second biological son. And--
Q Let me just make sure I understand, that would be your third child; is that correct?

A My third child, yeah. And my husband didn't want me to have the baby. He -- when he found out I was pregnant, he told -- he said it wasn't his baby and I tricked him and he didn't want another child. And I eventually decided that I was going to have the baby. And his way of dealing with that was to not to speak to me for about three and a half weeks.
Q Let me go back a second, Ms. Dillon.
A Mm-hmm.
Q Prior to the time that you were pregnant with your third child, have there ever been any psychological abuse?
A No, I thought we had a pretty good marriage and were [145] really pretty together and happy.
Q Had there ever been any verbal abuse prior to that time?
A No.
Q So to your best recollection, the abuse within your marriage began when you were pregnant with your third child?
A Yes.
Q And what form did it take from then on?
A Well, at that time, like I said, it became -- this silence thing that he developed became pretty -- a way of dealing with me.
Q Now when you say silence, what do you mean?
A Well, lots of times he would come in on a Friday evening from work and we would have a good time together, talk and laugh and share and make love and Saturday morning we would wake up and he wouldn't be speaking to me and wouldn't speak to me for as long as a week. And that was really hard for me, because I didn't understand what that was all about.
Q Now these periods of silence, would they go on and off for periods of time?
A Yeah, he did that a lot to me.

Q And when they -- when you say he did that a lot, about how frequently?
A Uh...
Q Would it occur about once a month, once a year?
A Well, originally about once a month. He really got -- [146] towards the -- of course, towards the end of the marriage it became more intense.
Q Now were you employed at the time?
A My husband and I had our own business together.
Q And what kind of business was it?
A Contracting, paint contracting.
Q And did you go to work together every day?
A Yes.
Q During the periods of silence when you say your husband didn't talk to you, did he talk to you at work?
A He didn't talk to me at work. He would talk to the secretaries, but he wouldn't talk to me at all. I mean, he just didn't talk to me at all. It was no talking.
Q Would you know why the periods of lack of communication began?
A Would I know why, no.
Q And would you know why they would end?
A No.
Q And they could last sporadically for period of time and it was up to him about how they long they lasted?
A Yes.

• • •

[147] Q Now you stated that the abuse began when you were pregnant with your third child. What forms other than the silence did the abuse take?
A Well, the abuse escalated when I became pregnant with my fourth child. And at that time the abuse became physical and verbal. For instance, I can remember being pregnant and being quite large in the

belly and being thrown against the kitchen sink and being afraid of losing my baby.
Q Now were there any injuries sustained when he threw you against the sink at that point in pregnancy?
A I didn't go to the hospital, I was just very sore from that.
Q Did you start to miscarry in any way at that point?
A I had spotting.
Q Did you have cramping at that point? Were you [148] fearful --
A I remember the spotting and I was -- yeah, and I laid down and I was afraid for a few days that I might lose the baby. He didn't want that baby either.
Q At any point was there physical abuse to you by your husband?
A Well, after -- at that time, that's when it started getting very physical, until I -- from that period, which was -- I had that baby in 1980 at Christmas -- from that period until the end of the marriage, it became very physical.
Q When you say physical, what do you mean?
A I can remember being thrown on the floor in the kitchen and being kicked around with his feet. I can remember being drug from the back room of the office and thrown down the cellar steps while the secretaries were there. I can remember being thrown against the cellar door and smashing my face on the cellar door.

Usually when he hit me it was -- it was either he threw me or he hit me a lot. I remember being, you know, hit with his fists in my chest a lot.
Q And when you say he hit you a lot, where would he hit you?
A Mostly in my chest or if he would throw me on the floor, he would kick me in my legs.
Q Did you ever -- were you ever required to seek medical [149] attention as the result of the abuse?

A Yeah, I went to the hospital several -- on several occasions.
Q Do you recall how many times you went to the hospital?
A I went to the hospital at least five times.
Q Now when you would go to the hospital, what would you tell the hospital about how the injuries were sustained?
A Well, four times that I went to the hospital I would tell them that I walked into a door.
Q Now where do you live, what county?
A I live in Monroe County.
Q And is -- can you describe for the Court what kind of area Monroe County is?
A It's a small town. It's a small town, it's rural.
Q And the hospital that you went to, was it the same hospital every time?
A Yes.
Q And did they know you at the hospital?
A People -- I knew lots of people at the hospital, lots of people knew me and my husband.
Q And the people that you saw in the emergency room each of the times that you went were the same?
A Not always the same people, but people from the town.
Q And each occasion you told them that you had what?
A Walked into a door.
[150] Q At any point that you went to the hospital to seek medical attention, did you ever tell them that you had been hurt by your husband?
A The last time that I went, when he threw me into the door and I thought my nose was broken. I waited about three days and I went to the hospital, I went to the emergency room.

And I decided I'm going to tell the doctor what happened. And the doctor said what happened and I

said my husband threw me into the door in the kitchen and I think my nose is broken. And he looked at me and he said you're not going to get a free nose job out of this and he left the room.
Q And that was his full and complete response?
A They x-rayed me and a nurse came in later and said it's not broken, you can go home.
Q Now, let me ask you this. Prior to the time -- on the fifth time that you had gone to the hospital, had you ever asked for help for the abuse within your family?
A No.
Q And why not?
A Because I was embarrassed, it was kind of embarrassing to me and degrading to me and also I was afraid of how he would react if he found out that I was telling people about our secret, about what he was doing to me.
Q And what were you afraid of?
[151] A I was afraid of more abuse.
Q At the time that you told the doctor the first time, what was your reaction after he reacted in the way you've testified?
A My reaction was that what I suspected was true, that nobody would believe me or that if they did, they would feel it was my fault anyway.
Q When was the next time that you asked for help after this fifth trip to the hospital?
A Well, I left my husband in 1984, October, and I didn't go -- I didn't seek any help until 1987.
Q So would it be fair to say that it was approximately three years after --
A Yes.
Q -- this trip to the hospital that you sought additional help?
A Yes.
Q Now let me ask you this. Was there ever an

occasion when your husband would abuse your children?
A My husband beat my children. He would -- he would kind of -- he and I would get into a fight -- a verbal disagreement and sometimes he would divert it away from me onto them and the next thing I would hear him down in the basement where they had their room hitting them with whatever he hit them with, usually an object.
[152] Q Now I didn't ask you this before, but at the height of the abuse, about how frequently did it occur, to you?
A At the height?
Q Yes.
A Oh, about once a week.
Q And how about to your children, how frequently did it occur at the height of the abuse?
A Probably about once every two or three weeks.
Q Now I'm interested about your husband's responses to the pregnancy. Now you stated at the first pregnancy he wanted you to have an abortion; is that correct?
A Well, my first -- no, my first pregnancy with him he wanted the baby. My second pregnancy with him, he insisted that I have an abortion.
Q And how about your third pregnancy with him?
A The same thing, he wanted me to have an abortion. He did not want another baby.
Q And the instances of silence that you described, did that occur with your third child -- or with your -- I'm sorry, your fourth pregnancy also?
A Yes.
Q And how long did they last after notifying him of the fourth pregnancy?
A The silence?
Q Mm-hmm.
[153] A With the second one it wasn't as bad as with the third, but probably about 10 days. But that -- what kind

of happened later was he just kind of ignored the child when it came and didn't help a bit or participate.
Q Now was there ever a time besides telling the doctor at the hospital that you call the police for assistance?
A Yes, after I -- well, after I left my husband, I got a protection from abuse order and I called the police on several occasions. One time I called and they said that they had lost the order and we would have to wait till Monday. Another time I called and they said the order had expired and we would have to wait until my lawyer called them Monday. They were pretty non-responsive.
One time I -- my husband and I were talking on the phone and he said I'm coming to your house with a gun and I got really scared and really nervous and I thought he would really do it and I called them and I had a PFA and I talked to the State Police and told them what was happening and they said -- the gentleman said to me, call me when you're dead, honey.
Q Was there ever an occasion that your husband beat your children or abused your children after you had left him?
A Yeah, one occasion in particular that was really bad was after I had left, my one -- my first son, who my husband had adopted, was staying with his father and he was beaten with a [154] vacuum cleaner and he was -- I describe it as not black and blue but purple from here to his feet.
Q And when you say here, can you explain to the Court --
A From under his neck, from his whole chest, his back, his here, his legs and to his feet.
Q Now you stated for the Court that you were in the contracting business with your husband. About how much money, approximately, per year did the two of you earn?
A We were making a lot of money. On our last year

together we netted close to 200,000.
Q At the point that you left, did you take any money with you?
A I took $25,000.
Q And did you keep that $25,000?
A No, my attorney advised me to return it, that I would be getting support and that I should return it and I did.
Q From the time that you left until you obtained child support, how long a period of time was that?
A From the time I filed for child support until I obtained it was 18 months.
Q Did you receive any child support from your husband during that period?
A No, not during those 18 months, no.
Q And once you got child support -- let me just ask this first, to your knowledge, did your husband's income remain [155] approximately the same?
A Yes.
Q And about how much child support did you get after you obtained an order of support?
A The final order that I got after the 18 months I received $125 a week.
Q And that was for all four children?
A That was for all four children.
Q Now are you employed?
A I'm employed now, yes.
Q And where are you employed?
A I am employed by Women's Resource of Monroe County, Incorporated.
Q And what is that?
A It's a non-profit organization that provides services to battered women and children in domestic violence situations and sexual assault victims.
Q Before I get into your job duties, I do have one futher question about the abuse.
A Mm-hmm.

Q At any point during your marriage, did your husband force you to have sex?
A Yes, he did.
THE COURT: Would you speak a little louder?
THE WITNESS: I'm sorry, yes, he did.
[156] BY MS. KOLBERT:
Q And when was the first time that you told any person about that?
A The first time I told any person about that was last week.
Q Okay and was that in response to my questions to you?
A Yeah, I told you.
Q Now in your job as a -- with Monroe County Women's Services, what are your responsibilities?
A I'm a counsellor, so I counsel the women and children in domestic violence and sexual assault, such as -- such as rape, incest, marital rape and under domestic violence we work with women that are physically, mentally, emotionally battered and abused.
I also do -- I also do PF -- protection from abuse accompaniment to the courthouse and I shelter women that need safe housing and I do crisis intervention also.
Q And approximately how many people do you speak with per year in this capacity?
A Well, I also -- I work in the office and I work hotline, on the hotline, last year I personally did over 600 hours with women. The year before I did over 600 hours.
This year -- this past year in the office, I probably up to about 1300 hours.
Q Now to the best of your recollection, are some of the [157] stories that you hear on a daily basis in that job similar to those of your own?
A Yeah, a lot of times it hits very close to home.
Q And as a general rule, would it be fair to say that the

women that you speak with have difficulty consulting you about their abuse?
A A lot of women call for appointments and can't get in. A lot of women that finally do get in talk about their fear of being found out for having come to us. A lot of women that I talk with are not allowed out of the house unless their husband is with them, so ...
Q Now when you say they're not allowed out of the house, what do you mean?
A I have talked to many, many, many women that can't even go to Wawa without their husband along with them. So they call on the phone and they don't know how they're ever going to get in to see me. Sometimes I do phone appointments with those women.

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[158] Q Is Monroe County Women's Center where you are working a member of the Pennsylvania Coalition Against Domestic Violence?
A Yes, we are.
Q And can you tell the Court what that organization is?
A That's an organization -- that's a coalition of organizations that provide services to battered women and children.
Q And do you have knowledge about the numbers of women that the full coalition provides services to each year?
A In our most recent fiscal year, which ended in June, the coalition provided services -- 400,000 service hours to 70,000 people, both women and children.
MS. KOLBERT: If I may have a minute?
(Pause in proceedings.)
BY MS. KOLBERT:
[159] Q Now Ms. Dillon, you testified that you

stayed with your husband for a period of almost five years after the abuse began. Can you tell the Court why you didn't leave?
A Well, one reason why I didn't leave was because I had four small children and I had put a lot of effort into the business that we had together. We were finally, after eating beans for a long time, making some money. It was real hard for me to face leaving that and having no job skills, no education.
MS. KOLBERT: Your Honor, may I approach the witness?
THE COURT: Yes.
(Pause in proceedings.)
BY MS. KOLBERT:
Q Ms. Dillon, I've just opened the notebook in front of you to document 49, page 44, which is a listing of social service agencies within Monroe County that is included within information that the Department of Health has prepared that provides social services to pregnant women. Can you look over that list for me?
A I can look over it, there's only four listed here.
Q And are there other services within Monroe County that would be appropriate to help women who may be pregnant?
A One of these listed here isn't in Monroe County, it's in Scranton. And there are many more social service agencies in [160] our area.
Q Okay.
A That should be listed or could be listed.
Q And what would some of those include?
A Catholic Services, Lutheran Services, Women in Crisis, Women's Resources --
THE COURT: You must speak louder, please.
THE WITNESS: Okay, should I repeat them?
THE COURT: Yes.
THE WITNESS: Okay, Catholic Services, Lutheran

Services, Women in Crisis, Women's Resources, to name a few. I'm sure there are more.

BY MS. KOLBERT:

Q Now I would ask you to turn to document number 48 in that same booklet. Could you identify that document for us?

A This is spousal notice certification regarding spousal notice.

Q And have you had an opportunity to look at this document?

A Yes, I have.

Q If you had been given this document prior to receiving health services, do you have a reaction, at the time that you were being battered, how you would have reacted to it?

A My reaction to this would be confusion as to what to do. Whether to tell the truth, what that might mean to me if I did and he found out. If I lied, what that might mean to me [161] if he found out. What it might mean relative to would I be imprisoned. It's a pretty scary document to me.

Q Ms. Dillon, have you ever had an abortion?

A I've had two abortions.

Q And were they legal abortions?

A No, they were illegal abortions.

Q And when did they occur?

A 1966, 1967.

Q Could you briefly -- very briefly describe for the Court what occurred on those occasions?

MS. MERSHIMER: Your Honor, I object on relevancy grounds.

THE COURT: Is this relevant?

MS. KOLBERT: I have one question that will make it relevant, your Honor.

THE COURT: All right, overruled. You may renew the objection later, if you wish.

THE WITNESS: I was -- well, I was in college and I was living with my boyfriend and at that time there was no birth control and I got pregnant and sought -- twice sought abortions in Washington, DC and -- do you want me to describe what happened there?

BY MS. KOLBERT:

Q Very, very briefly.

A Okay, well at that time I went to the doctor's office in [162] Washington. You were not allowed to have any anesthesia. I was not allowed to make any noise at all. I was told very forcefully to keep my mouth shut. And afterwards -- immediately afterwards was basically given a pad and asked to leave.

Q Now Ms. Dillon, as a result of those illegal abortions, did you ever suffer any post-abortion stress or suffer from post-traumatic stress in any way?

A No, my reaction to the abortions was relief.

* * *

[163] Q When you talked about 70,000 women and children that were victims of domestic violence in 1988/89, is that the correct number?

A. 70,000 recipients of services from PCADV member organizations.

Q Well, what does that mean, recipients of service?

A It means women and children and significant others that [164] have been or are currently in a domestic violence situation.

Q And does domestic violence include physical violence along with psychological coercion?

A Yes.

Q And do you know how many of these 70,000 service recipients were battered women?

A I don't know that in my head, I have those statistics written down, because they mail us -- mailed us those.

• • •

MS. KOLBERT: Your Honor, we will stipulate to the number if it is helpful to counsel.

THE COURT: Will that --

MS. KOLBERT: Would that be helpful?

THE COURT: -- take care of the matter?

MS. MERSHIMER: I'd just like to know the number.

MS. KOLBERT: The number is 59,912 battering victims, 8,078 children and 4,042 significant others.

BY MS. MERSHIMER:

Q Now Ms. Dillon, do you know of those 59,900 -- were any [165] of those 59,912 battering victims, does that include women, is that what it's focusing on?

A Yes, that's what it's focusing on.

Q I mean, there's just no men involved in that number?

A I personally haven't worked with any men. I'm not saying that there's not one or two men in that number, but --

Q Fine. Do you know how many of those battering victims that were married?

A No, we don't -- I don't have that statistic.

Q And do you know -- so then you wouldn't know how many were married and pregnant?

A No, I don't know that.

Q And you wouldn't know how many were married, pregnant and wanted to have an abortion?

A No.

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(5) (5)

Nos. 91-744 and 91-902

Supreme Court, U.S.
FILED
MAR 6 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, REPRODUCTIVE HEALTH AND COUNSELING CENTER, WOMEN'S HEALTH SERVICES, INC., WOMEN'S SUBURBAN CLINIC, ALLENTOWN WOMEN'S CENTER, and THOMAS ALLEN, M.D., on behalf of himself and all others similarly situated,

Petitioners and Cross-Respondents,

—v.—

ROBERT P. CASEY, ALLAN S. NOONAN, and ERNEST D. PREATE, JR., personally and in their official capacities,

Respondents and Cross-Petitioners.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX
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CERTIORARI GRANTED JANUARY 21, 1992

TABLE OF CONTENTS

Page

Relevant Docket Entries 1

Excerpts from Transcript of Hearing on Plaintiffs' Motion for a Temporary Restraining Order, April 21, 1988 23

Excerpts from Transcript of Hearing on Plaintiffs' Motion for a Preliminary Injunction, May 9, 1988 27

Order Granting Plaintiffs' Request for Class Certification (Oct. 25, 1988) 42

Plaintiffs' Amended Complaint for Declaratory and Injunction Relief 44

Order Clarifying May 23, 1988, Preliminary Injunction (Jan. 11, 1990) 72

Defendants' Answer 74

Stipulation of Uncontested Facts 86

Supplemental Stipulation of Uncontested Facts 102

Stipulation of Voluntary Dismissal 112

Excerpts from Trial Transcript, July 30 through August 1, 1990 113

Non-Jury Trial - Day 1 113

Non-Jury Trial - Day 2 204

Non-Jury Trial - Day 3 315

Excerpts from Defendants' Trial Exhibits 393

Defendants' Exhibit 1: Excerpts from
Magee-Womens Hospital Informed
Consent for Termination of
Pregnancy Form 393

Defendants' Exhibit 2: Excerpts from
Women's Health Services (WHS)
Individual Counseling Guidelines/
Post Abortion Group Guidelines/
Personal Counseling Guideline 396

Defendants' Exhibit 3: WHS Consent
for Abortion Form 410

Defendants' Exhibit 4: WHS
November 20, 1986
Memo Re Parental Notification 415

Defendants' Exhibit 5: Excerpts from
WHS Patient Record Form 418

Defendants' Exhibit 8:
WHS Advertisements 441

Defendants' Exhibit 9: Excerpts from
Planned Parenthood of
Southeastern Pennsylvania (PPSP)
Center Policy and Procedure Manual 444

Defendants' Exhibit 10: Excerpts from
PPSP Request for Abortion Form 451

Defendants' Exhibit 11: Excerpts from
PPSP Fact Sheet 453

Defendants' Exhibit 13: Excerpts
from Guidelines of
Women's Suburban Clinic (WSC) 457

Defendants' Exhibit 14: WSC
Disclosure of Risk,
Benefits and Alternatives Form 461

Defendants' Exhibit 17: WSC Information
Prior to Consent/Certification
by Patient Form 464

Defendants' Exhibit 18: WSC
Parental Involvement Form 465

Defendants' Exhibit 19: WSC
Physician's Certification Form 466

Defendants' Exhibit 20: WSC
Protocol Regarding Minors 467

Defendants' Exhibit 26: Excerpts from
Reproductive Health and Counseling
Center (RHCC) Consent Forms 469

Defendants' Exhibit 30:
RHCC Advertisements 473

Defendants' Exhibit 32: Allentown Women's Center (AWC) Counseling Checklist 474

Defendants' Exhibit 33: Excerpts from AWC Confidential Patient Record Form 477

Defendants' Exhibit 35: AWC Advertisements 484

Defendants' Exhibit 36: AWC Consent Form 486

Defendants' Exhibit 37: Northeast Women's Center Guidelines for Informed Consent 487

Defendants' Exhibit 39: Summary Compilation of Quarterly Reports 488

Defendants' Exhibit 45: Commonwealth of Pennsylvania Department of Health (DOH) Abortion Facility Registration Form 489

Defendants' Exhibit 46: DOH Abortion Quarterly Facilities Report Form 491

Defendants' Exhibit 47A: DOH Report of Induced Termination of Pregnancy Form (version no. 1) 493

Defendants' Exhibit 47B: DOH Report of Induced Termination of Pregnancy Form (version no. 2) 497

Defendants' Exhibit 47C: DOH Report of Induced Termination of Pregnancy Form (version no. 3) 500

Defendants' Exhibit 48: DOH Certification Regarding Spousal Notice Form 504

Defendants' Exhibit 49: Excerpts from DOH Directory of Social Service Organizations for Referrals for Pregnant Women 506

Defendants' Exhibit 50: Excerpts from DOH Printed Information on Medical Assistance Benefits 508

Defendants' Exhibit 51: DOH Notices Required by Abortion Control Act 518

Defendants' Exhibit 54: Deposition Excerpts of Thomas E. Allen, M.D 519

Defendants' Exhibit 55: Deposition Excerpts of Sue Roselle 522

Defendants' Exhibit 56: Deposition Excerpts of Carol C. Wall 527

Defendants' Exhibit 57: Deposition
Excerpts of Sherley Hollos 532

Defendants' Exhibit 58: Deposition
Excerpts of Jane S. Green 538

Defendants' Exhibit 59: Deposition
Excerpts of Sylvia Stengle 541

Defendants' Exhibit 60:
Discovery Excerpts 552

Excerpts from Plaintiffs' Trial Exhibits 556

Plaintiffs' Exhibit 49: DOH Instructions
and Definitions for Report of
Induced Termination of
Pregnancy Form (July 1988) 556

Plaintiffs' Exhibit 60: Veto Message
to the Pennsylvania Senate on
S.B. 742 of Governor Dick Thornburgh
(Dec. 23, 1981) 572

Plaintiffs' Exhibit 61: Message
to Pennsylvania Senate on Signing
of 1982 Pennsylvania Abortion
Control Act of
Governor Dick Thornburgh
(June 11, 1982) 583

Plaintiffs' Exhibit 62: Veto Message
to Pennsylvania House of Representatives
on H.B. 1130 of Governor
Robert Casey (Dec. 17, 1987) 592

Plaintiffs' Exhibit 67: Excerpts from
The Federal Role in Determining the
Medical and Psychological
Impact of Abortion on Women,
H.R. Rep. No. 392,
101st Cong., 1st Sess. (1989) 599

Plaintiffs' Exhibit 89:
Diagnostic Criteria for
Post-Traumatic Stress Disorder 606

Excerpts from Verifications Filed
in Support of Plaintiffs'
Preliminary Injunction Motion 608

Excerpts from Verification
of Sue Roselle (Apr. 19, 1988) 608

Excerpts from Verification
of Sylvia Stengle (Apr. 18, 1988) 615

The following opinions and orders have been omitted in printing this Joint Appendix because they appear on the following pages in the Appendix to the Petition for a Writ of Certiorari in No. 91-744.

Planned Parenthood v. Casey, 947 F.2d 682
(3d Cir. 1991) 1a

Planned Parenthood v. Casey, 744 F. Supp. 1323
(E.D. Pa. 1990) 104a

Order of the United States District Court
for the Eastern District of Pennsylvania,
filed August 24, 1990 .....285a

EXCERPTS FROM DEFENDANTS' TRIAL EXHIBITS

Defendants' Exhibit 1: Excerpts from Magee-Womens Hospital Informed Consent for Termination of Pregnancy Form

MAGEE-WOMENS HOSPITAL
Pittsburgh, PA 15213
INFORMED CONSENT FOR TERMINATION OF PREGNANCY

I hereby authorize _____, M.D., and/ or such associates and assistants as he/she may select and supervise to perform the following procedure(s): _____.

The doctor has explained to me the nature and purpose of the procedure(s), the risks associated with the treatment, the available alternatives and risks of these alternatives, as summarized below.

1. The medical procedure to be used is _____, which has been explained to my full satisfaction.

2. The risks involved with the procedure(s) include severe blood loss, infection, perforation, incompleteness, possible need for further surgery (hysterectomy, removal of tubes and ovaries), possible sterility, danger to subsequent pregnancies, fatality and _____, which have been explained to my full satisfaction.

3. I understand that possible alternatives to the abortion procedure include childbirth and possible placement for adoption which have been explained to my full satisfaction. I fully understand the risks of these alternatives, which have been explained to me.

4. I fully understand that there is no guarantee that this procedure will be successful or that it will terminate my pregnancy.

5. If any unforeseen condition arises in the course of the abortion which, in accordance with good medical practice calls for procedures in addition to or different from those contemplated, I further authorize the above-named physician or his designee to perform such procedures which in his professional judgment are necessary.

6. I understand that it is my responsibility to bring to the attention of the staff physician and Magee-Womens Hospital any unusual symptoms following the procedure and to report for check-ups or pregnancy tests as recommended.

7. I have had full opportunity to ask additional questions of the doctor(s) and staff about this procedure and the risks and alternatives involved and am satisfied with the answers. I have no further questions. I understand that I am free to withhold or withdraw my consent to perform this procedure at any time prior to the abortion without prejudicing my future care.

8. I understand that Pennsylvania law requires that fetal tissue removed during an abortion be submitted for pathological examination.

Magee-Womens Hospital will be responsible for fetal tissue:

_____ Yes _____ No

I certify that I have read (or had read to me) and fully understand the above consent to abortion and the explanations referred therein were made to me.

_____ _____ _____

PATIENT SIGNATURE DATE TIME

PATIENT IDENTIFIED PRE-OPERATIVELY BY:

_____

* * *

Defendants' Exhibit 2:
Excerpts from Women's Health Services (WHS)
Individual Counseling Guidelines/
Post Abortion Group Guidelines/
Personal Counseling Guidelines

INDIVIDUAL COUNSELING GUIDELINES
Abortion Clinic

The purpose of this interview is to establish that the woman understands her pregnancy options and desires an abortion, has a genuinely informed consent, and to obtain the necessary history for the medical record.

Before the interview the counselor should review the chart, looking for LMP, any pelvic exam, age, distance traveled, occupation, whether anyone is accompanying her, marital status, medical history, record of prior visits and lab work. This information is helpful to have in mind when greeting and getting to know the woman so that we can provide service in a manner that will meet her needs as well as those of the people accompanying her.

The usual interview covers steps 1 thru 14 of the outline below and takes from ten to thirty minutes. The average time is about twenty minutes but can vary due to specific circumstances. In this interview the counselor must assess the woman's individual needs and determine the best way to organize the session. Women who are conflicted and unable to resolve those conflicts in a short period of time (15 minutes) should be referred immediately to the personal counselor or to a counseling administrator.

There are times when all information given to the patient including the post abortion follow up instructions

and the contraceptive instructions should be done in the individual session. Women who are deaf, have significant English language problems, adolescents under 15, those who are slow to comprehend, or who have emotional disabilities should be given all information in this individual session. The latter paragraphs below describe the steps in covering this additional information.

Suggested interview outline:

1. Give an overview of what the woman will experience during her stay--where she will be, how long she will be in certain places.

2. Tell the woman what you will be talking about during the interview and that you will (1) discuss any questions or concerns the woman has about the abortion (2) discuss the procedure (3) take her medical history. In this way a contract is informally set. It is important that the woman knows what to expect from the counselor during the interview--that the goals are clearly defined. For those who are to have all information individually the counselor would also include (3) care afterwards and (4) birth control in her overview of the interview.

3. Encourage the woman to ask any questions she may have. She will be more *ready* to listen if this is done first. Find out what she knows about the abortion procedure. Her questions, level of information and concerns will help the counselor gauge where to start. It is up to the counselor to decide in what order to cover the necessary information with the woman so that it attends to those individual needs that are within the limits of the counselor's goals and capabilities.

4. The counselor usually describes the procedure next, reviewing each step and what the patient will feel. The counselor starts by making certain that the woman understands basic reproductive anatomy and the menstrual cycle.

5. The complications should be listed and an explanation of how they might occur. These must be presented in a way that is both realistic and in perspective to the chance of occurrence. We believe a genuinely informed consent should be part of any medical procedure. All patients should have infection, hemorrhage, perforation and incompleteness, the possibility of further medical treatment or surgery, i.e. hysterectomy, removal of tubes or ovaries resulting in sterility, as well as fatality explained to them. Emphasize that in an EA the most common complication is incompleteness.*

6. Assess the woman's readiness for the abortion by asking her if it was an easy or difficult decision, and with whom she has been able to discuss this. If the woman is not ready for the abortion, the counselor should stop here, attempt to help resolve the issues and get help from the personal counselor or supervisor if needed. The counselor should make sure that the woman understands all the options available to her including abortion or a full term delivery where she could either keep the child or put it up for adoption.

7. Take the histories on pages 1, 2, 3, 4, 5 of the chart.

8. Take her vital signs and record them.

9. Have her read or read to her the consent. Have

patient sign the consent. Witness the consent.

10. All women should be given a copy of the WHS "Guide to Birth Control Options" and asked to look it over in preparation for the recovery group.

11. When the interview is finished, allow the patient to stay in the counseling room, and take the chart to the lab for the test results.

12. If the blood type is Rh Negative explain the meaning of this before you escort her from the counseling room.

13. Get and record her weight, instruct her to use the restroom if possible and then have a seat in the waiting area.

14. Counselor should take her completed chart to flow and get her next assignment.

If the patient is to receive all information on an individual basis the counselor will:

A. Review all information on the post abortion instructions* after completing the histories in step 7. The attached envelopes should be reviewed also.

*The EA patient will be given additional instructions in the Recovery Room. Tell her in counseling that if the fetal tissue is less than 8 weeks LMP, she will need a pregnancy test within 2 to 3 weeks after the abortion as well as a check-up by 8 weeks. She should make her check-up appointment after getting her

pregnancy test results. For a check-up made after 8 weeks the woman will be charged for an annual exam. Tell the patient that on the slight chance she is still pregnant at the time of the UCG, it is important that she have a repeat procedure to terminate the pregnancy. The fetus can be damaged by infection from the uterus having been entered.

B. The review of the birth control methods is done next. The goals are to give accurate birth control information, assess the woman's needs for a method and usually urge the woman to choose a method to prevent further pregnancies. The counselor gives a brief introductory overview to all the methods, and then, depending on how the woman responds, discusses all, one, or several of the methods. Each woman is instructed in the use of foam and condoms since it is an easily available back-up method. If a woman states she does not plan to use any, this is explored--complete information on birth control is given so that she will know about the methods for the future. If she does not want a method, that decision is respected.

C. Complete steps 8 and 9.

* * *

Summary of Charting Inservice

5. Specific charting areas

a. *Page One* will no longer be reviewed in depth by the receptionist. This will now be the

counselor's responsibility. Clerical will cover the "black dot" questions (allergies, heart, epilepsy, seizures, diabetes, hepititis, jaundice) and the "white dot" data needed for sizing in order to make the necessary referrals to the NP/PA's.
The counselor covers items 1-36 recording for any circled items: date of occurrence and description (original onset, degree of problem, treatment if any). Counselor covers any medication taken today, medications taken previously, any allergies and allergic reactions to medicines. The allergies are circled in red on page one and the counselor writes the allergy in red on page 5 on allergy line. Remember to write N/A at any section where there is nothing to record to indicate you covered the data.

The counselor should review any questionable histories with NP/PA's to determine if any special exam or care is necessary.

Counselor must be fully aware of the contraindications to abortion in Medical Standards.

b. *Page 2* - It is important to record what isn't as well as what is (birth control history -- none used for example). The counselor checks the appropriate box in the laboratory section when VD culture is done in procedure.

c. *Page 3* - The counseling paragraph should summarize *Relationship issues* (a stress situation, how partner, parents, friends, others of significance have responded to decision, degree of support wanted and available, how do parents and/or partner see their emotional and financial responsibility to patient; *ability to communicate* (any need for special explanations due to

language problems, slowness); *the decision* (difficulties, pros and cons, reason for termination, any issues concerning morality of abortion). If the woman is having the abortion for medical reasons this must be stated and that the option of a second opinion with genetic counseling was offered must be recorded.
Special Cases 1) Reasons for not telling parent if underage, 2) If patient is victim - raped or incest - and on MA it must be recorded in counseling paragraph as the reason for the abortion, 3) If full interview done and reason for doing this is to be recorded.

The counseling paragraphs should be written in complete sentences, no slang should be used, be descriptive, discreet and avoid the counselor's personal judgments about the patient or her life style. The paragraph should only summarize information related to the abortion decision.

All pamphlets given to her, referrals to personal counselor, other referrals such as to PAAR, Neighborhhod Legal Services, etc. should be recorded under recommendations and referrals.

When a patient is voided, the administrator should record the related information in the box on the bottom of page 3 so we can use the same insert if the patient returns for termination of that pregnancy.

PERSONAL COUNSELING SESSION

Interviewer: _____ Case#_____
(Initials) (If appropriate)

Nickname: _____ DOB:_____

INTRODUCTORY COMMENT: I understand that you've been having a difficult time with this decision. Perhaps by talking about your concerns and hearing the answers to your questions, you will be better able to decide what is best. Our discussion is intended to be of help to you. Any time you don't understand why I'm asking a particular question, please feel free to ask me about my reasons for asking that particular question.

INTERVIEW QUESTIONS:

1. When you think of pregnancy, what kinds of things come to mind?

_____
_____
_____
_____

2. How long have you been pregnant?_____

3. Have you ever had an abortion? ___No ___Yes
(Number:___)

4. Who have you chosen to tell about your pregnancy?
People* told. Their reaction

_____

* This person accompanied patient.

_____
_____
_____
_____

Partner's reaction to pregnancy - initially:
__Positive __Negative __Not Told

_____'s current reaction is: __Positive __Negative
(Name of Partner)

_____
_____

5. What were your beliefs about abortion before this happened?
__AB acceptable
__AB acceptable, difficult decision
__AB unacceptable, unless under cases of rape, incest, MR, etc.
__AB unacceptable
Comment: _____
_____
_____

6. Do you have other children? __Yes __No

7. How do you see a child fitting into your life right now?

_____
_____
_____
_____

8. What is your religious background?
__Christian __Jewish __Moslum __Catholic
__Protestant __N/A

9. Have you ever been hospitalized for a nervous disorder? __No __Yes Where?

_____

10. Have you ever seen a counselor, psychologist, psychiatrist? __No __Yes

11. Do you have any questions of me?
__ No
__ Client asked about procedure.
__ Client asked about fees.
__ Client asked about feelings women have post AB.
__ Client asked if the procedure will affect future pregnancies.
__ Other (specify) _____
_____
_____

CLIENT ORIENTATION DURING INTERVIEW

Internal Control . . . . . External Control

Little Denial Present . . . . . Denial Evident

Self Esteem Present . . . . . Poor Self Esteem

INTERVENTIONS

__ Support for assertive right to make personal choice, whether AB, pregnancy to term, adoption.
__ Showed pictures of early fetal development.
__ Gave reading materials.
__ Gave list of phone numbers related to religious

groups/individuals (client may contact)

___ Cognitive restructuring to establish fact(s)/realty related to _____

_____

_____

RECOMMENDATIONS

___ None needed/none requested

___ Client is comfortable with her current personal choice.

___ Suggested she give AB more thought.

___ Client is to return to another session on (date) _____

___ Client is to return for another session "when needed"

___ Contact West Penn Hospital for genetic counseling/information

___ Call for sizing appointment

___ Suggested she seek support from significant other(s). Specify _____

_____

_____

___ Suggested she return for post AB session.

___ Suggested that AB doesn't appear to fit within her value system. We discussed other options for a second time.

OTHER RECOMMENDATIONS not aforementioned

_____

_____

CLIENT DECISION

___ Keep scheduled appointment for procedure
___Very comfortable with decision
___Comfortable with decision

___ Schedule procedure
___Very comfortable with decision
___Comfortable with decision

___ Schedule another personal counseling session

___ Give procedure further thought

___ Discuss potential decision with significant other(s)_____

_____

___ Keep Pregnancy

___ Adoption procedure (___gave information on local adoption agencies)

INTERVIEW QUESTIONS WITH PERSON(S) ACCOMPANYING CLIENT

___ Not applicable, no one accompanied her

___ Mother ___ Relative (Specify_____)

___ Father ___ Friend

___ Partner ___ Counselor

1. What are your thoughts regarding this pregnancy?

_____

_____

_____

_____

2. How long have you known about this pregnancy? ___

3. Who else have you told?_____
Does the client know this? ___Yes ___No

4. What are some of your concerns?_____

_____

_____

5. In what areas are you willing to be helpful if she decides to carry her pregnancy to term?

___ Emotional support, no matter what she decides.
___ None, she's on her own.
___ Lodging, she can live with me/us
___ Child care (full time/part time/occasionally)
___ Financial
___ Just food for she'll be on her own
___ Other (specify) _____

6. Have you told her how much support/help she can expect from you? ___Yes ___No
(If "no", when do you plan to do so? _____)

7. Do you have any questions of me?
___ About the procedure
___ Fees
___ AB effect on future pregnancies
___ Other (specify) _____

8. Interview's impression of significant others. Check (✓) all that apply.
___ Opinion seeker
___ Initator (person is appropriately assertive)
___ Information seeker
___ Opinion giver
___ Information giver
___ Elaborator
___ Organizer/coordinator
___ Evaluator/critic
___ Aggressor
___ Blocker (person avoids reality of situation)
___ Moralizer
___ Supporter
___ Passive
___ Observer
___ Follower
___ Compromises

___ Harmonizer
___ Recognition seeker
___ Self-confessor
___ Dominator
___ Help seeker

RECOMMENDATIONS TO SIGNIFICANT OTHER(S)

Not needed, already present	Needed	
___	___	Offer emotional support, no matter what she decides.
___	___	Make position clear to client
___	___	Seek counsel from other sources, e.g., _____
___	___	Return with client for another session
___	___	Stop enabling client's excessive dependency
___	___	Read the same material given to client so topics can be discussed.

Comments: (please use reverse side)

Defendants' Exhibit 3:
WHS Consent for Abortion Form

CONSENT FOR ABORTION

I hereby authorize a Staff Physician to perform upon me a VACUUM ASPIRATION ABORTION, including all the mechanical aspects, which have been explained to me.

I consent to the administration of anesthesia to be applied by or under the direction of the staff physician, and the use of such anesthetics as s/he may deem advisable.

If any unforeseen condition arises in the course of the abortion which, in accord with good medical practice, calls for procedures in addition to or different from those contemplated, I further request and authorize the staff physician to perform such procedures, or administer any medication which s/he may deem advisable or to have me admitted to a hospital facility.

I understand that it is my responsibility to bring to the attention of Women's Health Services, Inc. any unusual symptoms following the abortion and to report for check-ups or pregnancy tests as recommended.

The nature and purpose of an abortion by vacuum aspirations, other abortion techniques, and the alternatives to abortion, including childbirth and adoption, the risks involved, and the possibility of complications and detrimental physical and psychological effects which are not anticipated but may occur, including by way of illustration and not limitation, hemorrhage, infection, perforation, incompleteness as well as the possible need for further surgery (i.e. hysterectomy, removal of tubes and ovaries), possible sterility and fatality, all of which have been fully

explained to me.

I authorize Women's Health Services to dispose of all fetal tissue as it sees fit.

I CERTIFY THAT I HAVE READ (OR HAD READ TO ME) AND FULLY UNDERSTAND THE ABOVE CONSENT OF ABORTION AND THAT THE EXPLANATIONS THEREIN REFERRED TO WERE MADE.

Date_____ Time_____
Signature of Patient _____

_____
Signature of Person authorized to give consent, if not patient

_____
Relationship to Patient

_____
Signature of Physician

_____
Signature of Witness

_____

ECTOPIC PRECAUTIONS

I certify that I have received a copy of the sheet listing the precautions for possible ectopic pregnancy, have read it and understand the importance of the medical follow-up.

Date____ Signature of
Patient _____

_____

Alternate contact person in addition to myself:

_____

Relationship Phone Number

_____

Signature of Witness

_____

EARLY ABORTION SPECIAL INSTRUCTIONS

I certify that I have received a copy of the sheet describing the special instructions for early abortion patients, have read it and understand the importance of the medical follow-up.

Date____ Signature of
Patient _____

_____

Signature of person authorized to give consent, if not patient

_____

Relationship to Patient

_____

Signature of Witness

_____

POST ABORTION INSTRUCTIONS

I certify that I have received a copy of the sheet describing instructions for after the abortion, have read it and understand the importance of the medical follow-up.

Date____ Signature of
Patient _____

Signature of
Witness _____

_____

Signature of Person authorized to give consent, if not patient

_____

Relationship to Patient

_____

CONSENT FOR ORAL CONTRACEPTION

I hereby authorize a staff physician of Women's Health Services, Inc. and/or whomever s/he may designate as a practitioner to perform:

Contraceptive Services and Supplies

I have received and agreed to read the patient information on oral contraceptions provided by the manufacturer.

I do hereby release Women's Health Services, Inc. from any and all claims which I may have by reason of their providing me this service.

I understand that it is my responsibility to bring to the attention of Women's Health Services, Inc., any unusual symptoms and to report for check-ups as recommended.

I CERTIFY THAT I HAVE READ (OR HAD READ TO ME) AND FULLY UNDERSTAND THE ABOVE CONSENT TO CONTRACEPTIVE SERVICES AND SUPPLIES, AND THAT THE EXPLANATIONS THEREIN REFERRED TO WERE MADE AND THAT ALL BLANKS OR STATEMENTS REQUIRING INSERTION OR COMPLETION WERE FILLED IN.

Date____ Signature of Patient _____

_____

Signature of person authorized to give consent, if not patient

_____

Relationship to Patient

_____

Signature of Witness

_____

_____

I do hereby release Women's Health Services, Inc. from any and all claims which I may have by reason of their providing me this service I understand that it is my responsibility to bring to the attention of Women's Health Services, Inc., any unusual symptoms and to report for check-ups as recommended.

Date____ Gynecological Exam

Signature of Patient _____

Date____ Antibiotic Therapy

Signature of Patient _____

Defendants' Exhibit 4:
WHS November 20, 1986
Memo Re Parental Notification

To: All Paraprofessional Counselors, Nurse Counselors, Clerical Staff, Administrative Staff, Personal Counselors

From: Liz Lincoln

Date: November 20, 1986

RE: Addition to 11/23/86 memo regarding parental notification

Please re-read the 11/23/86 memo. A copy is on the staff lounge bulletin board for convenience.

While we are not going to ask parents to come in when we make an appointment for an adolescent, if a parent or parents come in on the day of the abortion we will get their signature on the consent page of the chart using the following guidelines.

1. Front Reception - Ahead of time, identify which patients on the appointment list are less than 18 (up to day before 18th birthday). When the adolescent signs in, ask if anyone has accompanied her. If a parent or parents are there, instruct her to tell them not to leave the facility until they are notified the abortion is done.

2. Counselors - Nurse/Counselors - After greeting the patient who has parents here give her an overview of the counseling interview and ask if the parent can sit in on the description of the abortion and the

complications so the parent can sign the part of the consent for "others authorized to give consent". Most should agree if this is presented as described below.

Try to include just one parent - although if both want to come we should accommodate that. Use one of the four rooms with windows since those rooms are larger. Extra chairs will be put in scale room for you to use and return when needed.

Review the procedure, possible complications, and options to abortion with the parent and adolescent. Answer questions. Give reassurance if needed. Get parent's consent on line titled "signature of person authorized to give consent, if not patient". Write parent on line titled "relationship to patient". Escort parent back to front waiting areas. The patient herself will sign on "Signature of patient" line after the interview is completed. Counselor witnesses at that point.

If the adolescent seems ambivalent, her decision making process and support system should be discussed before bringing the parents in, rather than after they are returned to the waiting area. Any conflicts about the decision should be resolved before including the parent.

If the patient does not want to include the parent, one of the counseling administrators or another counselor if available will cover the information with the parent and get the parent's signature.

This instance should be rare. The discussion of the decision, and support system, the history taking, vital

signs, etc. will always occur without the parents. If this is made clear and if the adolescent wants to be here, it will be all right with most of them to include the parents for the description of the procedure and complications.

If a separate discussion is needed for parent consent use separate consent sheet to expedite time and staple to original consent. Review procedure, complications, and options with parent.

We are doing this to comply with our liability insurance requirements. This is not part of the abortion control act.

REMINDER: After the procedure is done, the counselor accompanying the adolescent through procedure should see parents and tell them they can go out for an hour at that time if they wish. Give estimated discharge time.

Defendants' Exibit 5:
Excerpts from WHS Patient Record Form

WOMEN'S HEALTH SERVICES, INC.
PATIENT RECORD

Name _____
Address _____
City _____ County _____
State _____ Zip Code _____
Home Phone (____) _____
Business Phone (____) _____
_____
_____
Date of Birth _____ Age _____
___Single (Never Married) ___Married
___Widowed ___Separated ___Divorced
Name you wish to be called by _____
Occupation _____
Place of Employment _____
Referred to WHS by: _____
What is your doctor's (clinic's):
Name _____
Address _____
Telephone Number _____
(Area Code)
_____
_____

First Day of last normal menstrual period:
1._____ 4._____
2._____ 5._____
3._____ 6._____

Do you consider yourself to be in good health: Yes No
Circle the number for each of the following you have or have ever had:

1. epilepsy or seizures
2. hepatitis or jaundice
3. heart disease
4. rheumatic fever
5. heart murmer
6. diabetes (suger)
7. sexually transmitted disease (gonorrhea, syphilis, herpes, chlamydia)
8. disease or surgery of uterus, ovaries or tubes
9. extopic (tubal) pregnancy
10. cesarean section
11. Pelvic Inflammatory Disease (PID)
12. cancer
13. vaginal infection
14. urinary tract/ bladder/kidney infection
15. asthma
16. fainting, dizzy spells
17. breast lump or tumor
18. high blood pressure
19. sickle cell disease
20. blood transfusion
21. anemia
22. bleeding tendency
23. chest pains
24. shortness of breath
25. nausea and/or vomiting
26. frequent headaches
27. migraines
28. double vision
29. varicose veins
30. blood clots (phlebitis)
31. swollen feet or ankles
32. leg cramps
33. smoking
34. ever been hospitalized overnight

Any Family history of cancer, diabetes, T.B., allergies, epilepsy, heart problems, high blood pressure?

WHO	WHAT
_____	_____
_____	_____
_____	_____

Have you taken medication, today:
__No __Yes, I took

Date	Medication	Time
Date	Medication	Time
Date	Medication	Time

_____

OPTIONAL: For Research Purposes Only
Religion _____ Ethnic Background _____
Education - Last Grade Completed _____

_____

List any other Allergies such as bee stings, eggs, etc.

_____

Place an (X) in the appropriate column for any medicines you have ever used or are allergic to:

USED		ALLERGIC
_____	Doxycycline	_____
_____	Aspriin	_____
_____	Penicillin	_____
_____	Tetracycline	_____
_____	Sulfa	_____
_____	Codeine	_____
_____	Demerol	_____
_____	Antibiotics	_____
_____	Tranquilizers	_____
_____	Sedatives	_____
_____	(Novocaine) local anesthetic	_____
_____	Rho gam	_____
_____	Dilantin	_____
_____	Anticoagulant	_____
_____	Other	_____

Description of Reaction _____

_____

_____

Patient Name _____ Patient Number___

HISTORY AT INITIAL VISIT:

Date: _____

MENSTRUAL HISTORY:

Age of onset ___ length of cycle ___ days of flow ____
Amount of flow: Scant Moderate Heavy
Amount of Discomfort: _____
Relieved by: _____

INTERNAL EXAM:
Ever had one: Yes No Date_____

PAP SMEAR:
Ever had one: Yes No Date_____
Date_____
Date_____
Date_____
Date_____
Date_____
Date_____

ANY ABNORMALITIES: Yes No Date _____
If Yes, explain _____

CONTRACEPTIVE

	Dates Used	Problem	Dates Used	Problem
Pill				
IUD				
Dia-phragm				
Foam				
Con-doms				
Other				

PREGNANCY: Give dates (month & year); sex, male or female. If Cesarean section, circle dates.

Live births				
Still births				
Now living				
Spon. AB				
Induced AB				
Where				
Types				
Total Preg-nancies				

Complications:
Birthweight over 10 lbs.
Ectopic pregnancies
Multiple pregnancies
RH infants (jaundiced)
Molar Pregnancies
Hemorrhage

Patient Name _____ Patient Number___

ABORTION COUNSELING

Date _____
Return Date _____
Time In _____ Time Out _____
Referred from _____
Counseling received there? Yes No

1. contraceptive
2. abortion & alternatives
3. personal

Was abortion an easy or difficult decision?
(If difficult, explain below)

Able to discuss decision with concerned others:
Yes No
(If no, explain below)

With her today:
1) Name _____
Relationship _____
2) Name _____
Relationship _____
3) Name _____
Relationship _____

Pregnancy Test
Date _____
Place _____
Positive Negative
Emergency Contact: _____
Describe Woman's Mood: _____

_____
_____
_____
_____
_____
_____

Have you ever had professional counseling?
Yes No
If yes, explain _____
_____
_____
_____
_____
_____
_____
_____

Contact between 9-4 Monday thru Friday at:
Number Place Letter /Other
Nickname "Shelly" Yes No /Address

Check appropriate box(es):
___ Woman understands and desires termination, appears to have no problems with this and should do well.
___ Abortion related problems
___ Other life problems

_____ _____
_____
_____
_____
_____
_____
_____
_____

_____

_____

Consent form signed Yes No

Physicians Signature _____

Counselor's signature _____

Interview Group Counselor's signature _____

Recommendations/Referrals _____

_____

Counselor's signature _____

RESCHEDULE/VOID INFORMATION,

Date _____

_____

Signed _____

[4]

_____

Patient Name _____ Patient Number___

PHYSICAL FINDINGS

Date_____BP___P___Temp___Hgt.___Wgt.___

Return date if applicable_____

BP___P___Temp___Hgt.___Wgt.___

LMP:_____ Weeks since LMP _____

Sizing_____ LMP Sonar results _____

Name_____NP/PA

SBE Prophalaxis ___Yes ___No

_____

_____

Comments:_____

_____

_____

_____

_____

Contraceptive Desired 28O.C. F&C_____

_____

PROCEDURE

Date:_____

Pelvic Exam: Describe Positive Findings

External Genitalia + - _____

Vaginitis + - _____

Acute Cervicitis + - _____

Adnexal Mass or Tenderness + - _____

Uterus: Estimated Uterine Size _____

_____

Weeks from LMP

Anterior Midposition Posterior

OPERATIVE REPORT: VACUUM ASPIRATION

Date_____

Sound_____cm Dilation to:_____Fr.

Cannula:_____mm KARMAN

Nesacaine 2% 12cc Carbocaine 1%_____cc.

Pitressin 2.5 units or 5 units

Other _____

Uterine exploration: curette forceps both

I.U.D. + - Molar Degeneration + -

Tissue Volume Small Mod. Large(for gest.)

Villi Seen + - Molar Degeneration + - ?

Fetal Age_____(Weeks from LMP by tissue exam)

Embryo/Fetus: + - Incomplete ?Complete

Probably Complete

Blood Loss:_____cc. Perforation + -

Tissue to Pathology + - Rush + -

Comment: _____

_____

_____

Complications + - (comment below)

_____

_____

Patient state during procedure: _____

Notes and Comments: _____

_____

_____

_____

ORDERS FOR RECOVERY AND DISCHARGE

Immune Globulin

___Yes ___No

Valium_____ I.M., P.O._____

Pitocin_____cc._____

Methergine 0.2mg. I.M._____

Methergine 0.2mg. P.O. 6 tablets/12 tablets

Doxycycline 200mg. P.O. _____

Other _____

28 day O.C. _____

Acetominophen 1000 mg. _____

Ibuprofen 400 mg._____

Other _____

Return for pregnancy test 2 weeks

___Yes ___No

Early Abortion Instructions

___Yes ___No

Extopic Precautions

___Yes ___No

The Standard Dilation and Vacuum Aspiration Technique was performed as stated above

Signed_____M.D.

Time in_____ Time Out _____

Procedure Counselor: _____

RECOVERY ROOM

Time of Admission_____AM/PM Date_____

Hour				
Blood Pressure				
Pulse				
Bleed-ing	N Sm Mod Hvy	N Sm Mod Hvy	N Sm Mod Hvy	N Sm Mod Hvy
Pain/ Cramps	N M M S	N M M S	N M M S	N M M S

Allergies: No Yes_____

Previous Medication

Dosage Route & Site Time By

1.

2.

RH Negative: Yes No

Immune Globulin Given: Yes No

RH Inf. and Card: Yes No

Lab Comments:_____

Medication Administered	Doasage	Route & Site	Time	By
1.Doxycycline	200 mg.	P.O.		
2.Ibuprofen	400 mg.	P.O.		
3.				
4.				
5.				

Medication Dispensed	Dosage	Amount	By
1.Methergine	0.2 mg.	P.O.	6 tablets/ 12 tablets 1q. 6 hours
2.Ampicillin	250 mg.	QID x 12 doses	
3.			

Contraceptive: 28-day O.C. Type/Amount _____
Given By _____
F&C Tubal Vasectomy Diaphragm Has Own/None
Insurance Form Completed: Yes No
MA Forms: Yes No
Post Abortion Instructions:
Instruction Sheet: Yes No
Contraceptive Instructions: Yes No
Can read thermometer? Yes No
Thermometer given Yes No
Check-up: WHS_____ Private M.D._____
Excuse needed for _____ Yes No
No. of days _____ Given: Yes No
Transportation:
Car Cab Bus Train Plane Walk
Other____
By Self With Family/Friend
Emotional Condition:
Interacts openly Composed Withdrawn Upset
Referred for Personal Counseling
Physical Condition:
No Problems Cramps: Mild Moderate Severe
Other_____

_____ M.D.
Time of Discharge _____ AM/PM
Signed _____ RN/LPN
Signed _____ RN/LPN

Patient Name _____ Patient Number___

REPEAT PROCEDURE/EMERGENCY CHECK

Date _____

Time of Admission

_____AM Repeat Procedure Recheck

_____PM Repeat Admission Pls. Circle

PREGNANCY TEST Positive Negative

Pelvic Exam: Describe Positive Findings

Vaginitis + - _____

Acute Cervicitis + - _____

Adnexal Mass or Tenderness + - _____

Uterus: Estimated Uterine Size _____

(Wks from LMP)

Anterior Midposition Posterior

Carbocaine 1%_____cc Pitressin 2.5 units/5 units

Dilation: Yes to ___Fr. No

Cannula: ___mm BERKLEY KARMAN

Material Aspirated _____

_____

Blood Loss: _____cc Perforation + -

Tissue to Pathology + - Rush + -

Comment: _____

_____

Complications: + - (comment below)

_____

_____

Patient state during Procedure _____

Notes and Comments _____

Impression: _____

_____

_____

Plan: _____

ORDERS FOR RECOVERY AND DISCHARGE

Methergine 0.2 mg. I.M. _____

Methergine 0.2 mg. P.O. _____

Doxycycline 200 mg. P.O. _____

Acetominophen 1000 mg. P.O. _____

Ibuprofen 400 mg. _____

Other _____

Return for Pregnancy test 2 weeks Yes No

Ectopic Precautions Yes No

Signed _____M.D.

Time In _____ Time Out_____

Procedure Counselor: _____

RECOVERY ROOM

Hour		
Blood Pressure		
Pulse		
Bleeding	N Sm Mod Hvy	N Sm Mod Hvy
Pain/Cramps	N M M S	N M M S

Allergies: No Yes _____

Previous Medication Dosage Route & Site Time By

1.

Medication Administered	Dosage	Route & Site	Time	By
1.Doxycycline	200mg.	P.O.		
2.Ibuprofen	400mg.			
3.				
4.				
5.				

Medication Dispensed Dosage Amount By

1. _____
2. _____
_____

Excuse needed for_____ Yes No
No. of days___Given Yes No

Transportation:
Car Cab Bus Train Plane Walk
Other____
By Self With Family/Friend

Emotional Condition:
Interacts openly Composed Withdrawn Upset
Referred for Personal Counseling

Physical Condition:
No problems Cramps: Mild Moderate Severe
Other_____

_____ M.D.
Time of Discharge _____AM/PM
Signed _____RN/LPN
Signed _____RN/LPN

WOMEN'S HEALTH SERVICES, INC.
CONTRACEPTIVE CLINIC

Patient Name _____ Patient Number___

Put an (X) in the appropriate column for each of the following you have had *only since your last visit to the Women's Health Services, Inc.*

* * *

Patient Name _____ Patient Number___

Visit # Date Visit # Date

Chief Complaint:	Chief Complaint:
History:	History:
Temp. BP P Wt. LMP	Temp. BP P Wt. LMP
Thyroid:	Thyroid:
Breasts:	Breasts
Heart:	Heart:
Lungs	Lungs
Abdomen:	Abdomen:

Pelvic: Vulva	Pelvic: Vulva
Vagina	Vagina
Cervix	Cervix
Corpus	Corpus
Adnexa	Adnexa
Rectal	Rectal
Extremeties:	Extremeties:
Tests: PAP GC	Tests: PAP GC
Wet Prep	Wet Prep
Other	Other
Impression:	Impression:
Plan:	Plan:
Contraception:	Contraception:
Next Appointment: Wks. Mos.	Next Appointment: Wks. Mos.
RN/PA M.D.	RN/PA M.D.

* * *

CONSENT FOR ABORTION

I hereby authorize a Staff Physician to perform upon me a VACUUM ASPIRATION ABORTION, including all the medical aspects, which have been explained to me.

I consent to the administration of anesthesia to be applied by or under the direction of the staff physician, and to the use of such anesthetics as s/he may deem advisable.

In the course of the abortion if any unforseen condition arises which, in accord with good medical practice, calls for procedures in addition to or different from those contemplated, I further request and authorize the staff physician to perform such procedures, and to administer any medication which s/he may deem advisable and to have me admitted to a hospital facility.

I understand it is my responsibility to bring to the attention of Women's Health Services, Inc. any unusual symptoms following the abortion and to report for check-ups and pregnancy tests as recommended.

I understand the nature and purpose of an abortion by vacuum aspiration. I understand that there are other abortion techniques. I understand the alternatives to abortion, including childbirth and adoption. I understand the risks involved with an abortion, and the possibility of complications and detrimental physical and psychological effects which may occur. These include, by way of illustration and not limitation, hemorrhage, infection, perforation, hematometra, cervical damage, incompleteness as well as the possible need for further surgery (e.g. laparoscopy, laparotomy, hysterectomy, removal of tubes and ovaries), possible sterility and fatality. All of these matters have been fully explained to me.

I authorize Women's Health Services to dispose of all fetal tissue in accordance with state and federal laws.

I CERTIFY THAT THIS ENTIRE ABORTION CONSENT HAS BEEN READ TO ME AND THAT I HAVE READ OR HAD THE OPPORTUNITY TO READ THE ENTIRE CONSENT FORM AND THAT I UNDERSTAND THE ABOVE CONSENT FOR ABORTION AND THE THE EXPLANATIONS HEREIN REFERRED TO WERE MADE.

Date_____ Time_____

Signature of Patient _____

Signature of Person authorized to give consent, if not patient _____

Relationship to Patient _____

Signature of Physician _____

Signature of Witness _____

ECTOPIC PRECAUTIONS

I certify that I have received a copy of the sheet listing the precautions for possible extopic pregnancy, have read it and understand the importance of the medical follow-up. Date_____

Signature of Patient _____

Alternate contact person in addition to myself:

_____

Relationship _____

Phone Number _____

Signature of Witness _____

EARLY ABORTION SPECIAL INSTRUCTIONS

I certify that I ahve received a copy of the sheet describing the special instructions for early abortion patients, have read it and understnad the importance of the medical follow-up. Date _____

Signature of Patient _____

Alternate contact person in addition to myself:

_____

Relationship _____

Signature of Witness _____

POST ABORTION INSTRUCTIONS

I certify that I have received a copy of the sheet describing instructions for after the abortion, have read it and understand the importance of the medical follow-up

Date_____

Signature of Patient _____

Signature of Person authorized to give consent, if not patient:

_____

Relationship _____

Phone Number _____

Signature of Witness _____

CONSENT FOR ORAL CONTRACEPTION

I have received and agreed to read the patient information enclosure regarding oral contraceptives distributed by the manufacturer. I understand that it is my responsibility to bring to the attention of Women's Health Services, Inc. any unusual symptoms and to report for check-ups as recommended. I CERTIFY THAT I HAVE READ (OR HAD READ TO ME) AND FULLY UNDERSTAND THE ABOVE CONSENT TO CONTRACEPTIVE SERVICES AND SUPPLIES, AND THAT THE EXPLANATIONS HEREIN REFERRED TO WERE MADE. Date_____

Signature of Patient _____

Signature of Person authorized to give consent, if not patient:

_____

Relationship to patient _____

Phone Number _____

Signature of Witness _____

I do hereby consent to have Women's Health Services, Inc. provide to me the service noted below.

Date_____Gynecological Exam
Signature of Patient_____
Date_____Antibiotic Therapy
Signature of Patient_____
Date_____Lamicel Insertion
Signature of Patient_____

FINANCIAL PAGE

Insurance Company _____
Insurance Address_____
Agreement # _____
Group # _____
Subscriber_____
Sub. Employer _____
HMO Center _____
HMO MR# _____
HA Family I.D.# _____
MA # _____
Line # _____R.C._____
State _____
Exp. Date_____ D.D._____
_____ D.D._____
_____ D.D._____
_____ D.D._____
_____ D.D._____
MC/Visa# _____
Sub. Name _____
Exp. Date _____
_____

Defendants' Exhibit 8:
WHS Advertisements

The Pittsburgh Press

Ask a friend

"I was very pleased with the professionalism and personal treatment. I would refer any of my friends to WHS."

About Women's Health Services
"Counseling Services for Men & Women"
"PMS Program--Abortion Services--Gyn Care"
Fulton Building ■ 107 6th St.
Downtown Pittsburgh
(412) 562-1900

* * *

WAMO 1500 Chamber of Commerce Bldg.
FM 106 Pittsburgh, Pennsylvania 15219-1905
(412) 471-2181

WOMENS HEALTH SERVICES .....

IF YOU'RE CONCERNED ABOUT AN UNPLANNED PREGANCY...HELP IS JUST A PHONE CALL AWAY....562-1900. WOMENS HEALTH SERVICES....FULTON BLDG...DOWNTOWN OFFERS YOU HELP IN MAKING DECISIONS ABOUT YOUR LIFE. WOMENS HEALTH SERVICES HAS A HIGHLY

SKILLED GYNECOLOGICAL STAFF AND A COUNSELING STAFF AND YOUR VISIT WILL BE KEPT COMPLETLY CONFIDENTIAL. IF THE PIECES OF THE PUZZLE DON'T QUITE FIT...LET WOMENS HEALTH SERVICES HELP....OUR PHYSICIANS PROVIDE SKILLED MEDICAL CARE AND YOU'LL BE TREATED IN A REASSURED AND COURTEOUS MANNOR. FOR A GYN APPOINTMENT..OR ANSWERS TO QUESTIONS ABOUT AN UNPLANNED PREGNANCY CALL THE PHONE STAFF AT 562-1900....BETWEEN 8 and 5PM ...MONDAY THRU FRIDAY....SATURDAY 8 to 4PM.....WOMENS HEALTH SERVICES...IN THE FULTON BUILDING ...DOWNTOWN.....FREE PREGNANCY TESTING IS AVAILABLE DAILY. FOR MORE INFORMATION CALL WOMENS HEALTH SERVICES AT 562-1900.....HELP IS JUST A PHONE CALL AWAY.

* * *

THE CAMPUS
OF ALLEGHENY COLLEGE

Ask a friend

"Everyone treated me nicely. I felt comfortable and relaxed. the procedure was explained step by step. I liked that."

About Women's Health Services

Where Experience Makes A Difference
Early & Later Abortions--Confidential Counseling
Fulton Building ■ 107 6th St.
Downtown Pittsburgh

1-800-323-4636

* * *

Phone Listing:

ABORTION SERVICES DIVISION OF WOMEN'S HEALTH SERVICES INC

1st & 2nd Trimester Abortions in a comfortable setting. Highest medical standards.

107 6 St Pittsburgh PA
Toll Free Dial "1" & Then--800 426-4636

Defendants' Exhibit 9:
Excerpts from Planned Parenthood of Southeastern Pennsylvania (PPSP) Center Policy and Procedure Manual

• • •

C. Counseling and education.

1. All pregnancy test clients will receive appropriate options counseling if desired by patient. Intensive counseling may be scheduled for a separate visit if deemed necessary by client and counselor.

2. The purpose of pregnancy counseling and referral is to support a woman in clarifying and achieving her immediate reproductive goal. All applicable alternatives (parenting, adoption, foster care, infertility testing, pregnancy termination, contraception) will be presented in an unbiased manner. As a result of the counseling session, the patient should understand:

a. Her alternatives, including description and approximate cost of services, and time constraints.
b. Advantages and disadvantages of her alternatives.
c. Specific resources for reaching her goal, including the support of her partner, friends and/or family, medical care, financial aid, transportation, bilingual services, counseling and education.
d. Methods of contraception available if found to be not pregnant.
e. What to do in an emergency.
f. Information about the accuracy of the test.

3. All counseling is confidential (within legal limitations) and will be conducted in privacy.

a. Results should be given to the woman alone and the partner or significant other brought in if desired by her.

4. Every patient age 17 and younger who is making a decision concerning a positive pregnancy test shall be encouraged to talk to a parent or an alternative adult.

5. Every patient should be given the opportunity to consider:

a. Clinical information with regard to her gestation of pregnancy.
b. Any aspect of her medical evaluation which pertains to the options available to her.
c. Review of contraceptive history and plans.
d. Options available for continuing or terminating a pregnancy, including appropriate referrals.
e. Potential effect each option suggests for the future.

6. A Consumer Feedback Form (#54) must be given to each patient referred for abortion services.

a. Request the patient return the Consumer Feedback Form within six weeks.

7. Document that pregnancy alternatives were discussed.

8. Pregnancy options counseling may be offered without testing if woman brings written results of a positive pregnancy test done elsewhere. Women who have used home pregnancy tests should have

another test done at the Center.

D. Referrals.

1. Prenatal care and delivery.
   a. A minimum of two direct service referrals must be provided.
   b. The CHOICE Hotline can be given as an additional resource.

2. Adoption and foster care.
   a. Provide the patient with appropriate referrals.

3. Abortion.
   a. A minimum of three referral sources is given from the approved Referral Lists (#55a and 55b) as indicated and available.

4. Up to date information is maintained at each site regardinq social services, Medicaid, drug abuse programs, as well as all medical referrals.

5. Document all counseling, advice, and referrals on the medical record.

6. Consumer Feedback form (#54) is given to patient to be completed and mailed back to PPSP center.

E. Counseling personnel.

1. Personnel suitable for pregnancy options counseling
   a. Physicians, clinicians, Center Managers, Center Assistants, social workers, and selected, trained and appropriately supervised volunteers.

2. Qualifications of counseling personnel.
   a. The ability to respect, understand and empathize with the woman as an individual.
   b. A sincere belief in the right of the woman to make her own decision after she has explored all the options.

3. Training of counseling personnel.
   a. The counselor must have a complete knowledge of the facts regarding abortion. These include:
      1) The facts about relative risks of early abortion as opposed to late abortion;
      2) Availability of services;
      3) Facility evaluation;
      4) Cost of services.
   b. Counselors must be thoroughly knowledgeable about all methods of contraception and community-wide contraceptive services.
   c. Counselors must have knowledge regarding facilities for prenatal care.
   d. Counselors must have knowledge regarding the necessary procedures for adoption and the location of adoption agencies.
   e. Counselors must have knowledge regarding the availability of insurance coverage or other reimbursement for abortion, and prenatal care and delivery.
   f. Counselors must have knowledge of the availability of psychiatric consultation which may be requested or which may be medically advisable.
   g. Counselors must be familiar with ail legal requirements for sterilization procedures which may be requested in conjunction with abortion.

• • •

K. Procedure for Center Assistant/Counselor.

1. Each patient will be seen individually by a Center Assistant/Counselor. Counselors will pick up charts, so keep completed charts in order. Keep Center Manager informed of unusual situations that may need special attention or patients with potential problems.

2. Have on hand:
   a. Pap slips.
   b. GC slips.
   c. Serology slips.
   d. Medical and information forms.
   e. Several pens.
   f. Pencil.
   g. China marker.

3. Greet patient and take her to counseling office. Explain your role as it relates to patient visit and Center procedure. The counselor performs role of advocate, assistant, and support to the patient.

4. Review patient's medical history (#16) with her. Make special note of potential problems and consult with appropriate staff as needed. Be sure all forms are completed.

5. Discuss patient's decision to have an abortion and provide opportunity for her to explore feelings. Let her know other options are available and you can provide her with referrals. Involve others accompanying client to facility, if appropriate. Support person can be included in procedure room

if, in staff's judgement, their involvement would be supportive to the client.

6. Explain, answer questions, discuss the abortion fact sheet (#21), including risks, and consent (#18). Have client sign and witness. Must be able to give informed consent.

7. Review birth control methods (#42) and discuss patient's choice. Have patient sign contraceptive consent and witness.

8. Review "safer sex" practices.(#99)

9. Review possible medical concerns with Center Manager, medical support staff, and physician prior to the procedure.

10. Ascertain that slips for GC and Pap have been completed and are in the patient's chart. Label Pap slides, GC plates with client name, date, and specimen number if appropriate. Be sure all specimen numbers have been recorded on lab sheet in chart.

11. Record results of pregnancy test, urine dipstick, hematocrit, and Rh factor on lab sheet in chart.

12. Record drug allergies and significant medical problems in red on outside of chart.

13. Provide a written social history in patient's record reflecting the counseling session. The followinq questions can be used in evaluating the abortion counseling session:

   a. Do I feel I have a clear picture of the

woman's intellectual and emotional status in regard to her abortion decision?
b. Are there conflicts between her emotional and intellectual status on the abortion decision?
c. Who else is involved in decision-making and what are their reactions? Does this woman have support for her decision?
d. If the woman decided alone, how did she reach the decision to do so and what are her feelings about it?
e. What are her contraceptive plans for the future?
f. Were there other problems, i.e. relationship, sexuality that were dealt with?
g. How will she react post-abortion? Does she desire future counseling services?
h. Is she clear in regard to the abortion procedure?
i. For extended first trimester procedures, follow all of the above steps plus:

1) Explain laminaria insert procedure plus possible complications.
2) Have patient sign laminaria consent (#90) and witness.
3) Schedule abortion appointment for the following day and review pre-abortion instructions.

* * *

Defendants' Exhibit 10:
Excerpts from PPSP
Request for Abortion Form

Planned Parenthood Southeastern Pennsylvania

Request for Abortion

Name _____

Address _____ Birth Date _____

I have received from Planned Parenthood a fact sheet containing detailed information on the nature and purpose of an abortion, the risks involved, and the possibility of complications. I have read the fact sheet which has been explained to me, and which I understand. I have had all my questions answered. I also understand that a doctor is available to answer any additional questions I may have. No guarantee or assurance has been made to me as to the results which may be obtained and I am aware, on the basis of the fact sheet and the explanation I received, of the risks involved in an abortion and the possible complications.

I hereby request that a doctor authorized by Planned Parenthood perform an abortion upon me if s/he, in her/his medical judgment approves the performance of the abortion. If any unforeseen condition arises in the course of the abortion calling in her/his judgment for procedures in addition to or different from those contemplated, I further request and authorize her/him to do whatever s/he deems advisable to protect my health and welfare.

I consent to the administration of a local anesthetic. To my knowledge, I am not allergic to any anesthetics.

I hereby give my permission to the employees of Planned Parenthood Southeastern Pennsylvania and others authorized by them to use information contained in my medical record for statistical purposes, with the understanding that confidentiality will be maintained.

Signature _____ Date_____

I witness the fact that the patient received, read, and said she understood the fact sheet.

Witness _____

[ ] **Physicians must sign only for minors under the age of 18 without parental consent:**

I have discussed with the patient the abortion she has requested and I believe she is sufficiently mature and intelligent to understand the nature and consequences of her condition and of the procedure. I believe that the abortion she has requested is in her best interest.

Physician _____

Defendants' Exhibit 11:
Excerpts from PPSP Fact Sheet

Facts About Early Abortion

What It Is

A surgical procedure to end a pregnancy within 14 weeks from the first day of the last menstrual period.

How It Is Done

The standard method is vacuum aspiration (suction curettage):

1. A local anesthetic is injected into or around the cervix (the lower part of the uterus). You may notice stinging or pressure, which goes away quickly. Some women don't feel anything.

2. The opening of the cervix is stretched slowly by a series of narrow rods (dilators), each a little wider than the one before. The largest dialator may be about as thick as a fountain pen. You may feel strong cramping during this part of the procedure.

3. When the cervical opening is wide enough to admit it, a cannula (a hollow plastic tube) is inserted into the uterus. This tube is attached to a suction machine, which is then turned on. You may notice a pulling or tugging feeling at this time.

4. After the uterus has been emptied by gentle suction, an ordinary spoon-shaped curette may be used to make sure that the uterus has been

emptied.

Possible Problems

As with any kind of surgery, complications can occur with early abortion. Early abortion by vacuum aspiration is, however, very safe. Fewer than 1 woman in 100 will have a serious problem, including but not limited to:

Infection

Infection is caused by germs from the vagina and cervix getting into the uterus. The risk of infection related to early abortion is less than 1 in 100 cases. Such infections mostly respond to antibiotics, but, in some cases, a repeat vacuum aspiration or hospitalization is necessary. Surgery may also be required. You can decrease your chances of developing an infection by *not* having intercourse until after your post-abortion exam and *not* inserting ANYTHING into your vagina, including tampons.

Bleeding

Bleeding from the uterus heavy enough to require treatment occurs less than 1 in 1,000 cases. This bleeding problem may require medications to help the uterus contract, a repeat vacuum aspiration or dilation and curettage, or rarely, surgery.

Cervical Tear

The cervix sometimes is torn during the procedure. This happens in less than 1 in 100 cases. Stitches may be required to repair the injury.

Incomplete Abortion

Sometimes, the contents of the uterus may not be quite emptied. The frequency of this event is less than 1 in 100 cases. This problem can lead to

infection, hemorrhage, or both. To remove the tissue, it may be required to repeat the vacuum aspiration or perform a dilation and curettage at the clinic or in a hospital. In rare instances, surgery may be required.

Perforation

Rarely, an instrument may go through the wall of the uterus. This event happens in about 2 per 1,000 cases. Should this happen, hospitalization is often required for observation and/or completion of the abortion. To inspect the condition of the uterus in this state, a small telescope (laparoscope) is inserted through the navel. Sometimes, an abdominal operation is required to repair the damage. This can include hysterectomy (removal of the uterus), which makes it impossible to have children. The frequency of hysterectomy in this setting is about 1 in 10,000 cases.

Failure to Terminate the Pregnancy

Once in a while, the early abortion procedure will not end the pregnancy. The chance of this event is about 2 per 1,000 cases. This possibility is one reason that a post-abortion examination is essential. In such cases, another abortion procedure is suggested, since the first attempted abortion can harm normal development of the pregnancy. The other possibility is that a tubal (ectopic) pregnancy may exist, which requires an abdominal operation to remove.

Death

Early abortion is one of the safest operations in all of medicine. Information from the Centers for Disease Control (CDC) shows that the risk of death

from an early abortion is about 1 per 100,000 cases. In contrast, the risk of death related to tonsillectomy is about 3 deaths per 100,000 cases. The risk of a woman dying from full-term pregnancy and childbirth is at least 7 times greater than that from early abortion.

Anesthesia Reaction

Some women may be allergic to novocaine derivatives. If you know this, it is important to tell the doctor.

Effect of Abortion on Future Wanted Pregnancies

At this point there is no clear proof that one early abortion carries any risk to future pregnancies. Some studies have shown that women who have had two or more such abortions may have an increased risk of premature births or miscarriages in future pregnancies. Different studies have shown otherwise.

Emotional Reactions

Strong feelings after abortion are common, and when they happen they mostly go away quickly. Most women report a sense of relief, although some feel depression or guilt. Serious psychiatric disturbances (such as psychosis or serious depression) after abortion appear to be less frequent than after childbirth.

Deciding whether or not to have an abortion is a very private matter. You need to be sure and comfortable that having an abortion is what you want to do, even if it is a hard decision to make.

Defendants' Exhibit 13:
Excerpts from Guidelines of
Women's Suburban Clinic (WSC)

Guidelines of Women's Suburban Clinic (WSC)
Protocol

OPTIONS COUNSELING/REFERRAL

I. *ELIGIBILITY:* Any woman who has

- -- a positive pregnancy test
- -- requests options counseling at WSC
- -- is eligible for options counseling.

II. *INTAKE:*

-- An appointment card is used for information on options counseling clients (see forms).

-- This card is completed as described in abortion intake procedures except that the medical history is not necessarily taken (if medical history is not taken this is noted in pencil on front of card).

-- Appointments are scheduled during the counselor's assigned times, as designated in the appointment book.

-- Options counseling clients are NOT given a "Disclosure of Risks, Benefits, and Alternatives to Abortions" to read after they return their medical history to the front desk.

• • •

V. *DISPOSITION:*

-- If a client chooses to have an abortion, she can be scheduled for an appointment at WSC or referred to another appropriate facility (see Referral Counseling). If a woman chooses to have an abortion at WSC, the appointment should not be made for the same day as the option counseling.

-- If a woman chooses to continue the pregnancy, the counselor may make a referral to appropriate community resourses (Examples: Pre-natal Care or Adoption Informatian).

-- Options Counseling Notes will be recorded by the counselor (see forms-Appendix B).

• • •

ABORTION AND SUPPORT SERVICES

VII. *COUNSELING*

The individual counseling is provided to all women who come to WSC for abortion services (see Counseling Standards). This counseling, usually done on the same day as the abortion, is <u>not</u> offered for the purpose of exploring pregnancy (see Options Counseling), although alternatives may be discussed. Rather, this counseling session assumes that the decision to abort has been carefully thought out prior to the session. The objectives of this session

are clearly defined under "Objectives" in the Counseling Standards section of the WSC Guidelines.

If, in the process of the session, the counselor determines that the client has not clearly decided to abort, he/she will suggest that the client not proceed with the abortion that day. The counseling session then procedes under the protocol for "Options Counseling, with the abortion (if chosen) being rescheduled for another day.

• • •

c. *The Counseling Session:* The pre-abortion session flows according to the clients needs and questions. The client's partner or other accompanying person is also encouraged to accept information, ask questions, and explore feelings at WSC. These "signifigant others" may be invited to joinq the counseling session, but only after the women has seen the counselor alone, thus giving her the opportunity to discuss any private concerns. (see also, Counseling Signifigant Others).

• • •

E. *Limitations and Referrals:* The counselors role is to discuss the clients' concerns primarily regarding the abortion decision. For those women who display a need for further counseling or assistance which is non-abortion related, the counselor may refer the client to an appropriate agency or individual. A resource book is maintained by WSC under the supervision of the head counselor. The Resource Book includes numerous community resources.

F. *Counseling Signifigant Others:* Any person who accompanies a client to WSC is offered the opportunity and is encouraged to see a counselor. This may include the client's partner, her parents, and/or any "Signifigant Other". The counselor may see the Signifigant Other with the client, or after the clients' counseling session. This is left up to the discretion of the client and the counselor.

• • •

Defendants' Exhibit 14:
WSC Disclosure of Risk, Benefits and Alternatives Form

WOMEN'S SUBURBAN CLINIC

DISCLOSURE OF RISKS, BENEFITS AND ALTERNATIVES

Because abortion is a form of minor surgery, which, like all surgery, has certain statistical risks, it is the policy of Women's Suburban Clinic to provide detailed information regarding the risks, benefits and alternatives to abortion so that you can make a clear and conscious choice.

Alternatives: The alternative to ending a pregnancy is to continue it to term and birth. This usually leads to parenthood or adoption. Pregnancy and childbirth have some medical and psychological risks. Both the benefits and risks of parenthood and adoption should be carefully considered before deciding upon an abortion.

Benefits: The benefits of early abortion depend upon the individual. Abortion permits the planning of parenthood. Abortion eliminates the decision between parenthood and adoption.

Risks: 96% of all early abortions take place without any complications at all. Complications associated with abortion are generally less frequent than with childbirth. In childbirth some 15 to 20 out of 100,000 women do not survive. Abortion is 5 to 10 times safer.

Below is a list of possible complications to abortion. You will be asked to sign a consent form indicating that you understand these risks before you have an abortion.

Please read this form carefully so that you understand that we cannot guarantee that the results obtained from an abortion will always be perfect. Complications may occur and require further treatment. A member of Women's Suburban Clinic staff is on-call 24 hours a day for consultation; and we will assume financial responsibility for treatment of all medical (not psychological) complications to abortion if such treatment is given at or recommended by Women's Suburban Clinic.

Medical Risks:

a) Risk of Infection: In approximately 1 in 100 cases, minor or possible major infections can occur after an abortion. Antibiotics are necessary to treat these infections and, very rarely, infections may lead to reduced fertility.

b) Incomplete Abortion: Sometimes all of the tissue may not be removed during the abortion. This happens in approximately 1 in 100 cases, and may lead to infection unless treatment is begun soon or the abortion is redone.

c) Continued Pregnancy: In as many as 1 in 100 cases, a woman may still be pregnant after an abortion. This may be due to multiple pregnancies (i.e. twins), a double uterus, or a pregnancy in the tubes (ectopic pregnancy). A failed abortion may be detected by follow-up exam and pregnancy test after which the abortion can be redone. A tubal or ectopic pregnancy is difficult to detect and will require a hospitalization and surgery.

d) Bleeding or Hemorrhage: Heavy bleeding immediately or shortly after an abortion may happen in a very small number of cases. This requires evaluation and treatment, which depends upon the cause of the bleeding.

e) Perforation or Laceration: Very rarely an instrument may tear the cervix or puncture the wall of the uterus. These cuts will generally heal themselves, with no treatment, but occasionally they may require hospitalization or surgery.

f) Anesthetic Reaction: Anesthetics do not always eliminate all pain. In very rare instances, local anesthetics cause extremely severe reactions, including convulsions or cardiac arrest.

Psychological Risks:

Sometimes women express negative feelings after having had an abortion. These feelings may include a sense of loss, guilt, regret or sadness.

The likelihood of your experiencing these feelings depends on many factors including your feelings about abortion, your religious convictions, your cultural and social norms, and the support you receive from your family and friends.

You will have the opportunity to discuss these factors with a counselor before the abortion to reduce the likelihood of their causing negative feelings later. If negative feelings do occur, you may return to Women's Suburban Clinic for counseling and/or referral for more involved therapy.

Defendants' Exhibit 17:
WSC Information Prior to Consent/
Certification by Patient Form

INFORMATION PRIOR TO CONSENT

I, _____, certify that on _____, 1988, I orally informed _____ prior to her consenting to an abortion, of the nature of the proposed procedure and treatment of abortion and of the risks and alternatives to abortion or treatment that a reasonable patient would consider material to the decision whether or not to undergo the abortion.

_____ physician

_____ qualified physician assistant

_____ health care practitioner

_____ technician delegated by either physician

CERTIFICATION BY PATIENT

I, _____, certify that prior to my consenting to an abortion at the Women's Suburban Clinic, the person who has signed the above statement called INFORMATION PRIOR TO CONSENT ' told me about the nature of the proposed procedure and treatment of abortion and of the risks and alternatives to abortion and treatment.

Date: _____, 1988

_____
patient

Defendants' Exhibit 18:
WSC Parental Involvement Form

Parental Involvement

I, _____, have carefully considered with the counselor the possibility of involving my parents or guardians in my decision to terminate my pregnancy. However, I choose not to do so. I understand that if, during my abortion, I have any complications which hospitalization, the hospital may choose to call my parents. On the medical history form, I have given Women's Suburban Clinic the number where my parent can be reached in case of emergency.

_____
Client's Signature

or

I am the parent/guardian of _____ and I am aware of her decision to abort.

_____
Signature

or

My parent/guardian is aware of my decision to abort, but could not be present today. I have given Women's Suburban Clinic a number where my parent can be reached in case of emergency.

_____
Client's Signature

Defendants' Exhibit 19:
WSC Physician's Certification Form

PHYSICIAN'S CERTIFICATION

I certify that prior to the abortion I had a private medical consultation with the above client and determined that in my best clinical judgment the abortion was necessary.

Signature of Physician

Defendants' Exhibit 20:
WSC Protocol Regarding Minors

II. STANDARDS

D. Protocol Regarding Minors

1. It is one of the underlying philosophies of Women's Suburban Clinic that all women *capable of informed consent* be provided the opportunity to "choose". These choices involve the decision regarding an unplanned pregnancy, the decision regarding whom they choose to inform about their pregnancy and what method of birth control they choose to use. As with any woman, this philosophy also pertains to minors. However, in the case of a minor (any woman under 18 years of age), the issue of whom she chooses to inform or not inform is carefully explored.
2. For any minor who at the time of scheduling her abortion has not informed one of her parents of her decision, the following will occur:
   a. Anyone under 18 years of age whose parent(s) do not know about her decision to have an abortion is *strongly encouraged* to come to Women's Suburban Clinic for precounseling. The reason for this is to allow the counselor on opportunity to explore more fully with the young woman her feelings regarding involving her parent(s). Further, a pre-counseling session would allow the teenager time to discuss her pregnancy with her parent(s) in the event that after counseling she chooses to do so. If the young woman chooses not to involve her parent(s) the counselor would then want to

explore other people (siblings, other relatives, or friends) who could provide a support system. It is ultimately the right of this teenager to decide whom, if anyone, she wants to involve. In all cases the minor will be asked on her Medical History form the name of her parent or guardian, and how to contact them in the event of an emergency.

3. For those minors who choose not to inform their parent(s) it is the role of the Women's Suburban Clinic staff, as with all clients, to review and educate them regarding how to take a temperature and read a thermometer, what is considered a complication, and what to do in the event that a complication occurs.
4. All minors will be asked to complete a parental involvement form at the completion of counseling.

Defendants' Exhibit 26:
Excerpts from Reproductive Health and Counseling Center (RHCC) Consent Forms

* * *

INFORMATION PRIOR TO CONSENT

I, _____, certify that on _____, 19__, I orally informed _____ prior to consenting to an abortion, of the nature of the proposed procedure and treatment of abortion and of the risks and alternatives to abortion or treatment that a reasonable patient would consider material to the decision whether or not to undergo the abortion.

_____ PHYSICIAN	_____ QUALIFIED PHYSICIAN ASSISTANT
_____ HEALTH CARE PRACTITIONER	_____ TECHNICIAN DELEGATED BY EITHER PHYSICIAN (COUNSELOR)

CERTIFICATION BY PATIENT

I, _____, certify that prior to my consenting to an abortion at the Reproductive Health and Counseling Center, the person who has signed the above statement called "Information Prior To Consent" told me about the nature of the proposed procedure and treatment of abortion and of the risks and alternatives to abortion and treatment.

_____, 19_____
DATE PATIENT

• • •

PHYSICIAN'S CERTIFICATION

I, _____, hereby
Patient's Signature

acknowledge that I will have a private medical consultation with Dr. _____. I have just cause to terminate this pregnancy because of the following reason:

___ Physical

___ Emotional

___ Psychological

___ Familial

___ Age

I, _____,

M.D. through a private medical consultation, do hereby certify that to the best of my clinical judgment this abortion is necessary.

• • •

After careful consideration I have decided:

1) I will not inform my parents of my decision to terminate my pregnancy.

(2) Parent(s) are aware of my decision, but are unable to be here today.

I understand that while I am a patient of the Reproductive Health and Counseling Center that all reasonable measures will be taken to maintain my confidentiality. However, if it is necessary for me to be hospitalized at any time during or after my care here, the hospital may choose to notify my parents about any treatment they may give me.

_____
Name

_____
Date

_____
Witness

Defendants' Exhibit 30:
RHCC Advertisements

REPRODUCTIVE HEALTH AND COUNSELING CENTER

- first and second trimester abortion services
- general & local anesthesia
- Routine gynecology care
- pregnancy testing
- counseling services
- vd screening
- vasectomy service

Quality reproductive health care . . .

ALL SERVICES HELD IN STRICT CONFIDENCE!

Call 874-4361

(Crozer Chester Medical Center Annex)
15th & Upland Av Chester, Pa.

Defendants' Exhibit 32:
Allentown Women's Center (AWC)
Counseling Checklist

COUNSELING CHECKLIST

1) Determine that patient has a clear decision to terminate pregnancy, knows options, and determine a log reasons for abortion (ie: financial, emotional, age, timing factor, life circumstances, medical, doesn't want children or any more children).

2) If first pelvic exam, prepare patient.

3) Explain procedure, discuss pain management, assuage fear, empower patient.

4) Obtain informed consent, explain risks.

5) Review medical history and flag problems, discuss if abnormal menstrual period.

6) Explore birth control - pursue and explain only if patient desires the information

7) Have patient sign appropriate consents. Must sign abortion consent, dispensing of medication consent, and medical records release. Oral contraceptive consent must be signed only for those patients wanting to start the pill immediately.

ADDITIONAL INFORMATION REQUIRED FOR GENERAL ANESTHESIA

1) Provide complete aftercare instructions.
2) Explain how to take oral contraceptives for those patients taking then for the first time.
3) Have patient sign general aneathesia consent.
4) Obtain patient's driver's signature.

MINORS

1) Explain that if complications develop, their confidentiality may be broken.
2) Make certain minor knows all options.
3) Determine and record whether patient's parent(s) are here or know she's here. Record reason(s) why a patient chose not to tell her parents.
4) If a parent is here, the parent MUST co sign for abortion.

IMPORTANT FACTORS TO CONSIDER WHEN DOING PRE-ABORTION COUNSELING

1) Make no promises that there will be no problems now or later.
2) It is better to see patient alone, at least briefly.
3) Counseling should be organic and cover concerns patient presents. Be empathetic, nonjudgemental, and caring.
4) Body language of counselor is just as important as what she says.
5) Observe patient to make sure she's listening. Do not over inform. Her ability to process may be restricted.
6) Be nonjudgemental in recording counseling notes. (Do NOT record anything that you wouldn't want patient to read, or anything that could be used against her later, ie: court).
7) Repeat patients who have had more than one

abortion. Review risks, and concentrate efforts on encouraging effective birth control use.
8) Prepare patient for being ineligible for procedure if you suspect she could be greater that 14 weeks LMP.
9) If patient is greater than 12 weeks LMP, advise her that she may need an ultrasound.
10) If you feel uncomfortable (for any reason) counseling a particular patient, give that patient to another counselor.
11) Ambivalent patient: When you have exhausted all possible information giving and patient is still ambivalent you can give patient these options.

a) Offer patient to leave the clinic and rethink decision. Give her time that she must be back if she still wants abortion that day.

b) Have patient and significant other sit together in counseling room to discuss decision. Counsel another patient and go back to her later.

c) If you feel patient needs more time to decide, you have the right to tell her that we can reschedule her appointment for another day, that she needs more time to make her decision.

12) Time management is important with short term counseling. If you are having a problem with a counseling session, notify clinic supervisor so that patient flow won't be disturbed.
13) Take time to share, vent, and discuss counseling cases with other counselors here.
14) If you are having any problems with a client in counseling don't hesitate to have another counselor or clinic supervisor assist you with that particular client.

Defendants' Exhibit 33:
Excerpts from AWC
Confidential Patient Record Form

• • •

For patients under 18:
Who of the following knows of and consents to your abortion?
Mother_____ Father_____
Guardian _____
If they are not aware you are here, why not?
_____

• • •

PROCEDURE

Name_____ Date_____
Patient discussed need for aboriton with physician and stated it is necessary _____
Physician's Initials
BP_____ P_____ Temp._____
LMP Date_____or_____weeks LMP
Heart_____ Lungs_____ Abdomen_____
Comments _____
Pelvic Exam: Normal _____
Abnormal findings: _____
Uterus: Anterverted _____
Retroverted _____
Midposition _____
Estimated duration of gestation based on uterine size:
_____
Pap smear _____
GC culture, cervix___ rectum___ urethra___

pharynx____
Room_____ Nurse:_____
Pre-op medication: _____

OPERATIVE REPORT
Procedure Performed

Patient was placed in dorsal lithotomy position, prepped and draped in usual manner. A paracervical block was administered using ____cc of ____% _____caine. The uterus was sounded to ____cm. The cervix was dialated to a #____ dialation using gradually increasong dialators. A #____ cannula was placed in the uterus and vacuum aspiration was performed. Uterine exploration with a sharp curette followed. Estimated blood loss was ____cc. Gross examination of POC Grams_____
Normal POC_____ Other (describe)_____
Villi seen_____ Consistent with ____ weeks gestation

_____

Send specimen for microscopic pathology_____
Instructions_____

_____.

Complications:_____
_____
_____
_____
_____

Post-Operative Medication

___Immune globulin, mini-dose	___Ergotrate	___Other
___Immune globulin, full-dose	___Birth Control Pills	_____
___Pitocin	___Tetracycline	_____

Notes or comments_____
Procedure Not Performed

_____

_____

_____

Physician's Signature _____
Referral:_____

_____

Counselor Signature _____

* * *

Do not sign unless you fully understand the following.

I, _____being_____years old, request that my present pregnancy be terminated. I understand that the termination of this pregnancy (i.e. abortion) will be by vacuum aspiration and curettage as explained to me. I understand that Dr._____ or a designated associated physician will be performing the termination procedure.

I further understand and give my consent to the taking of medical tests, cultures, and smears that are deemed necessary.

I have fully and completely disclosed my medical history, including allergies, blood conditions, prior and current use of or reactions to medications and drugs. I understand that a full and complete disclosure of my medical history is important to help minimize the risks of complications which may occur with termination of pregnancy. I understand that the physician of Allentown Women's Center is relying on my disclosures as being truthful and complete.

The first day of my last normal menstrual period was____19__. I understnad that this information concerning my last period is important to the diagnosis and method of treatment, and that the physician's decision to proceed with the termination is based on the above information as well as findings from examination.

I fully understand the purpose of the procedure is to terminate my pregnancy. I know that I can continue the pregnancy, but it is my choice to end it now. No one has forced me to do so.

I consent to the administration of such local anesthesia as may be deemed necessary or advisable by my physician. I understand that local anesthetics do not always eliminate all pain, that in a small number of cases, patients can have an allergic reaction which could result in shock or even death.

I fully understand that the practice of medicine and surgery is not an exact science and that qualified physicians cannot assure the results thereof. I realize there are inherent risks of minor and major complications which many occur in this and all surgical procedures, without the fault of the physician. No guarantee has been made to me. I understand that the

surgical procedure which I am about to undertake will in all probability involve a certain amount of pain and loss of blood. I also understand that the surgical procedure which I have requested is occasionally accompanied or followed by certain complications including, but not limited to, perforation of the uterus (putting a hole through the uterine muscle), hemorrage, retainded tissue and/or infection, all of which could be severe enough to require surgery resulting in hysterectomy (removal of the uterus), and/or sterility (never being able to become pregnant again). If any of the above reactions or complication do ocurr, I further realize that I may need to be hospitalized which would be at my own expense. I realize that such complications can be caused by other medical conditions and not related to the pregnancy termination procedure, by my own failure to follow post-operative instructions, or by the treatment of the follow-up physician. I know that every effort is made to protect my confidentiality, but that if I have a medical problem that needs treatment, my confidentiality may be jeopardized.

I understand that any questions I have will be answered by my physician, nurse and/or counselor, and I will ask any questions I have before leaving. If I have any questions or complications after leaving, I agree to call the Allentown Women's Center at 215-264-5657. I realize that immediate treatment may be necessary to avoid more severe complications.

I understand the importance of post-operative follow-up care and I realize that I am responsible for scheduling a post-abortion check-up in 2-3 weeks to be certain that no medical problem has occured, that I may be unaware of, and to check that the procedure has been complete. I agree to report any and all post abortion problems to the

Allentown Women's Center, particularly fever, heavy bleeding, severe cramping or pain, or the absense of a normal period within eight weeks of the procedure.

I certify that I have read (or had read to me) and fully understand the above consent form, regarding termination of pregnancy, that the explanations therein referred to were made, and that all blanks or statements requireing insertion or completion were filled in. I further certify that all information I have supplied, in this entire record, is true to the best of my knowledge and belief.

DO NOT SIGN UNTIL YOU HAVE COMPLETELY READ AND FULLY UNDERSTAND THE ABOVE

SIGNATURE _____
WITNESS _____
DATE _____
I certify that I have explained, translated, or otherwise informed the patient of the above.
SIGNATURE _____
DATE _____
RELATIONSHIP TO THE PATIENT _____

DRUGS DISPENSED

I request that drugs not be dispensed to me in safety closure containers.
SIGNATURE _____
WITNESS _____
DATE _____

CONSENT TO ORAL CONTRACEPTIVES

I have chosen to use oral contraception as a birth control method and request the physician at Allentown Women's Center prescribe this method for me. I

understand the possible side effects to the method include severe headaches, leg cramps, blurred vision, blood clots, chest pain and stroke. I agree to report any and all side effects to Allentown Women's Center or to my own physician or clinic. I am aware that the most serious side effects of birth control pills can be fatal. I have read the information sheets and fully disclosed any risk factors in my medical history that might be contraindications to taking oral contraceptives.
SIGNATURE _____
WITNESS _____
DATE _____

CONSENT FOR RELEASE OF MEDICAL RECORDS

I give permission for release of information from my medical records from the Allentown Women's Center to my follow-up care provider and, if specified below, my referral source.

Referred by _____
SIGNATURE _____
WITNESS _____ DATE _____

Defendants' Exhibit 35:
AWC Advertisements

DONNELLY DIRECTORY

ALLENTOWN
WOMEN'S
CENTER

ABORTION SERVICES
AWAKE OR ASLEEP
EARLY PREGNANCY TESTS
GYNECOLOGICAL CARE
VD TESTING
ALL SERVICES CONFIDENTIAL

264-5657

Rt 22 & Airport Rd. Allentown

* * *

ALLENTOWN WOMEN'S CENTER
ABORTION SERVICES
AWAKE OR ASLEEP
EARLY PREGNANCY TESTING
CONFIDENTIAL COUNSELING

Rt 22 & Airport Rd Allentown
Toll Free ---- 800 372-8500

* * *

ALLENTOWN WOMEN'S CENTER--
- ABORTION SERVICES
- AWAKE OR ASLEEP
- SATURDAY HOURS AVAILABLE

Rt 22 & Airport Rd
Allentown Toll Free --- 800 372-8500

Defendants' Exhibit 36:
AWC Consent Form

I, _____, have requested an abortion at the Allentown Women's Center, although I have also stated I don't think abortion should be legally available to women.

I have been offered waiting time to reconsider my decision to abort this pregnancy. I have been offered genetic counseling, psychological counseling, and an explanation of the resources for financial and emotional support available to me to continue this pregnancy. I have been asked to consider how I expect to feel after an abortion, and urged not to take the irreversible step of terminating my pregnancy until I have fully processed the options before me.

I take full responsibility for my decision to terminate this pregnancy. I acknowledge and understand that my doctor here and the support staff are caring, responsible people who are helping me implement my voluntary, uncoerced request to terminate this pregnancy.

If in the future I ever publicly state that the Allentown Women's Center counseled me inadequately or that I was not fully aware of the gravity of what I was doing in terminating my pregnancy I understand that I will, by so doing, give up all rights to confidentiality and that the staff of the Allentown Women's Center will defend their non-directive counseling protocols publicly.

Signature _____
Date _____
Witness _____

Defendants' Exhibit 37:
Northeast Women's Center
Guidelines for Informed Consent

GUIDLINES FOR INFORMED CONSENT

I. Individual Counseling Session
  A. Exploration of all options
  B. Determination of Reason for Abortion
    1. to meet qualifications for abortion control act
    2. to assure that patient is sure of abortion decision
  C. Review of medical history to determine medical eligibility.
  D. Distribution of follow-up & after care instructions
  E. Distribution of birth control information
  F. Opertunity to explore feelings about abortion
  G. Completion of State Health Dept. form
    1. report of induced termination of pregnancy.

II. Group Counseling
  A. Explaination of abortion procedure
  B. Explaination of possible risks, and complications
  C. Explaination birth control methods.
  D. Explaination of written consent
  E. Signing of consent form
  F. Question and Answer

III. Physician Consultation
  A. Determination of reasons for abortion
  B. Question and answer period.
  C. Abortion procedure

Defendants' Exhibit 39:
Summary Compilation of Quarterly Reports

CUMULATIVE/YEARLY TOTALS: 1985 & 1986

Facilities: WHS, PPSP, WSC, AWC, RHCC

Conditions/ Indications	1985*	1986
Cardiac	59 (0.31%)	63 (0.30%)
Diabetes	27 (0.14%)	17 (0.08%)
Genetic	5 (0.03%)	5 (0.02%)
Hydatid Mole	7 (0.04%)	6 (0.03%)
Hypertension	40 (0.21%)	19 (0.09%)
Malignancy	5 (0.3%)	1 (0.005%)
Psych.	42 (0.22%)	29 (0.14%)
Radiation	11 (0.06%)	15 (0.07%)
Renal	--	--
Rubella	--	--
Incest	3 (0.016%)	23 (0.11%)
Rape	176 (0.93%)	276 (1.31%)
All Abortions	**18,999**	**21,029**

***Includes all date except 2nd Quarter of PPSP**

Defendants' Exhibit 45:
Commonwealth of Pennsylvania
Department of Health (DOH)
Abortion Facility Registration Form

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF HEALTH

ABORTION FACILITY REGISTRATION FORM

Effective April 24, 1988, every facility at which abortions are performed shall file this form within 30 days with the Bureau of Quality Assurance, Pennsylvania Department of Health, P.O. Box 90, Harrisburg, Pennsylvania 17108. Subsequent changes should be reported immediately, using this same form.

1. What is the name of your facility?

_____

2. What is the mailing address of your facility
   Street _____
   Post Office _____
   Zip Code _____

3. In what county is your facility located?

_____

4. Does your facility have any parent, subsidiary, or affiliated organizations, corporations, or associations?
   ____No ____Yes (If yes, list names and addresses below)
   a. Name_____ b.Name_____
   Address_____ Address_____

5. Does your facility have any parent, subsidiary or

affiliated organizations, corporations or associations which have contemporaneous commonality of ownership, beneficial interest, directorship or officership with any other facility? (If yes, list names and addresses below) ___No ___Yes

a. Name _____ b.Name _____
Address _____ Address _____
_____ _____

6. Registration forms filed by facilities which have received state appropriated funds during the 12 month period preceding a request to inspect or copy such forms shall be deemed public information. Has your facility received such funds? ___No ___Yes

7. Is this form an update of a previously submitted Registration Form?
___No ___Yes (List items and check type of update)
a. _____ _____ _____ _____
b. _____ _____ _____ _____
Change Add Delete

8. Date Submitted: _____
MO DAY YR

Defendants' Exhibit 46:
DOH Abortion Quarterly Facilities Report Form

COMMONWEALTH OF PENNSYLVANIA
Department of Health

ABORTIONS: QUARTERLY FACILITIES REPORT

Effective April 24, 1988, every facility in which an abortion is performed within Pennsylvania during any quarter year shall file a report with the State Health Data Center, Pennsylvania Department of Health, P.O. Box 90, Harrisburg, Pennsylvania 17108. Reports are due within 30 days of the end of the quarter.

1. Reporting Period (check one):
___Jan. 1 -- Mar. 31 ___Apr. 1 -- Jun. 30
___Jul. 1 -- Sep. 30 ___Oct. 1 -- Dec. 31

2. What is the name of your facility?
_____

3. What is the mailing address of your facility?
Street _____
Post Office _____
Zip Code _____

4. In what county is your facility located?
_____

5. How many abortions were performed in your facility in each trimester of pregnancy during the reporting period?

First Trimester: 0-14 weeks completed from the first day of last menstrual period _____

Second Trimester: 15-26 weeks completed from first day of last menstrual period _____

Third Trimester: 27 weeks or more completed from first day of last menstrual period _____

TOTAL ABORTIONS PERFORMED _____

6. Did your facility receive state appropriated funds within the 12 month period immediately preceding filing of the report? ___NO ___YES

Date Submitted _____
MO DAY YR

Defendants' Exhibit 47A:
DOH Report of Induced Termination of Pregnancy Form
(version no. 1)

FORMS MUST BE SUBMITTED TO THE PENNSYLVANIA DEPARTMENT OF HEALTH WITHIN 15 DAYS AFTER EACH REPORTING MONTH.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF HEALTH

REPORT OF INDUCED TERMINATION OF PREGNANCY

1. FACILITY NAME _____
2. COUNTY OF PREGNANCY TERMINATION

_____

3. DATE OF PREGNANCY TERMINATION (Month, Day, Year)

_____

4. PATIENT'S IDENTIFICATION

_____

5. AGE LAST BIRTHDAY _____
6. MARRIED? ___YES ___NO

7a. RESIDENCE-STATE _____
7b. COUNTY _____

8. Of Hispanic Origin? (Specify No or Yes -- If yes, specify Cuban, Mexican, Puerto Rican, etc.) ____NO ____YES Specify: _____
9. RACE

___American Indian
___Black
___White
___Other (Specify) _____

10. EDUCATION (Specify only highest grade completed)
Elementary/Secondary (0-12) _____
College (1-4 or 5+) _____
11. DATE LAST NORMAL MENSES BEGAN (Month, Day, Year) _____
12. CLINICAL ESTIMATE OF GESTATION (Weeks) _____
13. PREVIOUS PREGNANCIES (Complete each section)

LIVE BIRTHS		OTHER TERMINATIONS	
13a Now Living	13b Now Dead	13c Spontaneous	13d Induced Do not include this termination
Number __ __None	Number __ __None	Number __ __None	Number __ __None

14. TERMINATION PROCEDURES
TYPE OF TERMINATION PROCEDURES
14a. PROCEDURE THAT TERMINATED PREGNANCY
(Check only one)
__ Suction Curettage
__ Sharp Curettage
__ Dilation and Evacuation (D&E)
__ Intra-Uterine Saline Instillation
__ Intra-Uterine Prostaglandin Instillation
__ Hysterotomy
__ Hysterectomy
__ Other (Specify) _____

__ Other (Specify) _____
14b. ADDITIONAL PROCEDURES USED FOR THIS TERMINATION, IF ANY
(Check all that apply)
__ Suction Curettage
__ Sharp Curettage
__ Dilation and Evacuation (D&E)
__ Intra-Uterine Saline Instillation
__ Intra-Uterine Prostaglandin Instillation
__ Hysterotomy
__ Hysterectomy
__ Other (Specify) _____
15. MEDICAL COMPLICATIONS OF PREGNANCY
__ Rubella
__ Hydatid Mole
__ Endocervical Polyp
__ Malignancies
__ Complication resulting from termination (Specify)
16. LENGTH AND WEIGHT OF THE FETUS
(Report only if termination subsequent to 19 weeks of gestation) Length_____cm Weight_____gm
17. DID A MEDICAL EMERGENCY EXIST? (Use back of form for explanations, if needed)
___YES Explain basis for judgment:
___NO Was the fetus viable prior to procedure? (Respond only if termination subsequent to 19 weeks of gestation)
___YES Explain basis for determination that the abortion is necessary, and the reason for selected termination procedure:
___NO Explain basis for determination of non-viability:
18. REFERRING PHYSICIAN, AGENCY, OR SERVICE (If any)
NAME _____

19. ATTENDING PHYSICIAN
Name _____
Licence Number _____
SIGNATURE AND DATE SUBMITED
_____Mo.__ Day__Yr.__

Defendants' Exhibit 47B:
DOH Report of Induced
Termination of Pregnancy Form
(version no. 2)

FORMS MUST BE SUBMITTED TO THE PENNSYLVANIA DEPARTMENT OF HEALTH WITHIN 15 DAYS AFTER EACH REPORTING MONTH

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF HEATLH

REPORT OF INDUCED TERMINATION OF PREGNANCY

1. FACILITY NAME
2. COUNTY OF PREGNANCY TERMINATION
3. PATIENT'S IDENTIFICATION (Do Not Use Patient's Name)
4a. RESIDENCE-STATE
4b. COUNTY
5. DATE OF PREGNANCY TERMINATION (Month, Day, Year)
6. AGE AT LAST BIRTHDAY
7. CLINICAL ESTIMATE OF GESTATION (Weeks)
8. PREVIOUS PREGNANCIES (Complete each section)

LIVE BIRTHS	OTHER TERMINATIONS

8a Now Living	8b Now Dead	8c Spontaneous	8d Induced (Do not include this termination)
Number __ ___None	Number __ ___None	Number __ ___None	Number __ ___None

9. TERMINATION PROCEDURES
TYPE OF TERMINATION PROCEDURES

9a. PROCEDURE THAT TERMINATED PREGNANCY

(Check only one)

__ Suction Curettage
__ Sharp Curettage
__ Dilation and Evacuation (D&E)
__ Intra-Uterine Saline Instillation
__ Intra-Uterine Prostaglandin Instillation
__ Hysterotomy
__ Hysterectomy
__ Other (Specify) _____

9b. ADDITIONAL PROCEDURES USED FOR THIS TERMINATION, IF ANY

(Check all that apply)

__ Suction Curettage
__ Sharp Curettage
__ Dilation and Evacuation (D&E)
__ Intra-Uterine Saline Instillation
__ Intra-Uterine Prostaglandin Instillation
__ Hysterotomy
__ Hysterectomy
__ Other (Specify) _____

10. MEDICAL COMPLICATIONS OF PREGNANCY

__ Rubella

__ Hydatid Mole
__ Endocervical Polyp
__ Malignancies
__ Other Complications Resulting From Pregnancy (Specify)
__ Complication Resulting From Termination (Specify)

11. ATTENDING PHYSICIAN
Licence Number

12. SIGNATURE AND DATE SUBMITTED
_____MO__DAY__YR__

Defendants' Exhibit 47C:
DOH Report of Induced
Termination of Pregnancy Form
(version no. 3)

FORMS MUST BE SUBMITTED TO THE PENNSYLVANIA DEPARTMENT OF HEALTH WITHIN 15 DAYS AFTER EACH REPORTING MONTH.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF HEATLH

REPORT OF INDUCED TERMINATION OF PREGNANCY

1. FACILITY NAME _____
2. DATE OF PREGNANCY TERMINATION

_____
(Month, Day, Year)

3. PATIENT'S IDENTIFICATION
(Do Not Use Patient's Name) _____
4. AGE LAST BIRTHDAY _____
5a. RESIDENCE-STATE _____
5b. COUNTY _____
6. DATE LAST NORMAL MENSES BEGAN

_____
(Month, Day, Year)

7. Of Hispanic Origin? (Specify No or Yes -- if yes, specify Cuban, Mexican, Puerto Rican, etc.)
__NO __YES Specify: _____
8. RACE
__American Indian
__Black
__White
__Other (Specify) _____

9. EDUCATION (Specify only highest grade completed)
Elementary/Secondary (0-12) _____
College (1-4 or 5+) _____
10. MEDICAL COMPLICATIONS
___ Pre-existing medical conditions which would complicate pregnancy (Specify)
___ Complication resulting from termination (Specify)
11. PREVIOUS PREGNANCIES (Complete each section)

LIVE BIRTHS		OTHER TERMINATIONS	
11a Now Living	11b Now Dead	11c Spontaneous	11d Induced (Do not include this termination)
Number __ __None	Number __ __None	Number __ __None	Number __ __None

12. TERMINATION PROCEDURES
TYPE OF TERMINATION PROCEDURES
12a. PROCEDURE THAT TERMINATED PREGNANCY
(Check only one)
__ Suction Curettage
__ Sharp Curettage
__ Dilation and Evacuation (D&E)
__ Intra-Uterine Saline Instillation
__ Intra-Uterine Prostaglandin Instillation
__ Hysterotomy
__ Hysterectomy

__ Other (Specify) _____

12b. ADDITIONAL PROCEDURES USED FOR THIS TERMINATION, IF ANY

(Check all that apply)

__ Suction Curettage
__ Sharp Curettage
__ Dilation and Evacuation (D&E)
__ Intra-Uterine Saline Instillation
__ Intra-Uterine Prostaglandin Instillation
__ Hysterotomy
__ Hysterectomy
__ Other (Specify) _____

13. CLINICAL ESTIMATE OF GESTATION AT TIME OF THE ABORTION*

(Weeks)_____

DETERMINATION OF GESTATIONAL AGE

Types of inquiries/examinations/tests utilized:

_____

Basis for diagnosis: _____

14. DID A MEDICAL EMERGENCY EXIST?

__NO __YES

Explain basis for judgement below.

_____

15. Was patient married? __YES __NO

IF YES, WAS NOTICE GIVEN TO THE SPOUSE? __YES __NO

IF NO, CHECK REASONS FOR NO NOTIFICATION

___ Spouse is not father of child.
___ Spouse, after diligent effort, could not be located.
___ Pregnancy was result of a spousal sexual assault which was reported to a law enforcement agency.
___ Patient had reason to believe that furnishing of notice would likely result in the infliction of

bodily injury by her spouse or another individual.
___ Medical Emergency.

16. REFERRING PHYSICIAN, AGENCY, OR SERVICE (If any)

NAME: _____

17. ATTENDING PHYSICIAN

Name_____

Licence Number _____

SIGNATURE AND DATE SUBMITTED

_____MO__DAY__YR_____

*IF GESTATIONAL AGE IS 24 WEEKS OR MORE, COMPLETE REVERSE OF FORM.

COMPLETE FOLLOWING ITEMS ONLY IF GESTATIONAL AGE IS 24 WEEKS OR MORE

18. BASIS FOR THE JUDGMENT THAT ABORTION WAS NECESSARY TO PREVENT THE PATIENT'S DEATH OR SUBSTANTIAL AND IRREVERSIBLE IMPAIRMENT OF A MAJOR BODILY FUNCTION.

_____
_____
_____
_____
_____

19. NAME OF CONCURRING PHYSICIAN

_____

20. NAME OF SECOND PHYSICIAN IN ATTENDANCE _____

21. WEIGHT OF ABORTED FETUS

_____gm

Defendants Exhibit 48:
DOH Certification Regarding
Spousal Notice Form

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF HEALTH

ABORTIONS: SPOUSAL NOTICE

CERTIFICATION REGARDING SPOUSAL NOTICE

I understand that as a married woman, I am required to notify my spouse of the fact that I am about to undergo an abortion, prior to obtaining such abortion, unless I am exempt from the notification requirements due to one of the reasons set forth below. Pursuant to this requirement, I hereby certify that:

CHECK APPROPRIATE BLANK(S)

_____ I have notified my spouse that I am about to undergo an abortion.

_____ I have not notified my spouse that I am about to undergo an abortion for the following reasons(s):

- _____ My spouse is not the father of the child.
- _____ My spouse, after diligent effort, could not be located.
- _____ The pregnancy is a result of spousal sexual assault which has been reported to a law enforcement agency having the requisite jurisdiction.

- _____ I have reason to believe that the furnishing of notice to my spouse is likely to result in the infliction of bodily injury upon me by my spouse or by another individual.

I understand that any false statement made herein is punishable by law.

_____
Signature/Date

NOTICE: ANY FALSE STATEMENT MADE HEREIN IS PUNISHABLE BY LAW.

Defendants' Exhibit 49:
Excerpts from DOH Directory of Social Service Organizations for Referrals for Pregnant Women

COMMONWEALTH OF PENNSYLVANIA

DEPARTMENT OF HEALTH

DIRECTORY OF SOCIAL SERVICES ORGANIZATIONS

JULY, 1990

The agencies listed provide a variety of services which may assist a woman through pregnancy, upon childbirth, and while the child is dependent. Private physicians, clinics, and hospitals may also offer these services.

Examples of services which may be provided directly, or by referral, include but are not limited to counseling, pregnancy testing, medical care, legal and financial assistance, transportation, childbirth instruction, housing, job placement, continuing education and adoption information. Where the agency offers primarily a specialized service, it has been noted. "Special Services" have been numerically coded according to the following index:

01- Abuse (Drugs, Domestic, Child)
02- Adoption
03- Book Resources on Childbirth (Childbirth Instruction)
04- Clothing
05- Counseling (Job, General, Psychological, Prenatal, Family)
06- Emergency Assistance
07- Food
08- Food Stamps
09- Fuel
10- Furniture
11- Hot Line Services
12- Interpreting Services
13- Job Training/Placement
14- Legal Referral
15- Nutrition
16- Information & Referral
17- Schooling/Education
18- Shelter/Housing
19- Short-term Crisis Intervention
20- Teens
21- Telephone Referral
22- Transportation
23- WIC (Women, Infants and Children) Nutrition Program
24- Foster Care
25- Financial Assistance
26- Medical Care/Testing
27- Family Planning
28- Day Care

* * *

Defendants' Exhibit 50:
Excerpts from DOH Printed Information on Medical Assistance Benefits

COMMONWEALTH OF PENNSYLVANIA

DEPARTMENT OF HEALTH

MEDICAL ASSISTANCE BENEFITS FOR PRENATAL CARE, CHILDBIRTH AND NEONATAL CARE

JULY, 1990

You may or may not qualify for medical assistance benefits, depending on your income. For persons who qualify, the Medical Assistance Program will pay for doctor, clinic, hospital, and other related medical expenses so you can receive prenatal care, delivery services, and care for your newborn baby. You can apply for Medical Assistance benefits at your local County Assistance Office.

Under the Healthy Beginnings Program you may be eligible for Medical Assistance because you are pregnant. A pregnant woman is allowed to have more income to qualify for this benefit and may receive prenatal care from certain providers while the formal application for assistance is being processed.

Your County Assistance Office can tell you which providers participate in the Medical Assistance Program and can answer your questions about other available

benefits. County Assistance Offices are listed for your information. The attached pamphlets on Medical Assistance and Healthy Beginnings also may be of assistance to you.

• • •

If you are pregnant or have children three years old or younger, **Healthy Beginnings** could provide you free health care for yourself and your children.

In October 1989, this program will be expanded to include children up to four years old.

If you or your family's income is less than or equal to the chart on the back of this card, you should call, toll-free **1-800-842-2020**, or contact your local county assistance office.

FAMILY SIZE	MONTHLY INCOME GUIDE
one person	$ 498
two persons (or a pregnant woman)	$ 668
three persons	$ 838
four persons	$1,008
five persons	$1,178
six persons	$1,348

If your income is close to these figures, call **1-800-842-2020**. We may still be able to help you.

Healthy Beginnings covers all your health care needs including prescriptions, dental care, physician, delivery and other necessary hospital costs.

If you think you quality for **Healthy Beginnings**, call **1-800-842-2020,** today!

* * *

FACTS

MEDICAL
ASSISTANCE
CAN
HELP

THIS BROCHURE CONTAINS SOME BASIC INFORMATION ABOUT MEDICAL ASSISTANCE. PLEASE READ IT CAREFULLY, IT WILL TELL YOU WHAT TO BRING WITH YOU WHEN YOU APPLY.

Commonwealth of Pennsylvania
ROBERT P. CASEY
GOVERNOR

Department of Public Welfare
JOHN F. WHITE, JR.
SECRETARY

OFFICE OF MEDICAL ASSISTANCE

REMEMBER --
MEDICAL ASSISTANCE
CAN HELP!

The Medical Assistance program is designed to help you pay doctor, hospital, and other medical-related expenses so you and your family can receive continuing medical and dental care when your medical and dental costs are higher than you can afford.

This brochure contains some basic information about Medical Assistance. **Please read it carefully. It will tell you what to bring with you when you apply.**

If you do have any questions, please call your local county assistance office. They want to help.

Note: Some counties may be using health maintenance organizations (HMOs) or health insuring organizations (HIOs) in addition or in place of the regular Medical Assistance Program. If you live in one of these counties, your local county assistance office will be able to explain these other programs to you.

Facts About Medical Assistance

- You can apply for Medical Assistance in the county where you live in Pennsylvania.
- You can work, and still may be able to get Medical Assistance.
- You can own a house and have a car and still get Medical Assistance.
- You don't have to get a welfare check to get Medical Assistance.
- You don't have to live with children to get Medical Assistance.
- You can be getting social security, unemployment or some other kind of income and still may be eligible for Medical Assistance.

Persons who are eligible for Medical may be eligible for some services under Medical Assistance which medicare does not cover. However, Medical Assistance does not automatically pay the difference between a medical provider's charge and the Medicare payment.

How Does Medical Assistance Work?

If you are eligible for Medical Assistance, you may go to a doctor, hospital, or other health-care provider for medical services. If the health-care provider participates in the Medical Assistance Program, and if you have no other medical insurance which will cover the medical service, the State will pay for the medical service.

Some services require prior authorization by the state Office of Medical Assistance. A brochure entitled **Prior Authorization of Medical/Dental Services** explains this.

Please note that payments are made to the **provider** not to the **patient**.

You may be asked to pay a small amount to the provider for the service. This is called a co-pay. Ask

your county assistance officer for the brochure **What is Co-Pay?**, which explains how co-pay works.

Out-of-State Services

The Department will pay for medical services furnished to you while out of of state if:

- You require emergency medical care while temporarily away from your home.
- You would be risking your health if you wait for the service until you returned home
- You live in a state border area and recipients in your area regularly use medical resources in a neighboring state.
- The Department decides, based upon the medical provider's advice, that you have better access to the type of medical service you need in another state.

Who Can Receive Medical Assistance?

There are three categories of Medical Assistance. You may be eligible for one of them:

1) Categorically Needy: This is for persons who are eligible for cash assistance, or for people who receive Supplemental Security Income (SSI). These persons receive a **blue** Medical Assistance card.

2) Medically Needy Only: Ths is for persons who are not eligible for cash assistance or SSI but whose income is not enough to cover their medical expenses. These persons receive a **green** Medical Assistance care.

3) State Blind Pension: This is for persons who are eligible for and receive a check from the State Blind Pension Program. These persons receive a **pink**

Medical Assistance card.

Ask your county assistance office for **Services Covered by the Medical Assistance Card**. This shows the benefits covered by each of the three Medical Assistance categories.

How Do I Apply for Medical Assistance?

You must file an application with you local county assistance office. You may pick up your application at the local county assistance office or phone the office and have one mailed to you.

If you are unable to apply for yourself, a relative, friend, hospital representative or other person may apply in your behalf.

When you return the application to your county assistance office, a worker will look over your application with you to make sure you have completed all items. The worker will help you complete the application if you need help. If there is some information you are not able to get, your county assistance office can help you to get this information.

When you apply for Medical Assistance, you will need to provide information about yourself and your family to help the county assistance office decide what kind of help you can receive. **It you don't have it on hand, apply anyway.**

You will need:

- Birth certificates and other forms of identification for yourself and other family members in your home, such as a driver's license or school or work identification.
- Your social security card and social security cards for other persons in the home for whom you are applying (your worker can help you apply for these if you do not have them).
- Letters or forms that show how much money you and other family members living in the home get from social security, Supplemental Security Income (SSI), Veteran's pensions, unemployment compensation, worker's compensation, retirement or other kinds of income.
- Wage stubs (if you are working) and wage stubs for other family members living in the home who are working.
- Health and medical insurance policies and bank books, savings books and any other records to show how much money you and other family members living in the home have available.
- Life insurance policies.

Your worker can tell you what additional information you will need to be eligible for Medical Assistance and help you to get this information.

After your worker determines that you are eligible for Medical Assistance, you will receive a Medical Assistance Card which is good through the date shown on the card. You will receive a new card before the old one expires. **If you card is lost, stolen or destroyed, tell your county assistance office immediately.** They will replace it so you don't have to miss any medical appointments.

As a recipient, you have certain rights and responsibilities. A pamphlet titled **Your Rights and Responsibilities in Public Assistance Programs** describes them.

How Do I Find a Medical Provider Who Will Accept the Medical Assistance Card as Payment?

First, check with your present doctor, dentist or

other medical provider to see if the Medical Assistance card will be accepted. If not, you may want to ask someone you know who receives Medical Assistance for the name of a doctor or dentist.

If you cannot find a doctor or dentist who accepts the Medical Assistance card, contact your caseworker at the local county assistance office, who will help you locate a medical provider who accepts the card.

What If I Don't Agree With the Decision of the County Assistance Office?

If the county assistance office determines that you are not eligible for the Medical Assistance Program, you will receive a notice from your county assistance office. You have the right to appeal the decision and request a fair hearing. If you are already receiving medical assistance and if you appeal within 10 days from the date of the notice, your Medical Assistance coverage will continue pending the outcome of the fair hearing.

Your county assistance office is there to help you. You should call them with questions you may have about Medical Assistance eligibility or coverage.

The Mission of the Department of Public Welfare is to:

Promote, improve and sustain the quality of family life,
Break the cycle of dependency,
Promote respect for employees
Protect and serve Pennsylvania's most vulnerable citizens, and

Manage our resources effectively.

Defendants' Exhibit 51:
DOH Notices Required by
Abortion Control Act

COMMONWEALTH OF PENNSYLVANIA

DEPARTMENT OF HEALTH

NOTICES REQUIRED BY
ABORTION CONTROL ACT

JULY, 1990

1. It is generally unlawful for any individual to coerce a woman to undergo abortion.

2. Any physician who performs an abortion upon a woman without according her a private medical consultation may be liable to her for damages in a civil action at law.

3. The father of a child is liable to assist in the support of that child, even in instances where the father has offered to pay for an abortion. The availability of support payments will depend, in part, on the father's income. You may wish to consult with a lawyer regarding the availability of support payments.

4. The law permits adoptive parents to pay costs of prenatal care, childbirth and neonatal care.

Defendants' Exhibit 54:
Deposition Excerpts of
Thomas E. Allen, M.D.

BY MS. MERSHIMER:

• • •

[9] Q. While you've been at Magee, have you performed any abortions because there was a medical emergency?

A. No.

Q. How about at WHS?

A. Not -- no.

• • •

[13] Q. All right. Now, Exhibit B attached to Defendants' Exhibit 1 is Magee's informed consent form?

A. Informed consent, correct.

Q. And this, you make sure every patient signs?

A. Reads this and signs it, or has it read to her if she can't understand it.

Q. Now, in cases of a minor, do you have the parent sign it, also?

A. It's required by Magee. There's no question about it. You can't do an abortion there without having the parent's consent.

Q. Does Magee require a parent's consent of a non abortion surgical procedure, also?

A. Yes. Everything except delivery of term -- or a delivery.

• • •

[28] Q. Now, Interrogatory 15, I had asked you

about the allegations in the Complaint that the Act unduly restricts a woman's access to counseling, and you refer to various verifications in your Answer?

A. I think that was my attorney's --

MR. ZEMAITIS: Yes. I don't think there's any obligation under the Federal Rules of Civil Procedure or otherwise that every plaintiff be able to state from his or her own personal knowledge facts that support a particular allegation of the Complaint.

MS. MERSHIMER: I'm not saying that there is.

[29] A. Yes.

Q. My question to you is: Do you have any knowledge upon that aspect of the Complaint, that allegation?

A. No, I do not.

• • •

[71] Q. Have you ever performed an abortion on anyone without having their informed consent?

A. No.

Q. So that would include both adults and minors?

A. Right.

• • •

[78] Q. Excluding abortion, would you ever perform a surgical procedure on somebody without their informed consent?

A. No.

Q. And, again excluding abortion, would you ever perform a surgical procedure on a minor without the consent of a parent?

A. No. Probably not. I can't think of -- except an emancipated minor who is not considered to be a minor. A woman who -- a teenager who has a child is not

considered a minor for any operative procedure, except as defined by this Act.

Q. Okay. Let's just clarify the question, then. Again excluding abortion, would you ever perform a surgical procedure on an unemancipated minor without the consent of the parent?

A. No. But by my definition, a person who is pregnant is emancipated to some degree.

Q. That's your personal definition.

[79] A. That's my personal definition, yes.

• • •

Defendants' Exhibit 55:
Deposition Excerpts of Sue Roselle

* * *

[7] Q. In Paragraph 2 of your verification, you [8] talked about the staff you're responsible for, and you mentioned 13 physicians.

A. Yes.

Q. Is that still the same number of physicians currently being used by WHS?

A. I believe we have 12 physicians currently.

Q. And Dr. Allen this morning said that all the physicians are part-time.

A. That's correct.

Q. Is there any approximate hours that they work?

A. There is one physician who works approximately 20 hours a week, and then everyone else is what we call as-needed, which is when we schedule them.

Q. And you perform abortions at WHS three days a week?

A. That's correct.

Q. For the most part, counseling occurs the same day as the abortion service --

A. That's correct.

Q. -- is provided? It's more difficult for her to take us down when I'm still asking a question [9] and you answer. I understand how it is. I have the same habit. Also, the record reads a little easier.

What, it's like 95 percent of all the counseling occurs on the same day the abortion services are provided?

A. Approximately 95 percent.

* * *

Q. In Paragraph 6, which would be on Page 3, it

lists the prices of the abortion procedure costs depending upon how late the pregnancy we're talking about?

A. That's correct.

Q. Have those prices changed since you initially filled out this verification?

A. Yes, they have.

[10] Q. Could you tell me what the new prices are?

A. $295 if 12 weeks or less; $395 if 13 to 14 weeks; $600 if 15 to 16 weeks; and $625 if 17 weeks.

Q. And no abortions after 17 weeks gestation --

A. That's correct.

Q. -- are performed at WHS; is that correct?

A. That's correct.

Q. Is there any particular reason why the prices went up, anything you can attribute it to?

MR. ZEMAITIS: You mean other than general economic trends?

MS. MERSHIMER: Right.

Q. Other than like labor costs went up or --

A. No.

* * *

[17] Q. . . . . WHS still encourages minors to bring a parent or another adult with them?

A. That is correct.

Q. Is your preference to have a parent?

A. That's correct.

Q. Is there a reason why you like the parent to attend with a minor?

A. To encourage family communications.

Q. If a minor calls up, when she first telephones, is that when it's encouraged, the minor is encouraged to bring her parent along?

A. Yes.

* * *

[20] Q. And the paraprofessional counselors, there's no education requirement to be a paraprofessional counselor?

A. That's correct.

* * *

Q. And what's covered during this counseling interview is a discussion about her options, her decision to have an abortion, make sure she's not unduly ambivalent about what she's doing and make sure she's not being coerced to have an abortion and [21] to talk about future contraceptive use. Is that pretty much it?

A. That's it.

Q. This next line talks about if a patient appears ambivalent about her decision and the abortion is rescheduled to give her more time to consider her options.

A. That's correct.

* * *

Q. And then the personal counselor is what? It's a more intense discussion, or what?

A. The personal counselor is prepared to at least masters degree level and has five years post masters experience in therapy, and it focuses on the pregnancy as a problem in relationship to the rest of the factors in her life.

* * *

[22] Q. When a parent does attend, does both the minor and the parent sign the informed consent form?

A. That's correct.

* * *

[43] Q. In Paragraph 35, you discuss your concern about putting the identity of the referring [44] performing physicians in a report to the Department of Health, and then you state, "I can state with complete certainty that because of the harassment and violence directed toward physicians who refer or perform abortion procedures, WHS will lose many of its referring physicians and possibly some of its performing physicians if this section goes into effect." Now, focusing on performing physicians, that information is being provided on the reports currently.

A. That's correct.

Q. And have you lost any performing physicians for that reason?

A. We have lost a couple of physicians. They have not given that reason for them leaving. The rest of the physicians have continued to express a lot of concern about that information becoming available to the public.

* * *

[79] Q. I take it from your response to Interrogatory No. 24 on Page 18 that WHS advertises in some local newspapers in the Pittsburgh area, on radio stations, and some college newspapers and also in the phone book?

A. That's correct.

* * *

[80] Q. I'm looking at Interrogatory No. 2 on Page 3 focusing on WHS' Answer. Remember you said you weren't sure of the percentages of minors that are

accompanied by an adult? Does that refresh your recollection, 75 percent of the minors are accompanied by an adult?

A. Yes.

Q. And that on the next page, that 50 percent of the minors are accompanied by one or both of their parents?

A. That's correct.

Q. Now, when a minor is accompanied by an adult, not necessarily their parent, does that adult participate or is involved at all in any part of the counseling or informed consent aspect?

[81] A. No.

Q. But if the minor is accompanied by one of the parents, then the parent is involved in part of that counseling session, and particularly as to informed consent?

A. That's correct.

• • •

[84] Q. When I asked you if any of the physicians that had left WHS was because their identity, performing physician's identity was listed on the reports to the Department of Health, you said that wasn't the reason they gave you?

A. That is not the reason they gave me.

Q. Did any of the reasons they gave you have [85] to do with any of the requirements of Pennsylvania law?

A. No.

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Defendants' Exhibit 56:
Deposition Excerpts of Carol C. Wall

BY MS. MERSHIMER:

• • •

[10] Q. And abortions at the Center City Clinic still occur on Wednesdays, Thursdays, Fridays, and [11] Saturdays?

A. Yes.

Q. And what are the general hours of the clinic then?

A. They are regular medical clinic hours. Abortions would be performed approximately four to five hours each of those days.

• • •

[12] Q. Now, the cost that you stated in your Verification of an abortion in the first trimester if they were not on Medical Assistance was $225.

Does that still remain the price?

A. No.

The price now is $240.

Q. Is there any specific reason why the price has gone up?

A. Yes.

The costs have gone up.

Q. What?

A. The costs of salaries and non-salary costs have gone up.

Q. Supplies and things like that?

[13] A. Yes

Q. And I see here that the fees cover the direct cost of the procedure, including counseling, medical testing, and examination, and abortion procedure, medical

supervision during the post-surgical recovery, and post-abortion examination?
A. That's correct.

* * *

[14] Q. When you said the direct cost, which is now $240, covers these various procedures, do you know how much of that charge covers the cost providing personal counseling?
A. No.

The salaried costs are broken down at some point when we are figuring what we have to [15] charge in order to cover our costs, but I don't know exactly how much the counseling part of it would be.

* * *

[16] Q. At Planned Parenthood are any abortions [17] performed because there is a medical emergency?
A. I would say no.

Could you be more specific on what medical emergency means to you?
Q. Well, there are two definitions of medical emergency that have been used in this lawsuit. One is the medical emergency definition that is contained in the Act.
A. Yes.
Q. And then the other definition of medical emergency is that which was provided by the Plaintiffs in response to Interrogatories, which give me a second and I will find it here. It was in response to Interrogatory NO. 18 where the Plaintiff said, "A medical emergency occurs whenever, in the judgement of the attending physician, a combination of circumstances presented requires immediate medical attention to protect the life or the health of the patient."

A. Yes; then my answer is definitly no as I said before.
Q. No as to either definition?
A. Yes.

* * *

[18] Q. Now, Planned Parenthood encourages minors to involve their parents in the decision to have an abortion; correct?
A. Yes.
Q. Do you encourage a minor to bring the parent along to the procedure if the parent is agreeable?
A. Yes.
Q. Why does Planned Parenthood do that?
A. Our experience is that very young women need to have the help and support of their family members and want it.
Q. If a parent does attend with the minor, does the parent also sign the Informed Consent Form?
A. No.

* * *

[20] Q. So you contract with the physicians?
A. Yes.
Q. How many physicians do you contract with?
[21] A. At this time three to four different physicians.

* * *

[24] Q. The counselors for Planned Parenthood, is there any minimum education requirement?
A. No.
Q. Are there any sort of certificates or degrees that they have to have?
A. No.

Q. But they must attend the training program at Planned Parenthood?
A. Yes.
Q. Could you tell me about the training program?
A. The training program is mainly in-service at the beginning of the time that they start working with us, and it is carried out by the clinical staff, the management of the clinical [25] staff.
Q. Is there any length of time that this in-service training occurs?
A. I don't know. It varies with the individuals and their backgrounds. I do know that.

We do have some people who have Master's degrees in counseling and some have Bachelor's degrees who have had a major in a field that's related. And we have some people who have not had that kind of formal training.
Q. You had said that the number of counselors you have varies on how many procedures are being performed?
A. Yes.
Q. You mean how many counselors you have coming in on any given day?
A. That's correct.
Q. How many counselors do you have as a pool to use?
A. I don't know.
Q. Is it more than ten?
A. No.

I would say fewer probably.
[26] Q. And they are all paid or are there any volunteers?
A. There are some volunteers, yes.
Q. The ones that are paid, what is their salary?
A. I don't remember.
Q. Well, do you know the starting salary?
A. No.

It would be around $15,000, $16,000 a year annualized, but I'm not sure.

* * *

[66] Item NO. 3 that states "all counseling is confidential (within legal limitations) and will be conducted in privacy."

MR. CIPOLLA: Where is this?
BY MS. MERSHIMER:
Q. I'm sorry, the second page of Exhibit-A.
A. Okay, thank you. You want to know -- what is your question?
Q. I just wanted to see, first of all, if you found that statement.
A. Yes, I have it.
Q. What are the legal limitations? I just didn't know that there were any ones that affect counseling. What is meant by that?
A. The one that I recall is that in the cases -- in a case of, I believe, it's rape or incest of a minor, our facility just, as any other helping facility, is required by law to report that to the municipality in which our facility is located. That is one.

* * *

[71] Q. There is a section on the bottom of this form requiring physicians to sign for minors under the age of 18 without parental consent; is that correct?
A. Yes.

* * *

Defendants' Exhibit 57:
Deposition Excerpts of Sherley Hollos

BY KATE MERSHIMER:

• • •

[4] A. I'm the Executive Director of Women's Suburban Clinic.
Q. Could you tell me what your job duties include as Executive Director?
A. Well, I am responsible to the Board of Directors. We are a 501C3, so all my department heads report to me and I'm responsible for the overall management of the clinic.

• • •

[7] Q. Now, abortions are performed at Women's Suburban Clinic on Tuesdays, Wednesdays, Thursdays during afternoon and early evening hours?
A. That's correct.
Q. And that is still the current situation?
A. Yes.
Q. Would you have any problem, as I ask you questions, if I refer to Women's Suburban Clinic as WSC?
A. No problem.
Q. Is there any other sort of shorthand form you use?
A. That's what we always call it, WSC.
Q. Now, how many physicians are there at WSC?
A. There are two physicians that practice at WSC.
[8] Q. And do they both work those Tuesday, Wednesday, and Thursday hours?
A. There is one physician present each day.

• • •

[11] Q. Now, the nurse practitioners, the RNs and the LPNs, do they do any counseling?
A. Not exactly, but a nurse by definition deals with the whole person. It's a matter of definition of what you call counseling.
Q. Well, is it fair to say that what you are talking about with the nurses, if they are going through the procedure, whenever there are questions presented by the patients, they are going to take the time to answer those questions?
A. Certainly, but a nurse is not a counselor in that they do the formal counseling prior to the procedure.

• • •

[12] Q. And the fee was $225 at the time of the Verification.
Is that still the same?
A. It's $245 now.
Q. Is there any particular reason why that fee rose?
A. Inflation.
Q. Basic cost of salary increase and supplies, thing like that?
A. Yes.
And extra papers that we have to deal with.
Q. The extra papers being the reporting forms of the State, the Department of Health?
[13] A. Yes.
Q. Do you know how much of that $20 increase is due to the extra reporting provisions versus just the standard cost of salaries going up?
A. No, I don't.

• • •

[19] Q. Now, minors are all encouraged to come in for

precounseling; is that correct?
A. That's correct; if they are not coming with their parent.
Q. And WSC encourages the parents to come; is that correct?
A. Yes.
Q. Why is that?
A. Because it's important for any woman having an abortion to have a support system beyond the clinic. And for a minor the obvious support system is the parent.

• • •

[20] Q. Now, is that the form, the Certification by Patient, that any patient must sign prior to having an --
A. Every patient must sign.
Q. That is to have an abortion?
A. Yes.
Q. And this is the form where they acknowledge that they were told about the risks of [21] the abortion and alternatives to abortion?
A. Yes.
Q. Now, if a minor has an abortion, that minor has to sign that form?
A. I believe so. I am not a counselor. I know that you have to sign the next form, the Parental Involvement Form.
Q. If the parent comes with their minor to the clinic, do they have to sign any forms?
A. Yes; then they sign the Parental Involvement Form to the "or," "I am the parent and guardian and I am aware of her decision to abort."
Q. Is this the way it works with the minor; if the minor comes alone and doesn't want to involve their parents, they sign this first paragraph of the Parental Involvement

Form?
A. Yes.
Q. And if the parent or guardian does come with the minor, then that parent or guardian must sign the second paragraph of the Parental Involvement Form?
A. That's correct.
Q. And then if the parent or guardian does know about the abortion but was unable to attend, [22] then, again, the minor would sign the last paragraph?
A. Correct.
Q. And then there is a third form called Physician's Certification?
A. Yes.
Q. All doctors have to sign that form?
A. Yes.
Q. Is that in the case of any patient or just minors?
A. Any patient.
Q. And are there any times where a physician refuses to sign this form?
A. Not to my knowledge.

• • •

[30] Q . . . . When we initially got onto the exhibit, we were talking about minors coming in for precounseling prior to the abortion appointment?
A. Yes.
Q. Do most minors do that, come in for the precounseling session?
A. Most -- I don't know statistically how many do, but that's a question that is always asked.
Q. It says here that the minors are asked to come in for precounseling, but it is not a requirement; is that correct?
A. All minors who have not informed a parent come in for precounseling.

Q. So they must come in for precounseling?
A. Yes; unless there are very extenuating circumstances.
[31] Q. Do such minors that come in for precounseling because they have not informed a parent, do they ever change their mind and then bring their parent to the abortion --
A. Yes.
Q. Do you know how much of a period of time there is between the precounseling session and the abortion appointment?
A. It depends. It could be anywhere from the night before to more time.
Q. A week or two weeks?
A. It would be dependent on their LMP date. How much, you know, how much time there is.
Q. So if they are in their thirteeth week of LMP, if they are going to have the abortion performed at WSC, there is not much time to wait?
A. That would be a good example.

* * *

[33] A. . . . . The only thing that isn't explicit -- is explicitly discussed is the alternative to having an abortion, but you can see that that happens because in the Disclosure of Risk Benefits and Alternatives it is gone over orally. And they are given that piece of paper, the Consent Form, before they see the counselor and asked to read it but not to sign it so that they have time to read it before sitting down in the counseling session.

* * *

[40] Q. And is it still Women's Suburban's estimate that if the Parental Consent Provision goes into effect it would require at least additional three-quarter time

counseling positions at a cost of about $15,000 per year?
A. I think that is accurate.

* * *

[44] Q. Now, that part of the law that requires the performing physician's identity to be submitted to the Department of Health, since that has gone into effect have you known of any doctors who perform abortions that have stopped performing abortions because their identity is on that form?
A. I don't know of any personally.

Defendants' Exhibit 58:
Deposition Excerpts of Jane S. Green

BY MS. MERSHIMER:

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[8] Q. First trimester abortions, the price listed in, I think it is an April '88 Verification, list the price as two hundred and ten dollars, is that still the price?
A. It remains the same.

• • •

Q. How about for early second trimester abortions; is it still three sixty-five?
A. That's correct.

• • •

[12] Q. Are abortions still performed on Wednesday and Friday afternoons and Saturday mornings?
A. On Saturday mornings, not at this point; Wednesday and Friday and Tuesday.
Q. Tuesday, all day Tuesday?
A. Tuesday afternoon.
Q. Is Wednesday just Wednesday afternoon or all day Wednesday?
A. Wednesday evening. So that is wrong. That says Wednesday from ten to three, so it is Wednesday evening.

• • •

[20] Q. Now, paragraph eleven of your Verification,

approximately in the middle, there is a discussion, "If the woman already has had a postive test when she calls RHCC and wants to terminate her pregnancy, an abortion appointment can be scheduled usually within one week's time."
Is that still correct information?
A. That is correct information.
Q. Does it ever take more than a week to schedule the abortion appointment?
A. Sometimes. It depends upon her medical history. There are certain questions that telephone counselors ask, in terms of medical history. And if the woman needs to obtain a physician's note, then it could take longer.

• • •

[23] Q. Now, RHCC encourages parental involvement in the abortion decision; is that correct?
A. What do you mean, in terms of that?
Q. I was just reading paragraph eighteen, it says, "In general, RHCC supports and encourages parental involvement in the abortion decision where possible."
A. That's correct.
[24] Q. Why is that?
A. Well, we feel that it is important because when the minor goes back into her home, that the parent will have a better understanding perhaps of what the minor is going through. Unfortunately, that is not always the case. But that is primarily the reason why we would want that support from the parent. We only can give short term relationship counseling and we can't go back with that person.
Q. Just to go back for a minute, you said that the parent, when he or she accompanies a minor does not attend the group session that goes over the risks and the

informed consent provision.
A. That's correct.
Q. So is the parent ever advised?
A. That's why we have the waiting room counselling, that's then when the waiting room counselor would do that with the parents.
Q. The waiting room counselor would advise the parents of possible complications?
A. That's correct.

• • •

Defendants' Exhibit 59:
Deposition Excerpts of Sylvia Stengle

BY MS. MERSHIMER:

• • •

[6] Q. You are the executive director of Allentown Women's Center?
A. Yes.
Q. Do you have any problem if I refer to Allentown Women's Center in this deposition as AWC?
A. That sounds fine.
Q. As director, you are responsible for the overall operation of the clinic?
A. That's correct.

• • •

[11] Q. . . . . The items on this two page document Counselling Checklist are the items covered during an abortion counselling session; is that correct? Please, review it.
Q. Yes, this is accurate.

• • •

[16] Q. -- you said that pregnancy testing and counselling was available at AWC Monday through Saturday,with abortions being performed three to five days a week, depending upon patient needs?
A. Uh-huh.
Q. Is that information still correct?
A. Yes.
Q. And then it says, "An appointment usually can be

scheduled in approximately one week's time."
A. Yes.
Q. Is there any variation, does it ever take longer or shorter?
A. Yes.
Q. Do you ever know how long it takes?
A. Well, if we have more appointments than we have available slots, we attempt to add a day so we do not need to ask patients to wait.

Sometimes if we have more appointments than we have available slots, we get backed up and patients need to wait more than a week, depending upon physician availability, we either can or cannot solve that lag. If that is how it goes.

• • •

[46] Q. Exhibit "B" we discussed earlier and that is the counselling checklist, two page document.
[47] At the bottom of the page there is a section concerning minors and the first statement under that says, explain if complications develop their confidentiality may be broken. When or why would that occur?
A. If a patient requires a hospital transfer or a visit to a hospital, it might be that that care provider would not honor her confidentiality or it might be that the circumstances are such that her confidentiality is violated. For example, if a minor would have a gush of heavy bleeding, which sometimes happens even if there is no complication, and it were in the middle of the night, it might be very appropriate for her to involve her parents and the confidentiality might then be broken. We have no control over that.

We want our minors to understand as we provide the service to them, that their health and care is more important than their privacies around the abortion,

because that makes the overall experience safer for the minor if she has that frame of reference.

• • •

[49] Q. The fourth statement says, "If a parent is here, the parent must co-sign consent for abortion."
A. That's correct.

• • •

Q. Exhibit "C" is an eight page patient record; is that correct?
A. Yes.

• • •

[50] Q. And then in the middle of that are questions about pregnancy and history, live births, still births, miscarriages, abortions and complications of pregnancies; do you know why that information is gathered?
A. That information is gathered because it helps us both as we provide surgery to that patient and as we counsel that patient around her decision. The complications of pregnancy is largely important medically.

• • •

[51] Q. When I was reviewing the Interrogatories and I saw that a parent must sign the consent form;if a parent comes with a minor, is there a specific space on this on this paper where they sign or some separate form that they sign?
A. They sign where it says, "Witness." There is not a line that says,parent. There in not a provision in the form for a line that says parent at this time.

• • •

[58] Q. Is it correct, is the newspaper article correct in stating under the policy, if a woman -- I am sorry. The policy forces women who seek abortions, but say they think abortion should be illegal to delay the procedure?
A. That's correct.
Q. Could you explain this policy to me?
A. Yes. We do not have a set of questions that we ask patients about their views on whether or not abortion should be legel. There is no quiz or sequence of information seeking. However, some patients volunteer to us that they believe that abortion in wrong, is murder or should be illegal or [59] some combination of those attitude sets. Those patients who volunteer to us that abortion should be illegal and should not be available to women, we suggest to those patients that perhaps they should continue their pregnancy or consider that as a very serious option. And we consider that to be a red flag. That indicates that they might have difficulty with the decision later.

And that it is important that they process their decision making very carefully before they take the irreversible action of terminating their pregnancy, which sometimes women who are opposed to abortion want to quote "just get this over with." Those patients we suggest that they come back on another day and we explain to them all of their options.

And we further explain to them that they must take responsibility for their own decision making, that they cannot suggest that we as providers are responsible for the fact that they are having an abortion. And we ask them to sign a consent form that indicates that they have had full options counselling and that they take responsibility for their own decision making.
[60] And that it has a concluding paragraph that says

if they would ever allege that they had not been counselled properly when they had an abortion at the Allentown Women's Center and their options had not been fully explained to them, that we would indeed defend what we had done and open our records so that could be shown.

MS. MERSHIMER: Could I got a copy of this form?

MR. ZEMAITIS: We will take it under advisement.
BY MS. MERSHIMER:
Q. The newspaper article implied that a woman that would reflect that abortion was wrong, murder, illegal, either had to say she had changed her abortion belief or that she had signed this consent form; is the newspaper article summarizing that accurately?
A. No.
Q. If a woman who initially says that she feels abortion is wrong or illegal, and you advise her to think it over some more, and if she does and she returns to AWC, must she sign this additional form that you just said no matter what?
A. There are several points here you are addressing, [61] so I cannot answer your question as phrased.
Q. Why don't you explain the subtle points?
A. Approximately, fifteen per cent of our patients, we become aware that they think abortion is wrong. Those patients are not required to delay their procedure, except in certain instances. For instance, if they exhibit extreme ambivalence about the decision or if they are extremely distraught.

If in the best judgment of the counselor and the clinic supervisor, they had not adequately processed their decision making, we suggest to them that they take some time and come back another day.

Often they agree with us; infrequently, we turn them away.

Your question also included if a patient thinks abortion is illegal; if a patient thinks abortion is illegal, we share information with her about its legality, we give her accurate information. That slender number of patients who want to affirm the right to have an abortion, want to exercise the right to have an abortion without affirming it for other women who say, I believe abortion should not be legal. That patient, we say, [62] let's talk this over. And that patient, as of our new policy, we suggest that she come back another day for her procedure and process her own decision making and the difficulty we have with that position.

Our concern as a clinic is largely that we want it to be very clear for the record and to her, that all of her options have been explored and that this is a decision that she must take responsibility for. And that she must process before she makes an irreversible act.

Q. You said that this consent form, that such a woman must sign at the end has a paragraph about how if she ever says that she was not counselled properly,, that you will release the information publicly to the extent to defend it or maybe not to the extent, but to defend that you indeed counselled her?

A. Yes. If she says one, she had an abortion and two, it was at the Allentown Women's Center, and three, indicates in some way she did not have her options explained to her or was inadequately counselled or that in any way we were not non-directive or in some way coerced her into a rushed decision, we will then defend ourselves against those mistruths [63] by opening the record.

Q. The newspaper article, it said that two women were told to wait and they said that you had made that statement.

A. That's correct.

Q. Is it true that you had said since the policy was

started in April, that indeed two women were told to wait?

A. The first woman was in April. We had a staff meeting following her visit to our clinic. She indeed was asked to wait, but at that time the form had not been developed. It was developed as the result of her visit to our clinic. But functionally, she was asked to wait and went through the clarification of her options having been explained and so forth and so on, as we discussed in the form.

The form was then developed and then was used with the second patient, who came in, who volunteered to us that she felt that abortion should be illegal, but indeed that she did want one.

Q. The newspaper article said that both women came back, one saying she had dropped her opposition to legal abortion and the other signed a consent [64] form. The woman they are saying, dropped her opposition of legal abortion, is that the first woman in April?

A. Yes, yes.

Q. Is that accurate what the newspaper stated that she dropped her opposition to legal abortion?

A. It's accurate. she said that. I think it is also important that you have a complete picture, that had she not said that we still would have given her an abortion on the second visit, if it was clear to us that that is what she wanted.

Q. Do you know how long a period of time was between her first visit to AWC and her second visit when she had the abortion?

A. No, but it was short.

Q. Less than a week, more than a week, do you know?

A. That is retrievable. I don't even know if that is retrievable at this point. It was short. It was probably not more than a week, but I can't guarantee it. I could say with pretty well absolute certainty that it was two

weeks.
Q. With the second woman who signed the consent form, do you know the period of time between when [65] she first came to AWC and when she returned and signed the consent form?
A. The same, it was short.
Q. With the same, probably under a week, but definitely under two weeks.

You had said early on, and correct me if I am wrong, that women who say they believe abortion is wrong or murder or illegal, that raises a red flag to AWC that they might have some trouble or some ambiguity or uncertainty with the abortion decision; is that fair?
A. It raises a red flag about more than that. It raises a red flag about that they might possibly have more guilt or more damaged self-worth or some kind of adverse psychological sequelae is more likely in those instances. So all of those things are taken, you know, addressed by the counselor in her thinking process.

* * *

[66] Q. Who has to sign the consent form?
A. Let's take this very slow. If approximately fifteen per cent of our patients we become aware without asking that they believe in some way that abortion is wrong or murder or something to that effect, but still wish to have one. Less than one per cent of our patients volunteer to us that they believe that abortion should not be available to other women, it should be illegal, which is stronger and more extreme. But that they would like to exercise the option of having a legal abortion and they would also like to cutoff that option for other women.

Those women in the fifteen per cent category, sometimes we ask patients to wait, because they are so ambivalent or so distraught as they present themselves to

us that we want to give them or sometimes they are coerced. Those women we want to give the opportunity to further process their decision making before they take an irreversible act. That is for the best interest of the patient.

That slender number of patients [67] who say that abortion should be illegal, not only for their sake, but also because we want to share with them that we need to make it clear that they must take responsibility for their own decision making and not lay it at the feet of the provider, that we are going to ask them to delay their abortion and return on another day after they have fully processed that they have explored their options and that they understand that they must take responsibility for their decision making.

MR. ZEMAITIS: Let me just ask a question, which I think will help clear it up.

The fifteen per cent, the larger group of women,are all of those women required to sign this new form?

THE WITNESS: None of them. This form has only been used twice and we see over four thousand patients a year.

MR. ZEMAITIS: The only time the form is used is in that much smaller group of people, where the woman thinks that abortion should be illegal and she returns on a second visit; is that right?
[68] THE WITNESS: She then returns on a second visit and she then -- to date, all of these women have remained steadfast in their desire to terminate their pregnancy.

There may be many more women who come to our clinic who think that abortion should be illegal, but we do not ask questions about that.
BY MS. MERSHIMER:
Q. So it is this one per cent or even smaller group --
MR ZEMAITIS: Much smaller.

BY MS. MERSHIMER:
Q. -- that feel abortion should not be available for all women that are asked to sign a consent form?
A. Correct.
Q. Or what is this form called, because I do not want to call it a consent form?
A. It's so new, it doesn't have a name.

I would just like to say that there is an error in this article. We never say, you may return if you change your mind. We do not attempt [69] to change people's minds.

• • •

[70] Q. For the record, we have had marked as Defendant's Exhibit-21 the form that we have been discussing for the last few minutes; that has no caption to it, correct?
A. Yes.
Q. You had said that one woman had returned to the clinic;that second women, and she had signed this form?
A. Yes.
Q. If she had not signed the form,had refused to sign the form, could she have received an abortion at AWC?
A. I think not. But I think the form functions largely as an information sharing and educational device. So I think it's extremely unlikely that such a situation would arise.
Q. In the last paragraph --

MR. ZEMAITIS: You have not had to face that situation yet?

THE WITNESS: That's correct.

BY MS. MERSHIMER:
In the last paragraph, one of the statements [71] is that, "If in the future I --"
A. There should be an "If."
Q. "If in the future I ever publicly state that the

Allentown Women's Center counselled me inadequately or that I was not fully aware of the gravity of what I was doing in terminating my pregnancy, I understand that I will by so doing, give up all right to confidentiality and that the staff of the Allentown Women's Center will defend their non-directive counselling protocols publicly."

My question to you is: What is meant by "all right to confidentiality?"
A. We are affirming our right to confirm that this patient who has already said that she had an abortion at the Allentown Women's Center, to give our version of that event and to represent it accurately, specifically the counselling component.
Q. So you would not release her entire patient record then?
A. No, we would not do that and that is not made clear or unclear by this statement. But we would not, in fact, consider that to be relevant. We would only correct any misinformation that she might be giving out about our facility.

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Defendants' Exhibit 60:
Discovery Excerpts

PLAINTIFF'S OBJECTIONS AND RESPONSES TO DEFENDANTS' REQUESTS FOR ADMISSIONS

Plaintiffs respond to Defendants' Requests for Admissions as follows:

* * *

Request for Admission No. 2:

While delay in the performance of an abortion may increase the risks to the patient from both a mortality and a morbidity standpoint, the increased risks may be negligible and are dependent upon the stage of gestation (first, second, or third trimester). A week delay in the first trimester will not likely result in a harm while there may be greater risks in the second trimester, with the risks more worthy of consideration in the latter part of the second trimester and throughout the third trimester.

Response to Request for Admission No. 2:

Request for Admission No. 2 is **admitted**.

* * *

Request for Admission No. 8:

Some early abortions may be more dangerous than later abortions due to the condition of the patient, the type of procedure used in performing the abortion, or the skill of the performing physicians.

Response to Request for Admission No. 8:

Request for Admission No. 8 is **admitted**.

* * *

DEFENDANTS' RESPONSES TO PLAINTIFFS' REQUESTS FOR ADMISSION AND INTERROGATORIES ADDRESSED TO DEFENDANTS

* * *

Request for Admission No. 10

Adolescents have one of the highest suicide rates of any segment of the population.

RESPONSE:

Defendants object to this interrogatory as being irrelevant to the constitutionality of the Act, particularly in that this admission does not distinguish between males and females and in that it does not relate to pregnant teens. Without waiving this objection, Admission No. 10 is **DENIED**.

ANSWER TO INTERROGATORY NO. 10:

The attached two tables (Exhibits 2 and 3) demonstrate that in Pennsylvania and the United States, teenagers have the lowest rate of suicide among the age groups.

* * *

Commonwealth of Pennsylvania - Department of Health
State Health Data Center

Resident Suicide Deaths by Age and Sex,
Number and Rate, Pennsylvania, 1987 (Provisional)

BY NUMBER:

AGE GROUP	TOTAL	MALES	FEMALES
All Ages	1,489	1,210	279
Under 10	0	0	0
10-14	14	12	2
15-19	89	72	17
20-24	145	127	18
25-34	319	269	50
35-44	219	173	46
45-54	180	129	51
55-64	178	131	47
65-74	194	165	29
75+	151	132	19

BY RATE:*

AGE GROUP	TOTAL	MALES	FEMALES
All Ages	12.5	21.3	4.5
Under 10	-	-	-
10-14	1.8	3.0	0.5
15-19	9.8	15.6	3.8
20-24	14.8	25.8	3.7
25-34	16.4	27.9	5.1
35-44	14.1	22.9	5.8
45-54	15.4	23.2	8.3
55-64	14.2	22.6	6.9
65-74	19.7	39.6	5.1
75+	20.6	51.3	4.0

* Rate per 100,000 estimated 1986 population for each specified age group.

• • •

EXCERPTS FROM PLAINTIFFS' TRIAL EXHIBITS

Plaintiffs' Exhibit 49:
DOH Instructions and Definitions
for Report of Induced
Termination of Pregnancy Form
(July 1988)

INSTRUCTIONS AND DEFINITIONS
REPORT OF INDUCED TERMINATION
OF PREGNANCY

Pennsylvania
Department of Health
State Health Data Center
July, 1988

INTRODUCTION

Purpose: These instructions and definitions are designed as an aid to acquaint hospital and clinic personnel, physicians, and others with responsibilities related to completing and filing reports of induced termination of pregnancy (induced abortion), The purpose is to achieve improved reporting by promoting better understanding of the forms and of the uses of information entered on them.

Generally the person in charge of the institution or facility where the induced abortion is performed has the overall responsibility for obtaining the required data, preparing the report, and filing the report with the Department of Health. For abortions performed outside a hospital, clinic, or other institution, the physician performing the abortion is responsible for preparing and filing the report.

State Reporting Requirements: The reports shall be completed by the hospital or other licensed facility, signed by the physician who performed the abortion and transmitted to the Department of Health within 15 days after each reporting month. Mail to the

Department of Health
State Health Data Center
ISSR Unit
P. 0. Box 90
Harrisburg, PA 17108

Specific Responsibilities: The hospital, clinic or other institution or facility where the induced abortion is performed is responsible for obtaining the necessary data, completing the form, and filing it with the State within the time period specified by law. To ensure the proper performance of these responsibilities, it is preferable that one staff member be given the overall responsibility and authority to see that the reports are completed and filed on time. Specifically, the hospital, clinic, or other institution should:

- o Develop efficient procedures for prompt preparation and filing of reports.
- o Collect and record the information required by the report.
- o Prepare a correct and legible report, making certain that every item is completed.
- o File the report within the time specified in the Abortion Control Act (15 days after each reporting month).

- o Cooperate with State officials concerning queries on report entries.

- o Call on the State Health Data Center at (717) 783-2548 for advice and assistance when necessary.

Physician: For induced abortions performed in a hospital, clinic, or other institution, the physician performing the abortion is responsible for providing the medical information required by the report. When an induced abortion is performed outside a hospital, clinic, or other institution, the physician performing the abortion is responsible for obtaining all of the necessary data, completing the form, and filing it with the State within the time period specified by law.

PART I - GENERAL INSTRUCTIONS FOR COMPLETING REPORTS

The data necessary for preparation of the induced termination of pregnancy report are obtained from the:

- o Patient

- o Attending physician

- o Hospital or clinic records

The data obtained from these reports are very important from both a demographic and a public health viewpoint. Therefore, it is essential that these reports be prepared accurately. These general rules should be followed:

- o File the *original* report with the Department of Health. These reports have sequential file numbers. *Do not reproduce or duplicate these forms.*

- o Avoid abbreviations except those recommended in the specific item instruction.

- o Spell entries correctly.

- o Refer problems not covered in these instructions to the State Health Data Center.

- o Use the current form designated by the State.

- o Type all entries whenever possible. Do not use worn typewriter ribbons.

- o If a typewriter cannot be used, print legibly in black ink.

- o Complete each item following the specific instructions for that item.

PART II -- COMBATING THE REPORT OF INDUCED TERMINATION OF PREGNANCY

These instructions pertain to the 1988 Report of Induced Termination of Pregnancy.

1-2 PLACE OF TERMINATION

1. FACILITY NAME

Enter the full name of the hospital or clinic where the induced termination of pregnancy occurred.

If the induced termination of pregnancy occurred in a hospital or a clinic that is physically situated within a hospital or is administratively a part of a hospital, enter the full name of the hospital.

If the induced termination of pregnancy occurred in a freestanding clinic, a clinic that is physically and administratively separate from a hospital, enter the full name of the clinic.

If the induced termination of pregnancy occurred in a physician's office or some other place, enter the name of the office or place.

In the coding boxes, enter the five-digit number found on the first line of your mailing label, as shown below.

8-0228
WOMENS HEALTH SERVICES
107 SIXTH STREET
FULTON BUILDING 3RD FLOOR
PITTSBURGH, PA 15222

ATTN: PATRICIA MADDEN

2. COUNTY OF PREGNANCY TERMINATION

Enter the name of the county where the pregnancy termination occurred. In the coding boxes, enter the correct county code. See Appendix A.

3. PATIENT'S IDENTIFICATION

Enter the hospital, clinic, or other patient identification number. This number must be one that would enable the facility or physician to access the medical file of this patient. Do not use the patient's name.

4 a-b. RESIDENCE OF PATIENT

The patient's residence is the place where her household is located. This is not necessarily the same as her "home State." "voting residence," "mailing address," or "legal residence." The State and county should be that of the place where the patient actually lives. Never enter a temporary residence such an one used during a visit, business trip, or a vacation. Residence for a short time at the home of a relative or friend is considered to be temporary and should not be entered here. Place of residence during a tour Of military duty or during attendance at college is not considered temporary and should be entered an the place of residence of the patient on the report.

If the patient has been living in a facility where an individual usually resides for a long period of time, such as a group home, mental institution, nursing home, penitentiary, or hospital for the chronically ill, this facility should be entered as the place of residence.

4 a. RESIDENCE - STATE

Enter the name of the State where the patient lives. This may differ from the State in her mailing address. If the patient is not a resident of the United States, enter the name of the country and the name of the unit of government that is the nearest equivalent of a State.

4 b. RESIDENCE - COUNTY

Enter the name of the county where the patient lives.

In the coding boxes, enter the correct county code. See Appendix A. For counties outside Pennsylvania, leave

blank.

5. DATE OF PREGNANCY TERMINATION

Enter the exact month, day, and year of the pregnancy termination.

The date the pregnancy was actually terminated should be entered. This may not necessarily be the date the procedure was begun.

Enter the full name of the month - January, February, March, etc. Do not use a number or abbreviation to designate the month.

6. AGE LAST BIRTHDAY

Enter the age of the patient in years at her last birthday.

7. CLINICAL ESTIMATE OF GESTATION

Enter the length of gestation as estimated by the attending physician in completed menstrual weeks. Do not compute this information from the date last normal manses began and date of termination. If the attendant has not done a clinical estimate of gestation, enter "None."

8. PREVIOUS PREGNANCIES (complete each section)

8 a. Now Living

Enter the number of children born alive to this patient who are still living at the time of this termination. Do not include children by adoption. Check "None" if the

patient has had no previous pregnancies, or if all previous children are dead.

8 b. Now Dead

Enter the number of children born alive to this patient who are no longer living at the time of this termination. Do not include children by adoption. Check "None" if the patient has had no previous pregnancies or if all previous children are still living.

8 c. Spontaneous

Enter the number of previous pregnancies that ended spontaneously and did not result in a live born infant. This should not include induced terminations. Check "None" if the patient has had no previous pregnancies or if all previous pregnancies ended in live born infants.

8 d. Induced

Enter the number of previous induced terminations (induced abortions) that this patient has had. Do not include this termination. Check "None" if the patient has had no previous induced terminations.

9 a-b. TYPE OF TERMINATION PROCEDURES

(Definitions of certain abortion procedures can be found in Appendix B)

9 a. Check the box that describes the primary procedure that actually terminated this pregnancy. Check only one box. If more than one procedure was used, identify the additional procedure(s) in item 9b. If a procedure not listed was used, check "Other" and

specify on the line provided.

9 b. Check the box(es) that describe the additional procedure(s) used. If no additional procedures were used, leave all boxes blank. If a procedure not listed was used, check "Other" and specify on the line provided.

10. MEDICAL COMPLICATIONS OF PREGNANCY

Check all that apply. If none apply, leave item blank.

11. NAME OF ATTENDING PHYSICIAN

Enter the full name of the attending physician. Be sure to spell it correctly and verify correct spelling. This item is used to query for missing or additional information.

Complete the license number of the physician, the signature, and the date submitted to the Department of Health.

APPENDIX A
PENNSYLVANIA COUNTY CODES

COUNTY CODE	COUNTY	COUNTY CODE	COUNTY
01	Adams	35	Lackawanna
02	Allegheny	36	Lancaster
03	Armstrong	37	Lawrence
04	Beaver	38	Lebanon
05	Bedford	39	Lehigh
06	Berks	40	Luzerne
07	Blair	41	Lycoming
08	Bradford	42	McKean
09	Bucks	43	Mercer
10	Butler	44	Mifflin
11	Cambria	45	Monroe
12	Cameron	46	Montgomery
13	Carbon	47	Montour
14	Centre	48	Northampton
15	Chester	49	Northumberland
16	Clarion	50	Perry
17	Clearfield	51	Philadelphia
18	Clinton	52	Pike
19	Columbia	53	Potter
20	Crawford	54	Schuylkill
21	Cumberland	55	Snyder
22	Dauphin	56	Somerset
23	Delaware	57	Sullivan
24	Elk	58	Susquehanna
25	Erie	59	Tioga
26	Fayette	60	Union
27	Forest	61	Venango
28	Franklin	62	Warren

29	Fulton	63	Washington
30	Greene	64	Wayne
31	Huntingdon	65	Westmoreland
32	Indiana	66	Wyoming
33	Jefferson	67	York
34	Juniata		

APPENDIX B
DEFINITIONS OF INDUCED ABORTION PROCEDURES

Suction curettage (Also known an vacuum aspiration). - In this procedure the cervical canal is dilated by the successive insertion of instruments of increasing diameter called dilators. When the opening is large enough, a flexible tube (cannula) is inserted into the uterine cavity, and the fetal and placental tissues are then suctioned out by an electric vacuum pump.

Sharp curettage (Also known as dilatation and curettage, D & C, or surgical curettage). - This procedure involves the dilation of the cervix an in suction, although usually to a larger diameter. The fetal and placental tissues are then scraped out with a curette, which resembles a small spoon.

Dilation and evacuation (D & E). - This procedure, used most frequently in the second trimester, involves opening the cervix (dilation) and using primarily sharp techniques, but also suction and other instrumentation such an forceps for evacuation.

Intrauterine saline instillation (Also known as saline abortion and saline amniotic fluid exchange). - This procedure entails withdrawing a portion of the amniotic fluid from the uterine cavity by a needle inserted through the abdominal wall and replacing this fluid with a concentrated malt solution. This process induces labor, which results in the expulsion of the usually dead fetus approximately 24 to 48 hours later.

Intrauterine prostaglandin instillation. - This procedure involves injecting a prostaglandin - a substance with

hormonelike activity - into the uterine cavity through a needle inserted through the abdominal wall. The interval between injection and expulsion tends to be shorter than in a saline abortion.

Hysterotomy. - This procedure involves surgical entry into the uterus, as in a cesarean section, that removes a fetus that is too small to survive even with extraordinary life support measures. It is usually performed only if other abortion procedures fail.

Hysterectomy. - In this procedure, the uterus is removed either with the fetus inside or after the fetus has been removed. It is usually performed only when a pathological condition of the uterus, such as fibroid tumors, warrants its removal or when a woman desires sterilization.

All definitions, except for D & E, are from *Legalized Abortion and the Public Health* (Institute of Medicine, 1975). The definition of D & E is based on national Center for Health Statistics consultation with the Center for Health Promotion and Education, Centers for Disease Control.

All other procedures should be shown an "Other" and the specific procedure listed. This category includes procedures using a combination of agents, such as urea and prostaglandin, prostaglandin and oxytocin, or prostaglandin and saline.

APPENDIX C
DEFINITIONS

The following definitions are included in the 1977 revision of the Model State Vital Statistics Act and Regulations. The definitions of live birth and fetal death conform to the definitions adopted by the Assembly of the World Health Organization.

Live birth is the complete expulsion or extraction from its mother of a product of human conception, irrespective of the duration of pregnancy, which after such expulsion or extraction, breathes, or shows any other evidence of life such an beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, whether or not the umbilical cord has been cut or the placenta is attached.

Note - If an infant breathes or shows any other evidence of life after complete delivery, even though it may be only momentary, the birth must be registered as a live birth and a death certificate must also be filed.

Fetal death is death prior to the complete expulsion or extraction from its mother of a product of human conception, irrespective of the duration of pregnancy; the death is indicated by the fact that after such expulsion or extraction, the fetus does not breathe or show any other evidence of life, such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles.

Induced termination of pregnancy is the purposeful interruption of pregnancy with the, intention other than to produce a live-born infant or to remove a dead fetus and which does not result in a live birth.

Note - If an induced termination is performed on a fetus of 16 weeks gestation or longer, a Certificate of Fetal Death as well as a Report of Induced Termination of Pregnancy must be filed.

REPORT OF INDUCED TERMINATION OF PREGNANCY MONTHLY TRANSMITTAL FORM

Please return this page with all of your completed Report of Induced Termination of Pregnancy forms for the reporting period of AUGUST 25-31 by September 15, 1988. Also, complete the requested information below for your facility:

FACILITY I.D. __-__ __ __ __ __

NAME OF FACILITY _____

CONTACT PERSON/TITLE _____

TELEPHONE NUMBER ( ) ____ - _____

DATE SUBMITTED _____

NUMBER OF COMPLETED FORMS ENCLOSED ____

Please complete and return this page even if you do not have any procedures to report.

MAIL TO: Pennsylvania Department of Health
State Health Data Center
ISSR Unit
PO Box 90
Harrisburg, PA 17108

Plaintiffs' Exhibit 60:
Veto Message to the Pennsylvania Senate
on S.B. 742
of Governor Dick Thornburgh
(Dec. 23, 1981)

December 23, 1981

To the Honorable, the Senate
of the Commonwealth of Pennsylvania

I have before me for action Senate Bill 742, Printer's No. 1535, which would establish a number of detailed procedures and requirements with respect to the performance of medical abortions.

Perhaps no issue in recent times has generated more concern, conflict and passion than the issue of what, if any, restrictions should be imposed upon the ability to obtain an abortion. Perhaps, then, it should not be surprising that this bill has led to a considerable amount of public passion and controversy. Unfortunately, it also appears to have generated a considerable amount of misinformation and misunderstanding.

Many who favor stringent limitations on abortion appear to perceive this bill as a means of furthering that objective. Many who oppose most or all restrictions on abortion appear to perceive this bill as preventing virtually all abortions.

I have carefully studied this bill and those opinions of the United States Supreme Court and other federal courts which establish the legal and constitutional parameters for the performance of medical abortions. I also have reviewed similar laws in other states and a variety of relevant materials and opinions reflecting all

points of view on the cluster of issues related to the abortion question.

I have concluded that this bill does far less to restrict the ability of a woman to elect to have an abortion than its proponents perceive or its opponents fear.

I have stated a number of times in the past my personal opposition to abortion on demand, and my view that abortion should not be employed as an alternative to birth control techniques. I have also expressed my concern that too many abortions are too casually undertaken. This is a matter of particular concern with regard to teen-agers who are usually less equipped than adults to independently evaluate the decision to have an abortion or understand the consequences it may later entail.

On the other hand, I also have stated in the past my personal view that abortion should be a permissable medical option in certain narrowly restricted situations, including threat to the life of the mother, rape, incest or serious and irreparable harm to the health of the mother.

While this bill contains a number of proposed requirements with which I am in agreement, I have concluded that it really does little, if anything, to prohibit abortions which can now be performed in the Commonwealth.

What this bill would do is erect a series of hurdles which would have to be cleared by a pregnant woman interested in obtaining an abortion.

Any competent, pregnant, adult intent upon obtaining an abortion who could negotiate those hurdles, could obtain one, much as she now could in this state. It must be assumed that the same services now available to assist and counsel women considering abortion would be available to provide assistance to any such woman in negotiating the procedural hurdles contained in this bill.

On the other hand, for those women, often minors,

who face the dilemma of an unwanted pregnancy with fear or ignorance, some of these proposed procedures would provide certain valuable information and protection.

Specifically, the bill would permit a pregnant woman to elect an abortion before the fetus is viable -- that is, capable of surviving outside the body of the mother -- if her physician made a medical determination that it was necessary in light of all factors relevant to the well-being of the woman, including physical, emotional, psychological, age and family circumstances.

The bill would, however, require women seeking such abortions to be counselled on the options with regard to an unwanted pregnancy and the consequences of each, including the medical risks involved in both proceeding with an abortion and with carrying the fetus to term. It would then require a waiting period of one day, which would provide the woman with an opportunity to assess and reflect upon this information. This waiting period would not apply where a medical emergency compelled the performance of an abortion.

The bill would require minors and adjudged incompetents to obtain the consent of a parent or guardian for an abortion if so desired. In the alternative, such a pregnant woman could obtain a court order authorizing the performance of an abortion upon a finding either that the woman is mature and capable of giving her informed consent, or that the performance of an abortion would be in the woman's best interests. In such a proceeding, the pregnant woman would be entitled to court-appointed counsel, and all proceedings would be confidential. In assessing the best interests of a minor seeking an abortion, I must assume that any court would rely heavily on the best medical judgment of the petitioner's physician.

The bill would require that any abortion after the

first trimester of pregnancy be performed in a hospital.

The bill would require certain precautions to help insure the survival of an aborted fetus which was viable. Where a physician has determined prior to an abortion that the fetus is, in fact, viable, an abortion could only be performed upon a determination by the woman's physician that the abortion was necessary to preserve her life or health, and then, to the extent medically feasible, by the method most likely to preserve the viability of the fetus. I am advised that this is already the case pursuant to current normal medical practice.

The bill would require that physicians performing abortions file reports setting forth certain detailed information relating to the facts and circumstances involved in the abortion. Such records would not contain the identity of the pregnant woman, but would be available for public inspection.

The bill would place restrictions an abortion-related coverage that could be provided in health care and disability insurance policies.

The bill provides for an annual review by the state Health Advisory Board of the standards and criteria for assessing viability, While the specific question of viability in any particular case appears to be left to the medical determination of the attending physician, the regularly revised standards devised by this board would appear to constitute a presumption against which each physician's determination could be judged. I have reservations about this provision. It has the potential to further politicize and complicate the whole issue of abortion. It will focus undue attention on a small board that may not reflect the consensus in the medical community at any given time on an issue that seems best left to the unfettered determination of individual treating physicians on a case-by-case basis. This is particularly troublesome since, by law, only half of that board's members are

physicians. I do not object to a periodic review and revision of criteria of viability. I believe, however, that this should be the responsibility of the recognized organizations of the medical community -- not of government.

Finally, this bill defines human life as beginning at the moment of fertilization. Much of the intent and purpose of the bill appears to flow from that assertion.

I do not believe that I have the scientific or theological expertise to affirm or refute that premise, nor do I believe that the members of the General Assembly do. The U.S. Supreme Court has noted the consensus among medical practitioners and theologians over a long period of time that human life does not begin until the time of viability or even later. The court has noted that this has been the predominant view in the Jewish and Protestant communities, and was also "official Roman Catholic dogma" until the last century.

It has been argued by many that the extremely detailed nature of some of the counselling and reporting requirements, when combined with the stringent criminal penalties that are provided for virtually any violation, is intended to deter women from seeking abortions and physicians from performing them, even under circumstances where the courts have made clear that abortions cannot be constitutionally restricted. I believe that these provisions, combined with the "human life" definition and power of a small state board to set standards of viability, have given rise to most of the concern and consternation expressed over this bill.

In performing my responsibility to properly evaluate this bill, I must carefully weigh not only the literal substance of the bill but what its effects could be. There is no bill to which I have given more careful consideration or undertaken more precise review and reflection. I have reached the following conclusions.

The medical necessity test for obtaining an abortion prior to the viability of a fetus, is consistent with U.S. Supreme Court holdings and is, in my view, reasonable.

The requirement for counselling and assessment are, in my view, reasonable for someone confronting a surgical procedure of this type and a personal decision of this magnitude -- one which studies show could have lasting emotional impact. Requiring a physician to provide such counselling or medical advice is, in my view, reasonable and comparable to the kinds of things physicians do in other similar situations. Indeed, I would think that any thoughtful and sensitive physician, under any circumstances, would agree that it is appropriate to apprise a patient of the various potential medical, psychological and other risks and effects associated with such a procedure. Further, I think it is right to explain to a pregnant woman that there are alternatives to abortion if her only objection is raising the child or her only fear is the inability to support the child. An abortion that would not be performed but for ignorance or fear is perhaps an abortion best not performed.

On the other hand, I doubt that requiring the preparation and availability of detailed color photographs of a fetus at various gestational increments is necessary to an informed abortion decision. Moreover, their presentation would likely cause many women considerable anguish and distress.

While I personally believe that a brief, so-called "waiting period" is reasonable, I must note that comparable provisions in other bills have been held unconstitutional by a number of federal appeals courts.

I feel that the provision for parental or guardian consent, or in the alternative, court review, is reasonable and consistent with traditional and legal parental responsibilities for the welfare of their minor children, and with the traditional role of the courts to determine,

when necessary, the best interests of minor children. At no time is a minor more likely to need or stand to benefit from the guidance and support of a responsible adult than when facing the emotional trauma and dilemma of an unwanted pregnancy. I believe, however, that if the alternative of a court determination is to meet constitutional standards of reasonableness, it should include a specific, limited time period within which the court must act rather than the more general and undefined term, "promptly", as the bill now provides.

I do not believe that the requirement that an abortion on a woman beyond the first trimester of pregnancy be performed in a hospital is unreasonable. In fact, the great majority of abortions are performed in the first trimester. Abortions performed beyond that period are more likely to entail greater risks, complications and care. However, I have serious reservations about the proposed requirement that all such abortions be performed on an in-patient basis. The necessity of proceeding on an in-patient basis, in my view, should be determined on a case-by-case basis by the attending physician. Clearly, proceeding on an in-patient basis would involve a greater burden and cost to the woman involved. Where the need to proceed on an in-patient basis is not reasonably related to maternal health or the protection of a potentially viable fetus, this requirement would appear to be unduly restrictive and thus unconstitutional.

The provisions which limit the aborting of a fetus medically determined to be viable and which require precautions to preserve the life of an aborted fetus which is in fact viable are, in my view, right and reasonable. In fact, the overwhelming majority of abortions are performed before any question of viability arises. I cannot disregard a recent *Philadelphia Inquirer* investigative feature which exposed the fact that in at

least some cases of more advanced pregnancy, viable fetuses were being aborted and permitted to die. If a fetus is capable of living and growing outside the womb, it is difficult for me to accept that it does not embody a human life. If we are to regard ourselves as a humanitarian society, I believe that we must take every reasonable precaution in favor of the preservation of innocent life. This would include, in my view, requirements such as the ones in this bill for the presence of a second physician where an aborted fetus may be viable and utilization of the abortion technique, where consistent with maternal life and health, most likely to preserve a viable fetus.

I am troubled, however, by the provision in Section 3212 (B) of the bill which, when read in conjunction with the definitions of "born alive" and "viability" in Section 3208, would appear to require the use of every scientifically possible means, including artificial sustenance, to maintain in a technical state of life, presumably indefinitely, an aborted fetus or organism, however defective, deficient, or diseased, that does not embody any prospect of human life as we know it. While this may not have been the intent of the legislation, this provision could require a physician, under the risk of severe criminal penalties, to artificially maintain even an aborted anencephalic fetus, that is, one with no head or brain. Such cases have been documented.

The provision would establish a higher standard of care for a viable fetus or human organism than is required in the case of a diseased or failing adult. Whether and when artificial means of sustenance should be employed is a decision which, in my view, is best left to the affected family and their physician.

I believe that some general reporting requirements are reasonable and could provide the kind of data that

would be beneficial in enabling us to make more informed judgments about the continuing questions related to the matter of abortion. Indeed, 30 other states have enacted legislation with some type of reporting requirements. However, I have reservations about several of the specific reporting requirements proposed in this bill, and a particular concern about the availability of such reports for general public inspection. I am concerned that this could lead to the compromising of the identities and privacy of women who have obtained abortions, and of the doctor-patient relationship.

I also have some reservations about the constitutionality of some of the restrictions in the insurance provision and on the use of public health facilities in performing abortions. Where the latter are the only accessible facilities for women who are seeking abortions under circumstances where they would be permitted in private facilities, the application of this restriction seems unfair and has been held unconstitutional.

I have reviewed the history and development of this bill. it appears to me that the various amendments and revisions to the bill as initially proposed reflect a genuine effort to adopt procedures to insure informed consent by adults and reasonable protection for the well-being of minors considering abortion, as well as standards and procedures for protecting and preserving, to the extent possible and consistent with the life and health of the mother, the potential for new human life, and to do so within the constitutional limitations prescribed by the U.S. Supreme Court.

The U.S. Supreme Court has recognized the interest of a state in reasonably regulating abortion in ways related to maternal health and well-being, and for the purpose of protecting the "potentiality of human life." I believe that many provisions of the bill, as I have

indicated, are consistent with those interests and are reasonable, particularly with regard to those women who, because of their circumstances, would benefit from the guidance and protection afforded by them.

On the other hand, I am concerned that other provisions, and to some extent, the overall tone and tenor of the bill, would have the effect of imposing an undue and, in some cases, unconstitutional burden upon even informed, mature adults intent upon obtaining an abortion under circumstances in which the U.S. Supreme Court has determined they are entitled to do so. For example, Section 3213 would preclude the victim of a rape who has made an informed and mature decision that she absolutely does not want to bear any child that might result from that rape from exercising the option of menstrual extraction, and would force her to wait the five weeks or more that is required for the fact of pregnancy to be determined. This requirement would appear to needlessly subject a woman in such a stressful situation to additional trauma.

Likewise, I am concerned that some of the detailed, complex, and burdensome requirements of the bill, accompanied as they are by severe criminal penalties, could well foster an atmosphere in which many physicians would be deterred from providing the kind of abortion-related medical services to which the U.S. Supreme Court has held their patients are constitutionally entitled. This could well disrupt the traditional doctor-patient relationship and impinge upon the right of physicians to practice. Of even greater concern is the potential for more experienced and conscientious physicians to refrain from involvement in even medically necessary abortions, and to abandon the field to marginal practitioners. It could even lead to a resurgence of "back alley" abortions, which no thoughtful person would wish to happen. I believe that this concern

could be alleviated by reduced criminal sanctions which would still be sufficient to deter physicians from willful violations.

I am also concerned that in its entirety the bill in its current form goes further than is necessary in protecting the state interests in this area to which I have referred. In so doing, it threatens to create additional regulation and bureaucracy and to unduly involve government in the private lives of its citizens.

Accordingly, and after extensive consideration and deliberation, I am returning this bill without my signature. In so doing, I wish to indicate the availability of my office to work with the General Assembly in developing revised legislation to effectuate the provisions with which I have indicated my agreement consistent with the objections I have expressed.

/s/_____
Dick Thornburgh
Governor

Plaintiffs' Exhibit 61:
Message to Pennsylvania Senate on Signing of 1982 Pennsylvania Abortion Control Act of Governor Dick Thornburgh (June 11, 1982)

June 11, 1982

To the Honorable, the Senate
of the Commonwealth of Pennsylvania

I have before me for consideration Senate Bill 439, Printer's No. 2049, which would require the Commonwealth to provide to criminal justice agencies certain criminal record information, upon appropriate request, free of charge. This bill has been subject to a number of unrelated amendments, the most important, and only controversial, one of which has to do with the procedures related to the performance of abortions in the Commonwealth.

I was confronted with such a measure in the form of S.B. 742 last December. That bill contained 11 provisions to which I objected. In addition, the overall tone and tenor was such that I felt it could have a chilling effect in a constitutionally-protected area, and created an aura of undue government intrusion into private lives which conflicted with my convictions and philosophy. On Dec. 23, 1981, I vetoed that bill, setting forth in detail those concerns and objections.

My careful review of this revised measure reveals that the statement of the bill's sponsor that the new measure was "tailored" to meet my objections appears to be accurate. My review reveals that virtually every item in the initial bill to which I objected has been removed or appropriately revised in the current measure.

Key among the 11 provisions to which I objected in

the original bill were:

•A definition of "human life" as commencing at the instant of fertilization. I objected to this, and it has been removed from the current bill.

•A requirement that the state Health Advisory Board set standards of fetus viability and, moreover, review and revise such standards on an annual basis. I objected to this and expressed the view that the question of viability was more properly determined on a case-by-case basis by an attending physician. This provision has been removed from the current bill.

•A provision requiring that detailed color photographs depicting the incremental development of the human fetus in the womb be made available for showing to women contemplating abortion. I objected to this and expressed the view that if imposed an unreasonable and potentially anguishing burden on women contemplating abortion. This provision has been removed from the current bill.

•A requirement that all abortions after the first trimester be performed on an in-patient basis. I felt that this was a matter better left to the judgment of the woman involved and her treating physician. I objected to this provision, and it has been removed from the current bill.

•A prohibition of menstrual extraction, even in cases of rape. I found this objectionable. This has now been eliminated in the bill currently before me.

•A provision prohibiting the inclusion of abortion coverage in standard medical insurance policies issued in the Commonwealth. I objected, and this provision has been removed from the current bill.

•Provisions which would have required the use of heroic efforts and artificial sustenance to maintain

in a technical state of survival any fetus once aborted which was capable of being so maintained, however deformed and regardless of its prospects for any meaningful life as we know it. This would even have included anancephalic fetuses (i.e., those literally born without a head or brain). I objected to this. It has been eliminated in the current bill before me. Under the current bill, physicians would only be required to provide the same types of treatment to an infant aborted alive that they would to a live adult under comparable circumstances. This is totally consistent with existing medical standards and legal obligations.

•Certain reporting requirements relative to the performance of abortions which in my view did not adequately protect the confidentiality of the doctor-patient relationship and the right of personal privacy. I objected, and the relevant provisions have been eliminated in the current measure.

•A provision effectively preventing the performance of abortions in state-owned or operated hospitals. I objected to this, and expressed the view that it would discriminate against women seeking abortions who did not have access to private hospitals. This provision has been eliminated. The new bill would permit abortions to be performed in state-owned or operated hospitals unless there was another nearby hospital in which such an abortion could be performed.

Severe criminal penalties on doctors who violated even the ministerial provisions of the act. I objected to this. The penalty structure has been drastically altered in the current bill. In certain cases, criminal sanctions have been removed altogether. In the other instances, the criminal sanctions imposed are now consistent with penalties

that already exist for comparable conduct and in laws similar to this one as enacted in many other states.

*A provision for court review of requests by a juvenile for an abortion that failed to impose any time limit within which the court must act, and thus created the prospect of an indefinite and unappealable delay in the process. I objected to this omission, and the current bill would now impose a requirement for speedy action in such court proceedings.

This bill does contain eight provisions concerning abortion procedures which were contained in the original bill presented to me. At the time I vetoed that bill, I stated that I did not approve of abortion on demand, and had become convinced "too many abortions are too casually undertaken." I also stated that I had become convinced by reports, including an investigative account by the Philadelphia *Inquirer*, that a need existed to provide better protection for viable fetuses, particularly those aborted alive. Indeed, it is worth noting that even one of the most vocal legislative opponents of regulating abortion procedures acknowledged during recent floor debate on this bill that ". . . there is an abortion problem."

I believe that society has in obligation to provide certain basic protection for pregnant women contemplating or confronting the abortion process, particularly juveniles, and for a viable fetus which embodies human life. I believe that this interest of society in ensuring informed consent and protecting human health and life should be achieved with the minimum possible intrusion into the private lives of our citizens, and with the least possible interference in a decision-making process which should essentially be between a woman and her treating physician.

I recognize that both proponents and opponents of this bill have contended that it would limit or prohibit abortions. Even the original bill, with its excessive and objectionable provisions, would not in my view have prevented anyone intent upon obtaining an abortion from doing so. I believe that the provisions in the current bill address the legitimate interests of society in providing the basic protections I have referred to in a minimally intrusive -- and acceptable -- manner.

Under this bill, any abortion could be performed, prior to the viability of the fetus, if it is found to be medically or otherwise "necessary." The determination of necessity is left strictly to the judgment of a treating physician. The definition of "necessary" permits the physician to consider a wide array of criteria, including physical, emotional, psychological, and even familial factors and the age of the woman seeking the abortion. Under the necessity test as defined in this bill, it clearly appears that very few, if any, abortions which can now be performed under existing legal and medical standards would be prohibited. The necessity test as articulated in this bill is totaily consistent with the express language of the United States Supreme Court on this subject in *Doe vs. Bolton*.

This bill would impose a requirement that a woman contemplating abortion be counselled on all available options and the medical consequences of each. I believe this requirement to be reasonable for someone confronting a surgical procedure of this type and a personal decision of this magnitude -- one which studies show could have a lasting emotional impact. Indeed, I would think that any thoughtful and sensitive physician, under any circumstances, would agree that it is appropriate to apprise a patient of the various potential medical psychological and other risks and effects associated with such procedure. Further, I think it is right to

explain to a pregnant woman that there are alternatives to abortion if her only objection is raising the child or her only fear is the inability to support the child. An abortion that would not be performed but for ignorance or fear is perhaps an abortion best not performed.

It is important to note that, unlike the previous bill, this bill would not require physicians to personally provide all aspects of such counselling, but rather only those respecting medical matters. Other information and counselling may be provided, as is now practiced in responsible facilities, by knowledgeable counselors.

This bill would require a 24-hour "waiting period" between the counselling and the actual performance of an abortion. This period would provide a woman with an opportunity to assess and reflect upon this information. I believe this to be a reasonable requirement, particularly since this waiting period would not apply where a medical emergency compelled the performance of an abortion. Absent such medical need, I can foresee no harm arising from such a brief period of delay and reflection. Indeed, I would think that such a period of reflection is normal and reasonable whenever someone is evaluating and confronting surgical procedures that are even less imbued with stress and risk.

This bill would require minors and adjudged incompetents seeking an abortion to obtain the consent of a parent or guardian. In the alternative, such a pregnant woman could obtain a court order within a fixed brief time period, authorizing the performance of an abortion upon a finding either that the woman is mature and capable of giving her informed consent, or that the performance of an abortion would be in the woman's best interests. In such a proceeding, the pregnant woman would be entitled to free, court-appointed counsel, and all proceedings would be

kept confidential. In assessing the best interests of a minor seeking an abortion, I must assume that any court would rely heavily on the best medical judgment of the petitioner's physician. I continue to feel that this provision is reasonable and consistent with traditional and legal parental responsibilities for the welfare of their minor children, and with the traditional role the courts have played in determining the best interests of minor children. At no time is a minor more likely to need or stand to benefit from the guidance and support of a responsible adult than when facing the emotional trauma and dilemma of an unwanted pregnancy. Moreover, the justification for such guidance is certainly as compelling in the case of an abortion as that of current consent requirements for such comparatively routine surgical procedures as the removal of an appendix or tonsils.

This bill would require that any abortion after the first trimester of pregnancy be performed in a hospital, although not necessarily on an in-patient basis. Of all abortions performed last year in this state, 94.4 percent were performed during the first trimester. Abortions performed beyond that period are more likely to entail greater risks, complications and care. I believe this provision represents a reasonable and responsible precaution.

The bill would require certain precautions to help ensure the survival of an aborted fetus which was viable. Where a physician has determined prior to an abortion that the fetus is, in fact, viable, an abortion could only be performed upon a determination by the woman's physician that the abortion was necessary to preserve her life or health, and then, to the extent medically feasible, by the method most likely to preserve the viability of the fetus. I am advised that this is already the case pursuant to current normal medical practice.

The bill would require the presence of a second

physician to attend to the fetus should it be aborted alive. If a fetus is capable of living and growing outside the womb, it is difficult for me to accept that it does not embody a human life. If we are to regard ourselves as a humanitarian society, I believe that we must take every reasonable precaution in favor of the preservation of innocent life. I do believe these precautionary provisions to be reasonable and responsible.

While protecting the identities of individuals seeking abortions, physicians performing abortions, and those associated with facilities providing abortion, this bill does require that reports be filed with the state Health Department regarding abortions.

I believe that these reporting requirements are reasonable and could provide the kind of data that would be beneficial in enabling us to make more informed judgments about the continuing questions related to the matter of abortion. Indeed, 30 other states have enacted legislation with these types of reporting requirements.

Twenty-two other states have enacted laws comparable to Senate Bill 439, without evidence of the extreme effects predicted by both proponents and opponents of this measure.

I recognize that there is a legitimate difference of opinion, and, in some cases, a conflict among courts, over the constitutionality of some of these provisions -- most notably, the waiting period and parental consent requirements. While I believe firmly that issues such as this, which touch upon questions of life itself, must be resolved as a matter of conscience and conviction, I also recognize that, as Governor, I have an obligation to reject legislation which is patently unconstitutional. I do not, however, feel that I must undertake to resolve all possible Constitutional contentions in evaluating legislation. This is the province of the courts.

In this regard, I note that the U.S. Supreme Court

has agreed to review a number of lower court decisions on statutes related to abortion and thus to provide final and definitive judgments on the constitutionality of a number of state laws which encompass virtually all of the provisions in the measure now before me about which questions have been raised. The bill before me would not take effect for six months. Thus, it is highly likely that the Supreme Court will provide clear guidance for all the states in this area before this bill would take effect. Obviously, any provisions in this bill which are inconsistent with the determination about to be made by the Supreme Court could not and would not take effect.

With that understanding, and consistent with my convictions on this issue as explained in my message of December 23, 1981, I am herewith signing this bill.

/s/_____

Dick Thornburgh
Governor

Plaintiffs' Exhibit 62:
Veto Message to Pennsylvania House
of Representatives on H.B. 1130
of Governor Robert Casey
(Dec. 17, 1987)

December 17, 1987

TO THE HONORABLE THE HOUSE OF
REPRESENTATIVES OF THE COMMONWEALTH
OF PENNSYLVANIA

I am returning without my approval House Bill 1130, Printer's No. 2546, entitled "AN ACT amending Title 18 (Crimes and Offenses) of the Pennsylvania Consolidated Statutes, limiting the defense of justification in certain cases; PROVIDING FOR DISTRICT ATTORNEYS' STANDING AND INTEREST IN PRISONER LITIGATION; adding provisions relating to the establishment and operation of the Pennsylvania Commission on Sentencing; REGULATING MATTERS RELATING TO THE PERFORMANCE AND FUNDING OF ABORTIONS, THE PROTECTION OF WOMEN WHO UNDERGO ABORTION AND THEIR SPOUSES, AND THE PROTECTION OF CHILDREN SUBJECT TO ABORTION; increasing the penalties for false reports to law enforcement authorities; making an editorial change; and making repeals."

I was elected Governor of Pennsylvania to carry out the pledges I made to the people of this Commonwealth, and I will not break faith with those people, or break my promises to them. I have stated repeatedly that I am opposed to abortion on every moral ground. I believe that our society must not tolerate the destruction of

human life, and that we have a moral obligation to work to end this tragedy. This legislation, if corrected in the manner discussed below, will provide us with an opportunity to take a step forward in limiting this destruction.

In its present form, however, I have concluded that it is not constitutional and that I must veto it. But I strongly reaffirm today my commitment to joining with the clear majority of the Legislature who voted for this bill, and the majority of Pennsylvanians who voted for me on the basis of my clearly stated agenda for this state, to sign into law the strongest possible measure controlling abortion consistent with the Constitution and my oath to it.

There are two considerations that the gubernatorial role in the process compels me to interject into the legislation at this point. These two concerns intersect. The first is simply this: In order to ensure that the measures we adopt actually take effect and contribute to the reduction and someday, I hope, the elimination of abortions in our state, they must be not only well-intentioned but well-drafted and able to withstand the constitutional challenges that will be mounted against them.

The second consideration may be just as simply stated: I promised the people of Pennsylvania, and I took an oath, that I would uphold the Constitution. The legitimacy of our system of government, the finest on earth, depends not just upon our pursuit of the moral good, but also upon our adherence to the rule of law. Our law, and my oath as Governor, require that I execute those laws -- including the Constitution -- as interpreted by the courts, until such time as we are successful, through the democratic process, in changing the courts or the law they interpret.

These tasks are not ones that I take lightly. I would

do both the people, and the values I cherish and seek to promote, a grave disservice were I not to give them my fullest attention and care. Given the magnitude of the issue, and its importance to so many Pennsylvanians, I have taken it as a solemn duty to review this matter, and the state of the law, in considerable depth. The adoption of concrete, final language by the Legislature enabled me, beginning last week, to undertake a comprehensive study of that language and the United States Supreme Court's rulings on the subject of abortion. I have wrestled continuously over the past few days with each of the questions potentially raised by the state of the law and its application to this bill. It is only after this searching analysis that I am ready to discuss this legislation fully with the Legislature and the people of this state.

A few sections of the bill call for our particular attention. The first of these is the informed consent provision that would be included in Section 3205 of the new law. The United States Supreme Court has ruled that a state cannot prohibit a physician from delegating to another qualified individual the counseling task in the informed consent context. The wording of the proposed Section 3205 is, however, potentially ambiguous on that point, and may possibly be read by some as requiring that counseling be carried out *only* by the performing or referring physician.

I do not believe that the legislation suffers from such a constitutional defect, however. When read *in pari materia* with the Medical Practice Act of 1985 governing all medical procedures in the Commonwealth, it is clear that, absent an express legislative declaration otherwise, physicians may delegate the functions in question to individuals qualified to perform such counseling. A statute is to be read so as to render it constitutional, and with such a reading Section 3205 is constitutional. I

therefore believe that this section of the bill must be so construed and thus passes constitutional muster.

Section 3209 requires that, except as provided in that section, before an abortion may be performed the woman must verify that she has notified the child's father of her decision to seek an abortion. To the extent that our law continues to allow the termination of the procreative process once set in motion, a decent society ought to do everything possible to promote participation and prudence in that decision by both the mother and father.

The Supreme Court has consistently adhered to a legal framework established in *Roe v. Wade*, and which may be summarized as follows: The right to obtain an abortion is derived from the right of privacy. This right of privacy protects various facets of an individual's life against government intervention and surveillance. While some of the concerns that give rise to this right of privacy grow out of such contexts as marriage, procreation, family relationships, and child-rearing -- all of which involve more than one individual -- the right of privacy is an individual right, accruing to each and every person individually and beyond the reach of the state. It was on this basis that the Court struck down a requirement that a woman obtain her spouse's consent before she could undergo an abortion.

Other rulings by the Court have declared that a state may not compel disclosure of information protected by an individual's right of privacy to *any* third-party; that a state lacks a legally justifiable interest in simply knowing the identity of a woman seeking an abortion; and that a state cannot intervene in the marital relationship to dictate the relations between husband and wife. In striking down spousal consent requirements, the Court held that a state cannot delegate to any third-party -- even a husband -- a power that the state cannot exercise

itself.

Moreover, in the one context in which the Court *has* upheld the involvement of others in an individual abortion decision -- parental consent and notice laws regulating minors seeking abortions -- the Court has permitted states to require such involvement only as a mature substitute for an immature minor's decision. The Court has mandated that a mature minor must be able to pursue an abortion without parental consent, or even notice. The case law makes plain that the Court treats consent and notice requirements equivalently in regard to their impingement upon the individual exercise of the abortion decision to which the Court has extended privacy protection.

I strongly disagree with this reasoning as a matter of morality, wisdom, and constitutional interpretation. My duty, however, requires me to pursue our objectives within the Constitution. The Supreme Court's decisions make it clear that the paternal notice requirement will be struck down as unconstitutional if enacted. Moreover, every state statute requiring merely *spousal* notice that has been taken before a federal court has been struck down. I am forced to conclude that this provision poses the almost certain and unacceptable prospect of invalidation, and costly, unsuccessful, and avoidable litigation.

In addition, Section 3214, which requires the reporting of information to the Department of Health, remains substantially unchanged from the version summarily struck down by the Supreme Court less than two years ago. The Court has indicated that the government has a sustainable interest in the collection of health-related data in the abortion control context. However, where information concerning identifiable individuals is maintained by the government, sufficient safeguards against its release must exist under the law;

the government must, of course, have a legitimate health-related concern for knowing the specific identity of the individuals to whom that data pertains. In its *Thornburgh* decision striking down this Section, the Court explicitly found substantial portions of the data required under the Act not to be health-related and therefore to be constitutionally infirm.

While eliminating the public copying provision that the Court struck down, the bill as drafted neither provides the types of confidentiality safeguards required and which are utilized for other sensitive health data, nor excludes any of the data -- such as method of payment, the woman's personal history, and the bases for medical judgment -- that the Court specifically singled out as unwarranted. In that light, the provision unnecessarily invites invalidation and would not represent responsible legislation.

Finally, I must note that our concerns cannot end with protecting unborn children, but must extend to protecting, and promoting the health, of *all* our children, and their mothers. The right to life must mean the right to a decent life. Our concern for future mothers must include a concern for current mothers. Our respect for the wonders of pregnancy must be equaled by a sensitivity to the traumas of pregnancy. This Administration has called for significantly increased support for child and maternal health programs, for education, for rape counseling and support services. And we will continue to advance more programs born of the recognition that our moral responsibility to mothers and children does not end at birth. Those proposals deserve to receive the same overwhelming vote of approval in the Legislature that this bill received.

Let me restate in summary the distinction between personal belief and constitutional duty as it applies to this legislation. I believe abortion to be the ultimate

violence. I believe strongly that *Roe v. Wade* was incorrectly decided as a matter of law and represents a national public policy both divisive and destructive. It has unleashed a tidal wave that has swept away the lives of millions of defenseless, innocent unborn children. In according the woman's right of privacy in the abortion decision both exclusivity and finality, the Supreme Court has not only disregarded the right of the unborn child to life itself, but has deprived parents, spouses, and the state of the right to participate in a decision in which they all have a vital interest. This interest ought to be protected, rather than denied, by the law. This policy has had, and will continue to have, a profoundly destructive effect upon the fabric of American life. But these personal beliefs must yield to the duty, imposed by my oath of office, to follow the Constitution as interpreted by the Supreme Court of the United States.

In light of these conclusions imposed upon me by my oath and obligation as Governor, I am returning this bill to the Legislature without my signature, for revision along the lines indicated. Most importantly, I emphasize again that we must -- and we will -- enact a strong and sustainable Abortion Control Act that forms a humane and constitutional foundation for our efforts to ensure that no child is denied his or her chance to walk in the sun and make the most out of life. I will sign this bill when it reaches the end of the legislative process and attains those standards.

/s/ _____
Robert Casey
Governor

Plaintiffs' Exhibit 67:
Excerpts from *The Federal Role in Determining the Medical and Psychological Impact of Abortion on Women*,
H.R. Rep. No. 392, 101st Cong., 1st Sess. (1989)

THE FEDERAL ROLE IN DETERMINING THE MEDICAL AND PSYCHOLOGICAL IMPACT OF ABORTION ON WOMEN

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[6] Although CDC researchers have concluded that abortion is generally safe, Dr. Willard Cates, Jr., and Dr. David Grimes, both former directors of the CDC Abortion Surveillance Branch, have re[7]ported that the earlier an abortion is performed, the safer it is for the woman.[31] For example, Dr. Cates and Dr. Grimes reported that the risk of death to the pregnant woman obtaining an abortion doubles for every two weeks' delay after eight weeks of gestation.[32] However, they concluded that "once pregnant, a woman encounters an increased risk of death, no matter what her choice of outcomes," and that before 16 weeks gestation, legal abortion is safer than any other alternative outcomes.[33]

In concluding that abortion does not cause long-term

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[31] Cates, W., Jr. and Grimes, D.A. (1981). Morbidity and Mortality of Abortion in the United States, in Hodgson, J.E. (Ed.) *Abortion and Sterilization: Medical and Social Aspects*. London: Academic Press Inc., p. 158; in subcommittee files.

[32] Ibid., p. 171.

[33] Ibid., p. 170.

health problems, the Surgeon General's draft report apparently rejected the medical reports that linked abortion to later reproductive hazards. Similarly, CDC researchers have criticized some of the research presented as evidence of medical problems resulting from abortion as having obvious methodological flaws.[34] For example, the National Right-to-Life Committee presented the subcommittee with a chapter written by Matthew J. Bulfin from *New Perspectives on Human Abortion* as evidence of the dangers of abortion.[35] In the chapter, Dr. Bulfin, a physician in private practice, documented the number of patients who came to him with infections, anxiety, and other problems resulting from a prior abortion. He concluded that 159 (20 percent) of 802 abortion patients that he saw had suffered from serious complications (including marital break-up).

CDC researchers have stated that it is not scientifically appropriate to assume that these kind of statistics are representative of abortion patients, since Dr. Bulfin's patients apparently came to see him because they had medical problems.[36] The weakness of these statistics is that they do not compare the number of abortion patients with problems to the total number of women who have had abortions. Therefore, when a

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[34] Cates, W., Jr. (1979). Late effects of induced abortion, *Journal of Reproductive Medicine*, Vol. 22, pp. 207-212.

[35] Bulfin, M.J. (1981). Complications of Legal Abortion: A Perspective From Private Practice, in Hilgers, T.W., Horan, D.J., and Mall, D. Frederick, MD: Altheia Books, pp. 145-150; available in subcommittee files.

[36] This kind of research was criticized in: Cates, W., Jr. (1979). Late effects of induced abortion: Hypothesis or knowledge? *Journal of Reproductive Medicine*, Vol. 22, pp. 207-212.

study is based on patients seeking treatment in one doctor's office, it is considered anecdotal data, rather than scientific research. Dr. Koop rejected anecdotal evidence as unscientific in his review of the medical evidence.[37] Moreover, studies reported in book chapters, such as Dr. Bulfin's, are not peer reviewed by scientists, and are therefore not considered scientific evidence.[38]

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[10] In their review paper presented to the Surgeon General, the American Psychological Association concluded that, despite the flaws in the research, there is so little evidence of psychiatric problems following abortion, and so much evidence of relief, that therefore abortion does not cause more psychiatric problems than unwanted pregnancy.[53] They also argued that given the large number of abortions, any significant psychiatric problems would have become very obvious to the mental health system in the last 15 years.[54] Dr. Henry David, who represented the American Public Health Association in his meetings with Dr. Koop and in his Congressional testimony, acknowledged that some women have psychiatric problems following abortion. However, his research

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[37] Hearing, testimony of Dr. C. Everett Koop, p. 232.

[38] Hearing, testimony of Dr. Jaroslav F. Hulka, pp. 3, p. 331.

[53] *Testimony on the Psychological Sequelae of abortion*, on behalf of the Public Interest Directorate of the American Psychological Association, presented to the Office of the U.S. Surgeon General, December 2, 1987, pp. 25, 29; document available in subcommittee files.

[54] Ibid. p. 3.

results indicate that the numbers are small, and there is no conclusive evidence that those psychiatric problems necessarily resulted from the abortion itself, rather than from the breakup of the relationship (which resulted in the unwanted pregnancy) or other factors.[55]

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[11] The National Right-to-Life Committee "white paper" also summarized the psychological research and concluded that the evidence was unclear but possibly showed more negative effects for abortion compared to maintaining the pregnancy.

One major study quoted by both the pro-choice advocates and the anti-abortion advocates helps illustrate the controversies. Dr. Henry David conducted a study of more than one million women in Denmark, to determine whether women who had obtained abortions 3 months earlier were more likely to be treated in psychiatric hospitals than were women who have given birth 3 months earlier or women who had not been pregnant.

Dr. David's research was cited as one of the best studies of the psychiatric impact of abortion by the Right-to-Life white paper and by pro-choice advocates.[62] Dr. David reported that approximately 12 women per 10,000 abortions or deliveries were hospitalized, compared to 7 per 10,000 for all women of reproductive age. He also reported that separated, divorced, or widowed women who obtained abortions were much more likely to be hospitalized in a psychiatric facility than divorced, separated or widowed women who give birth, perhaps because it "may have been an

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[55] Hearing, testimony of Dr. Henry David, p. 144.

[62] Hearing, testimony of Dr. Wanda Franz, p. 144.

originally wanted pregnancy."[63]

In contrast, the Right-to-Life white paper misrepresented this study, quoting statistics for divorced, separated, and widowed women having abortions (63.8 per 10,000) as if they applied to all women having abortions. When asked to explain this error or misrepresentation, Dr. Wanda Franz, vice president of the National Right-to-Life Committee, testified "The issue here is that the direction of the findings are that those women who had abortions had higher rates" and speculated that the abortion decision may have caused the breakup of the relationship.[64] She did not answer the question of why the psychiatric rates that applied to the less than 10 percent of the women who were divorced, separated, or widowed were incorrectly cited as if they applied to all of the more than 27,000 women who had obtained abortions.[65]

The major focus of the "white paper" was a meta-analysis, which is a statistical comparison that includes the data from several previously conducted research studies. The white paper was the one [12] new research paper for which Dr. Koop and his staff requested detailed criticisms. The paper was vehemently criticized by CDC scientists and other researchers who were asked to review the quality of their scientific evidence. For example, scientists at the Center for Health Promotion and Disease Prevention at CDC reported the following

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[63] Hearing, testimony of Dr. Henry David, p. 97.

[64] Hearing, testimony of Dr. Wanda Franz, pp. 144-145.

[65] The statistics are clearly presented in the published article, which was reviewed by the Surgeon General and his staff: David, H.P., Rasmussen, N.K., and Holst, E. (1981). Postpartum and postabortion psychotic reactions, *Family Planning Perspectives*, Vol. 13, pp. 88-93.

problems with the meta-analysis:

"1. The authors combine outcomes that are not well defined and are probably not comparable;

"2. The comparison groups used in the studies that were analyzed are inappropriate;

"3. The analysis was based on studies that, according to the authors of the report, are largely flawed as to design and methodology; and,

"4. The authors' assumption[s] . . . cannot be justified from the data."

The CDC scientists concluded that "Since the meta-analysis used a combination of studies with disparate results, the conclusions based on such analysis have little value."[66]

Scientists from the National Center for Health Statistics who were asked to review the white paper for the Surgeon General concluded that "the meta-analysis has no value" and that "The conclusions drawn by the authors seem to be based on a priori beliefs rather than on objective review of the evidence."[67]

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[14] For example, in his meeting with the American Council on Science and Health, Dr. Koop stated ". . . there is no doubt in my mind that there are physical effects of abortion and mental effects of abortion. They are, I think, a very tiny percentage of the number of people that are aborted. . . . I don't think there is any way that one could do an honest report and come up with such overwhelming statistics that you could use it as

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[66] This review document is in Hearing, pp. 151-155.

[67] Hearing, p. 156.

a weapon against abortion itself."[83] Similarly, in his meeting with the National Organization of Episcopalians for Life, he stated "The problems that truly present health problems are someplace down here. They're quite minuscule."[84]

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[83] Transcript of meeting of Dr. C. Everett Koop with the American Council on Science and Health, February 4, 1988, p. 7.

[84] Transcript of Dr. C. Everett Koop's meeting with the National Organization of Episcopalians for Life, March 31, 1988, p. 8; available in subcommittee files.

Plaintiffs' Exhibit 89:
Diagnostic Criteria for
Post-Traumatic Stress Disorder

A. The person has experienced an event that is outside the range of usual human experience and that would be markedly distressing to almost anyone, e.g., serious threat to one's life or physical integrity; serious threat or harm to one's children, spouse, or other close relatives and friends; sudden destruction of one's home or community; or seeing another person who has recently been, or is being, seriously injured or killed as the result of an accident or physical violence.

B. The traumatic event is persistently reexperienced in at least one of the following ways:
   (1) recurrent and intrusive distressing recollections of the event (in young children, repetitive play in which themes or aspects of the trauma are expressed)
   (2) recurrent distressing dreams of the event
   (3) sudden acting or feeling as if the traumatic event were recurring (includes a sense of reliving the experience, illusions, hallucinations, and dissociative [flashback] episodes, even those that occur upon awakening or when intoxicated)
   (4) intense psychological distress at exposure to events that symbolize or resemble an aspect of the traumatic event, including anniversaries of the trauma

C. Persistent avoidance of stimuli associated with the trauma or numbing of general responsiveness (not present before the trauma), as indicated by at least three of the following:
   (1) efforts to avoid thoughts or feelings associated with the trauma

   (2) efforts to avoid activities or situations that arouse recollections of the trauma
   (3) inability to recall an important aspect of the trauma (psychogenic amnesia)
   (4) markedly diminished interest in significant activities (in young children, loss of recently acquired developmental skills such as toilet training or language skills)
   (5) feeling of detachment or estrangement from others
   (6) restricted range of affect, e.g., unable to have loving feelings
   (7) sense of a foreshortened future, e.g., does not expect to have a career, marriage, or children, or a long life

D. Persistent symptoms of increased arousal (not present before the trauma), as indicated by at least two of the following:
   (1) difficulty falling or staying asleep
   (2) irritability or outbursts of anger
   (3) difficulty concentrating
   (4) hypervigilance
   (5) exaggerated startle response
   (6) physiologic reactivity upon exposure to events that symbolize or resemble an aspect of the traumatic event (e.g., a woman who was raped in an elevator breaks out in a sweat when entering any elevator)

E. Duration of the disturbance (symptoms in B, C, and D) of at least one month.

Specify delayed onset if the onset of symptoms was at least six months after the trauma.

EXCERPTS FROM VERIFICATIONS FILED IN SUPPORT OF PLAINTIFFS' PRELIMINARY INJUNCTION MOTION

Excerpts from Verification of Sue Roselle (Apr. 18, 1988)

VERIFICATION OF SUE ROSELLE

• • •

6. WHS provides approximately 11,800 free pregnancy tests and 7,600 first and early second trimester abortions each year. The abortion procedure costs as follows: $275 if twelve weeks or less from the last menstrual period; $375 if thirteen to fourteen weeks from the last menstrual period; and $500 if fifteen to sixteen weeks from the last menstrual period. The fee includes the abortion procedure, laboratory testing, personal counseling including contraceptive care, pathological examination and medical supervision during the post-surgical recovery period.

7. If our clients are eligible for medical assistance, WHS takes the necessary information and seeks reimbursement from the Commonwealth. Medical assistance is available only where the abortion is necessary because of a life-threatening condition, or because the patient was a victim of rape or incest. In 1987, WHS was reimbursed for 249 such abortions. Where a client receives medical assistance from the state, but is not eligible for medical assistance for an abortion, WHS nevertheless will discount the cost of the abortion. Last year WHS accomodated 1,470 clients who were unable to pay the full amount. WHS has never turned away any client seeking an abortion merely because of inability to pay.

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9. Our patients come primarily from Allegheny County. In 1987, however, 761 of our abortion patients came from areas in excess of two hours traveling time (100 miles) from the clinic.

• • •

11. When they present themselves at the clinic, if indicated, women are examined by a nurse practitioner or physician's assistant and everyone receives a pregnancy test and blood tests. In addition, all women are required to have an individual interview with a counselor on the day their abortion is to be performed. These interviews routinely last twenty minutes to an hour. During this interview, a woman is counseled with respect to her options and her decision to have an abortion. In that connection, the counselor seeks to ensure that the woman is not unduly ambivalent about her decision and that she is not being coerced. In addition, the counselor discusses future contraceptive use with the patient. If the patient appears ambivalent about her decision, the counselor will refer her to one of our staff therapists and the abortion will be rescheduled to give the patient more time to consider her options. On occasion, the clinic will refuse to perform the abortion if convinced of a patient's continued ambivalence. This is rare, however, because the great majority of our patients have absolutely decided to have an abortion before seeking medical care.

• • •

20. In general, WHS supports and encourages parental involvment in the abortion decision where

possible.

21. Under Section 3206, WHS will require the presence of a parent in order to give counseling to that parent sufficient to assure the parent is able to give his or her informed consent. We foresee no circumstances in which we would secure parental informed consent over the telephone, by mail, or means other than by an in-person visit to our clinic. This, in turn, may cause serious delays in the abortion even in cases where the parent is prepared to consent. Many parents will find it difficult to come to the clinic for the necessary counseling because of their work schedules, illness or other commitments.

22. The implementation of the parental consent requirement will cause administrative and scheduling nightmares inasmuch as at present, we normally do parental counseling on the day of the abortion procedure, which are performed only three days a week.

* * *

24. Some parents may not be able to come to the clinic for many days, or possibly even weeks, after their minor daughter has decided to seek an abortion. This would be true even in cases where the parent fully consents to the minor's having an abortion. The resulting delay caused by this could be both dangerous and prohibitive since most minors decide to have an abortion much later in their pregnancies than adults.

25. The additional costs incurred for minors and their parents who must come long distances -- whether together or separately -- could also be extremely burdensome and may result in the minor's effectively being deprived of her right to have an abortion.

26. Another problem with Section 3206 is that it does not state what procedures and documentation are

necessary for obtaining legally valid parental consent. Thus, because this section is so vague and uncertain, WHS will have to be extremely conservative in deciding on the kind of identification that will be required from the parent, resulting in further delay of the abortion procedure. If the parent does not have the proper documentation of parentage, the abortion would have to be rescheduled.

27. WHS also is greatly concerned about the effect the parental consent and judicial bypass provisions will have on minors themselves. Adolescents as a group are reluctant to establish contact with unfamiliar organizations. It is a difficult enough chore to call the clinic. The additional burden of being forced to go to a parent when reluctant to face a court may have one of several disastrous results for the adolescent: (a) the teen will come in later for her abortion because of the greater time it will take her to resolve the higher level of fear and confusion created by the legal requirements. The later she has an abortion, the more likely she is to have complications; (b) the teen will tell no one until the pregnancy is so advanced that someone else finally confronts her. The parents and teen may then have no options because the advanced stage of the pregnancy at this time precludes an abortion; (c) the teen will attempt a self-induced or illegal abortion with resulting permanent damage to her reproductive system or death; (d) the teen will run away from home; or (e) the situation will be deemed unresolvable by the teen and suicide will be viewed as the only escape. (Adolescents have been documented to have one of the highest suicide rates of any segment of the population).

28. Sections 3207(b) and 3214(f) will require WHS, respectively, to file annual reports identifying our facility and quarterly reports showing the total number of abortions performed per trimester of pregnancy. Under

the Act, these reports, if filed by facilities receiving any state-appropriated funds, will be open to public inspection.

29. WHS does receive state-appropriated funds in the form of state medical assistance funding for the victims of rape and incest and for patients whose pregnancy must be terminated because of physical conditions that are life-threatening. Additionally, WHS receives federal funds that are appropriated by the state for the purpose of counseling and testing clients who are in high risk groups for exposure to the Human Immunodeficiency Virus (HIV), the precursor of AIDS.

30. Inasmuch as WHS does receive state-appropriated funds, we are extremely troubled that our reports will be open for public inspection and copying. Over the years, WHS has been the target of continued harassment and violence by anti-abortion groups. On many occasions we have discovered anti-abortion advocates going through our trash to find any scraps of information they might put to use. Public disclosure of the information filed in the reports required by the Act is certain to enhance the frequency and intensity of the harassment and violence. In turn, women will be further intimidated from using our clinic for fear of being subjected to verbal and physical abuse. The intimidation deters all of our clients, and not just those pursuing their legal right to have an abortion. Many women intending to have an abortion in our clinic have also told me of their fear that the procedure itself will be interrupted by demonstrations, bomb scares and similar activities. Finally, such anti-abortion activities adversely effect the ability of WHS to operate its business and offer its services to the public.

31. In addition, Sections 3207(b) and 3214(f) provide that confidentiality of the required reports is conditioned upon whether a facility has received state-appropriated

funds within the 12-month period preceding the filing of the report. The retroactivity of this provision is disturbing to WHS because, at least with respect to reports we must file during the coming year, we have been deprived of a choice of whether to protect the confidentiality of our records no longer accepting state-appropriated funds. In 1987, WHS received medical assistance reimbursement for the treatment of only 249 patients. Had we known that receipt of such a relatively small amount of money would threaten the confidentiality of WHS records, we may well have decided to discontinue accepting medical assistance. Similarly, it was only in March of 1988 that WHS contracted for state-appropriated federal funding of HIV testing and counseling. Before that time WHS had been offering HIV testing and counseling for a small fee. Had we known of the confidentiality implications of our accepting the federal funds, we may have decided not to enter into the contract.

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34. The identification of facilities in Department reports is certain to open the door to increasing anti-abortion harassment and violence. In addition, some of the information that is required to be reported, coupled with the Department's right to identify facilities, exacerbates the risk. For example, under 3214(h), all physicians are required to report complications that they judge to have resulted from an abortion or attempted abortion. The definition of "complication" is vague; and the reporting requirment could permit physicians to exploit, abuse, or even inadvertently misconstrue the complications reporting procedure to the derogation of facilities such as WHS.

35. The second grave risk of section 3214 is the risk

posed by the requirement that the names of all referring and performing physicians must be reported to the Department. I can state with complete certainty that because of the harassment and violence directed toward physicians who refer or perform abortions procedures, WHS will lose many of its referring physicians and possibly some of its performing physicians if this section goes into effect.

36. Many of our referring physicians in particular, are extremely protective of their anonymity because of legitimate fears (often based on past experience) that any kind of documentation or record-keeping connecting them with any phase of the abortion decision could cause them to lose their medical practice, hospital and other professional privileges, as well as the ability to reside in their communities peacefully and without harassment.

37. For example, I personally know two medical doctors who, although they do not perform abortions, do refer clients to WHS for abortions on the strict condition that we not use their names in any WHS reports. They insist upon this because in the past, each has been subjected to public abuse, picketing and pamphleteering based on their having performed or referred abortions during their medical residencies. Each of these doctors has told me emphatically that under no circumstances would he refer any abortions to WHS or any other clinic under the new Act -- even if there were no risk of public disclosure at all. The mere requirement that their names appear on reports filed with a Commonwealth agency is sufficient, based on their past experience, to deter them from making any future referrals.

38. The net effect of this will be that women will be unable to find physicians willing to refer or to perform abortions for them, which in turn, operates to deny them their right to choose to have an abortion.

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Excerpts from Verification of Sylvia Stengle (Apr. 18, 1988)

VERIFICATION OF SYLVIA STENGLE

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7. For patients who receive medical assistance from the Commonwealth, AWC's fee for an abortion is $195. In the case of those medical assistance patients who require an abortion because of a life-threatening disease or because they were victims of rape or incest, AWC -- in the past -- has received reimbursement from the state, so that no fee was charged directly to the patient. The amount involved is relatively small. In 1987, AWC received less than $4,000 in medical assistance funds.

8. With the passage of this Act, AWC has decided to stop taking medical assistance funds from the state immediately.

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10. Our patients come primarily-from an 18-county area in northeastern Pennsylvania encompassing the counties of Lehigh, Northampton, Carbon, Schuylkill, Luzerne, Lackawanna, Lebanon, Berks, Bucks, Pike, Chester, Lancaster, Susquehanna, Wayne, Monroe, Montgomery, Columbia and Wyoming. Many of these counties have no local services available to women seeking abortions, AWC being the closest facility to which the women can turn. In 1987, 138 (3.26%) of our abortion patients came from areas in excess of two hours traveling time (100 miles) from the clinic; 1,220 or 29% came from areas in excess of 1½ hours traveling time (75 miles); and 2,276 or 54% came from areas in excess of 1

hour traveling time (50 miles).

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17. If the patient appears ambivalent about her decision to have an abortion, the counselor will review options and suggest that the patient take more time to consider her decision before terminating the pregnancy. On occasion, the clinic has refused to permit an abortion if, after consultation, the counselor and the clinic supervisor are convinced of the woman's extreme ambivalence, coercion, or that she is otherwise overly distraught. Sometimes, we will refer these women to outside counselors. Such instances are infrequent, however, because the great majority of our patients have absolutely decided to have an abortion before making an appointment here.

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24. Section 3206 requires that in order for a minor who is less than 18 years old and not emancipated to obtain an abortion, either one parent must give his or her informed consent to the abortion, or the minor must go through a judicial bypass procedure. This is certain to cause dangerous delays which could effectively deprive many minors of their right to have an abortion. Often, minors are overwhelmed by the prospect of involving parents because of fears of retaliation or rejection by the parents. Even where parents are involved and willing to consent, they may have scheduling problems making it difficult for them to come to the clinic.

25. Under the parental consent provision of the Act, AWC will have to insist upon a personal visit to the clinic by a parent so that we can give the counseling necessary to assure that the parent's (and minor's)

consent is informed. Normally, we will want the parent and daughter to come together for counseling, although this will not always be possible.

26. Requiring a consenting parent to come to the clinic for counseling and consent will most certainly cause serious delays -- even in cases where a parent is willing to consent. Many parents will find it difficult to visit the clinic because of work schedules, illness, burdensome travel distances and costs, or other commitments.

• • •

28. Some parents may not be able to get to the clinic for days, even weeks, after the daughter has decided to seek an abortion. Ensuing delays could be both dangerous and prohibitive since it is well-documented that minors as a group decide to have abortions much later in their pregnancies than do adults.

29. The likelihood of dangerous delay is particularly great in our part of the state because AWC services such a large (18-county) area. Furthermore, travel time and costs for minors and their parents will surely increase in cases where the parent and minor will not be able to come for joint counseling on the day of the procedure, the delay and costs will be even greater.

30. An antecedent, and perhaps more serious delay arises from the minor's fear and hesitation in divulging to her parents that: first, she has been sexually active; second, that she is pregant; and third; that she wishes to have an abortion. The prospect of the disruption and trauma erupting from such disclosure may cause the minor to delay telling her parents for days and even weeks. It is well-known that the risk of complications from an abortion increase dramatically with each day's delay, particularly after the 10 to 12 weeks gestation period.

31. Another disturbing aspect of 3206 is that it does not state what procedures and documentation are necessary for obtaining legally valid parental consent. This vagueness leaves AWC uncertain as to what we must require. We are concerned that no matter what identification procedures we adopt, we may be subject to civil liability. We are even more concerned about the penalties to our physicians who may be subject to suspension or revocation of their medical licenses. In any event, because the Act fails to provide guidance, we will be forced to implement stringent documentation requirements which, in turn, will cause further delays in the abortion procedure.

* * *

34. Second trimester abortions involve far more risks of complications than earlier abortions, and each passing day enhances these risks. At some point, the minor will suddenly find herself with no options and be forced to continue the pregnancy. Some will respond by trying to obtain illegal abortions or by attempting to self-induce an abortion. Others may resort to suicide. Problem pregnancy is a leading cause of suicide among adolescent women. In the past, AWC has had to do suicide counseling with pregnant minors. The new Act will only exacerbate the trauma and risks for these young women.

35. AWC is also troubled by sections 3207(b) and 3214(f) of the Act. Under these sections, AWC's annual reports (identifying our facility and its affiliates) and quarterly reports (stating the total number of abortions performed per trimester of pregnancy) to the Department of Health will be open for public inspection and copying as long as AWC receives state-appropriated funds.

* * *

37. During the past 12 months, AWC has received stateappropriated funds in the form of reimbursements for services to patients who are under state medical assistance. We are therefore extremely concerned about the prospect of our reports having no confidentiality. Over the years, AWC has been the target of continued harassment and threats of violence by anti-abortion groups. These groups are eager to obtain as much information as possible to fuel their activities. Public disclosure of the information filed in the reports is certain to intensify their activities. Women, in turn, will be even more intimidated from using our clinic for fear of being subject to verbal or even physical abuse. Too, anti-abortion harassment severely cripples AWC's ability to operate the clinic and offer its services to the public. Had we known that receipt of a relatively small amount of state funds would compromise the confidentiality of AWC's records, we could have decided to discontinue accepting state medical assistance as a means of containing the level of harassment we now endure.

38. As to the future, AWC has decided that with the enactment of the Act, it will terminate immediately all receipt of state-appropriated funding so that in 12 months time, the confidentiality of our records can be protected. This will mean that AWC will have to insist that patients who are on medical assistance must pay for our services or else be turned away. Thus, in the final analysis, it will be poverty-level women who will be the real victims of the Act.

39. AWC also finds it sadly ironic that while on the one hand, the Commonwealth reimburses the cost of abortions for medical assistance patients who were victims of rape, incest or have life-threatening conditions, and on the other, it penalizes providers of those abortions by depriving them of the right of confidentiality over their records.

40. Section 3214(a) sets out additional reporting requirements including, among other things, identification of all physicians who refer for, or perform abortions, and the reporting of complications that may have resulted from an abortion or attempted abortion. In addition, Section 3214(e) permits the Department of Health to issue an annual report based upon this information, and provides only that the report shall not lead to the disclosure of the identity of any person filing a report or about whom the report is filed.

41. These two provisions seriously threaten the availability of referring and performing physicians to AWC, and therefore affect its ability to continue providing services to our patients. Many of our physicians are highly protective of their anonymity because of legitimate fears of anti-abortion activities. Many physicians who would otherwise work for AWC, will not because of legitimate fears of anti-abortion harassment, picketing and violence. Likewise, referring physicians have told me that any kind of documentation -- even if only state-filed reports not open to the public -- connecting them with any aspect of the abortion decision could cause them to be subject to harassment in the communities in which they reside.

42. For example, several of AWC's present referring physicians will not permit us to send correspondence to their offices for fear that members of their own staffs will divulge to anti-abortion groups that they refer patients for abortions. One has told me that the new record-keeping provisions of 3214 would mean that many doctors will stop referring for abortions altogether. Thus, patients coming to these doctors for help would have to go elsewhere for information about AWC or similar facilities, even though the information is at the doctors' fingertips.

43. Another doctor who has performed abortions for

AWC in the past has told me that in light of the new Act, he would not consider working for the clinic any longer for fear of public exposure and harrassment. At one time, this doctor had performed abortions in his private practice but stopped doing so after receiving threats that anti-abortionists would begin picketing his home.

44. A third doctor with whom I have spoken, and who also stopped performing abortions because of threats from anti-abortionists, has told me that he too would be unwilling to refer patients to AWC for fear of reprisal and harassment. He also told me that he believes the hospitals, in order to preserve the confidentiality of their records, will stop performing abortions, and that private doctors who perform abortions will stop accepting patients on state medical assistance. This will have serious repercussions for many women on medical assistance.

45. For example, women with serious health problems cannot normally go to a clinic to have an abortion. Rather, they would have to go to a hospital for the procedure. If the woman is on public assistance, however, and the doctor and/or hospital refuse to perform her abortion, the woman will have no options whatsoever -- other than to lie about her physical condition so as to secure an abortion at a clinic (and thereby take the risk of serious medical complications). These women will be effectively and wholly deprived of their right to choose to have an abortion.

46. In my opinion, the sole purpose of the Act's various reporting requirements, along with the attendant risks of public disclosure of certain information in these reports, is to harass and deter physicians and clinics.

* * *

Nos. 91-744 and 91-902

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, REPRODUCTIVE HEALTH AND COUNSELING CENTER, WOMEN'S HEALTH SERVICES, INC., WOMEN'S SUBURBAN CLINIC, ALLENTOWN WOMEN'S CENTER, and THOMAS ALLEN, M.D., on behalf of himself and all others similarly situated,

Petitioners and Cross-Respondents,

—v.—

ROBERT P. CASEY, ALLAN S. NOONAN, and ERNEST D. PREATE, JR., personally and in their official capacities,

Respondents and Cross-Petitioners.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in upholding the constitutionality of the following provisions of the Pennsylvania Abortion Control Act:

   a. 18 Pa. Cons. Stat. Ann. § 3203 (definition of medical emergency)

   b. 18 Pa. Cons. Stat. Ann. § 3205 (informed consent)

   c. 18 Pa. Cons. Stat. Ann. § 3206 (parental consent)

   d. 18 Pa. Cons. Stat. Ann. §§ 3207, 3214 (reporting requirements)?

2. Did the Court of Appeals err in holding 18 Pa. Cons. Stat. Ann. § 3209 (spousal notice) unconstitutional?

PARTIES TO THE PROCEEDING

The parties to the instant proceeding are set forth in the caption on the cover of this brief.*

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* By agreement of the parties, Planned Parenthood, et al., petitioners on No. 91-744 and cross-respondents on No. 91-902, will be referred to as "petitioners" and will address all the issues in the consolidated cases in their opening and reply briefs. Robert P. Casey, et al., respondents on No. 91-744 and cross-petitioners on No. 91-902, will be referred to as "respondents" and will address all the issues in their responsive brief.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
I. HISTORY OF THE LEGISLATION	2
II. HISTORY OF THE LITIGATION	4
III. FACTS	5
A. Husband Notification	5
B. Biased Patient Counseling and Mandatory Delay	8
C. "Informed" Parental Consent	11
D. Definition of Medical Emergency	12
E. Public Disclosure and Reporting Requirements	13

PAGE

SUMMARY OF ARGUMENT 15

ARGUMENT 17

I. THIS COURT MUST REAFFIRM THE CENTRAL HOLDING OF *ROE v. WADE* THAT THE RIGHT TO CHOOSE ABORTION IS A FUNDAMENTAL RIGHT PROTECTED BY THE CONSTITUTION..... 17

A. This Court Cannot Uphold the Pennsylvania Statute Without Abandoning the Strict Scrutiny Standard of Review, thereby Overruling *Roe v. Wade* 17

B. The Doctrine of *Stare Decisis* Demands Reaffirmation of *Roe*..... 19

C. *Roe* Is Soundly Based in the Constitution and Sets Forth a Fair and Workable Standard of Adjudication 22

1. The decision to terminate or continue a pregnancy is a fundamental right 22

2. The *Roe* trimester framework is workable and fairly accommodates competing interests 27

D. *Roe*'s Guarantee of Safe, Legal Abortion Has Been of Profound Importance to the Lives, Health and Equality of American Women..... 31

II. THE "UNDUE BURDEN" TEST ADOPTED BY THE COURT OF APPEALS IS VAGUE AND UNWORKABLE..... 34

III. THE RATIONAL BASIS TEST WILL PROVOKE AND SANCTION EXTREME GOVERNMENTAL INTERFERENCE WITH PRIVATE REPRODUCTIVE DECISIONS... 38

PAGE

IV. THE CHALLENGED PROVISIONS ARE INVALID UNDER ANY STANDARD OF REVIEW 40

A. Mandatory Husband Notification Violates Rights of Privacy, Marital Integrity, and Equal Protection 40

1. In violation of the right of privacy, the Act's husband notification restriction increases the likelihood of violence against women and fails to further any legitimate state interest 40

2. The Act's husband notification provision unconstitutionally interferes with the protected marital relationship..... 44

3. Section 3209 denies women equal protection of the laws 46

B. The Act's Mandatory Delay Will Jeopardize Women's Health and Furthers No Legitimate State Interest 48

C. The Act's Biased Counseling Restrictions Violate the Right of Privacy and the First Amendment..... 50

1. Biased patient counseling interferes with the provision of quality medical care and serves no legitimate state interest..... 50

2. In violation of the First Amendment, the biased counseling provisions force the physician to communicate the state's ideology 53

PAGE

D. The Act's "Informed" Parental Consent Restriction Unduly Burdens the Right of Privacy and Forces Family Life to Conform to a State-Designed Ideal 55

E. The Act's Public Disclosure and Reporting Requirements Burden Women's Right of Privacy and Fail to Further Legitimate State Interests 57

F. This Court Must Enjoin Enforcement of the Act's Medical Emergency Exception to the Extent that Compliance Would Pose a Threat to the Life or Health of Women or Must Find the Provision Unconstitutional 60

CONCLUSION 62

TABLE OF AUTHORITIES

Cases: PAGE

American College of Obstetricians & Gynecologists v. Thornburgh, 737 F.2d 283 (3d Cir. 1984)..... 3

American College of Obstetricians & Gynecologists v. Thornburgh, 613 F. Supp. 656 (E.D. Pa. 1985).... 13

American College of Obstetricians & Gynecologists v. Thornburgh, 656 F. Supp. 879 (E.D. Pa. 1987).... 3

Arizona v. Rumsey, 467 U.S. 203 (1984) 20

Baldwin v. Missouri, 281 U.S. 586 (1930) 37

Bates v. City of Little Rock, 361 U.S. 516 (1960)...18, 34-35

Bellotti v. Baird, 443 U.S. 622 (1979) 4, 41, 56

Bigelow v. Virginia, 421 U.S. 809 (1975) 54

Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537 (1987) 45

Brown v. Board of Education, 349 U.S. 294 (1955) .. 22

Califano v. Webster, 430 U.S. 313 (1977) 48

Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) 21, 23-24, 27, 36

Charles v. Carey, 579 F. Supp. 464 (N.D. Ill. 1983), *aff'd in part and rev'd in part sub nom. Charles v. Daley*, 749 F.2d 452 (7th Cir. 1984), *appeal dismissed sub nom. Diamond v. Charles*, 476 U.S. 54 (1986) 30

City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) .....*passim*

PAGE

City of Dallas v. Stanglin, 490 U.S. 19 (1989) 45

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 30

Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632 (1974) 21, 44

Coe v. Melahn, No. 90-1552 (8th Cir. Mar. 2, 1992) . 34

County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573 (1989)..... 20

Craig v. Boren, 429 U.S. 190 (1976) 47

Cruzan v. Director, Missouri Dep't of Health, 110 S. Ct. 2841 (1990) 24

Daniels v. Williams, 474 U.S. 327 (1986)..... 31

Doe v. Bolton, 410 U.S. 179 (1973)..... 18

Doe v. Deschamps, 461 F. Supp. 682 (D. Mont. 1976) 41

Eisenstadt v. Baird, 405 U.S. 438 (1972) 23, 47

Employment Division, Dep't of Social Services v. Smith, 110 S. Ct. 1595 (1990)..... 45

Eubanks v. Brown, 604 F. Supp. 141 (W.D. Ky. 1984) 41

Ferguson v. Skrupa, 372 U.S. 726 (1963)..... 39

Florida Dep't of Health v. Florida Nursing Homes Ass'n, 450 U.S. 147 (1981)..... 22

Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528 (1985) 22

Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963) 34, 35

PAGE

Gilbert v. Minnesota, 254 U.S 325 (1920) 46

Goodman v. Lukens Steel Co., 482 U.S. 656 (1987).. 4

Griswold v. Connecticut, 381 U.S. 479 (1965)..23, 44, 45, 46

Guam Society of Obstetricians and Gynecologists v. Ada, 776 F. Supp. 1422 (D. Guam 1990), *appeal pending*, No. 90-16706 (9th Cir.) 39

Harris v. McRae, 448 U.S. 297 (1980) 59

Hilton v. South Carolina Pub. Rys. Comm'n, 112 S. Ct. 560 (1991) 19, 20

Hodgson v. Minnesota, 648 F. Supp. 756 (D. Minn. 1986)..... 50

Hodgson v. Minnesota, 110 S. Ct. 2926 (1990) .....*passim*

In re A.C., 573 A.2d 1235 (D.C. 1990) (*en banc*).... 29

In re Mary P., 444 N.Y.S.2d 545 (Fam. Ct. 1981) ... 21

In re Quinlan, 355 A.2d 647 (N.J. 1976) 21

International Union, U.A.W. v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991)..... 30

Jane L. v. Bangerter, No. 91-C-345-G (D. Utah filed Apr. 4, 1991) 38

King v. Palmer, 950 F.2d 771 (D.C. Cir. 1991) (*en banc*)..... 34

Kirchberg v. Feenstra, 450 U.S. 455 (1981) 47

Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) 61

Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) 54-55

Lehnert v. Ferris Faculty Ass'n, 111 S. Ct. 1950 (1991) 53

LeRoy Fibre Co. v. Chicago, M. & St. P. R. Co., 232 U.S. 340 (1914). 31

PAGE

Lovell v. City of Griffin, 303 U.S. 444 (1938) 18

Loving v. Virginia, 388 U.S. 1 (1967) 23

Margaret S. v. Treen, 597 F. Supp. 636 (E.D. La. 1984), *aff'd sub nom. Margaret S. v. Edwards*, 794 F.2d 994 (5th Cir. 1986) 30

Marks v. United States, 430 U.S. 188 (1977)..... 5, 34

Meyer v. Nebraska, 262 U.S. 390 (1923) 23

Michael H. v. Gerald D., 491 U.S. 110 (1989)..... 44

Michael M. v. Sonoma County Superior Court, 450 U.S. 464 (1981) 25

Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) 47, 48

Moore v. City of East Cleveland, 431 U.S. 494 (1977) .44, 57

Moore v. Sims, 442 U.S. 415 (1979) 61

Murdock v. Pennsylvania, 319 U.S. 105 (1943)..... 36

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) 35

New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988) 45

Nixon v. Administrator of General Services, 433 U.S. 425 (1977) 46

NOW v. Operation Rescue, 726 F. Supp. 1483 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *cert. granted sub nom. Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991) 13-14

Ohio v. Akron Center for Reproductive Health, 110 S. Ct. 2972 (1990) 53

PAGE

Olmstead v. United States, 277 U.S. 438 (1928)..... 23

Orr v. Orr, 440 U.S. 268 (1979)..... 48

Pacific Gas & Electric Co. v. Public Utilities Comm'n, 475 U.S. 1 (1986) 53, 54

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 19-20

Payne v. Tennessee, 111 S. Ct. 2597 (1991)..... 19-20

People v. Pointer, 199 Cal. Rptr. 357 (Ct. App. 1984) 21

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 23

Planned Parenthood v. Arizona, 718 F.2d 938 (9th Cir. 1983), *appeal after remand*, 789 F.2d 1348 (9th Cir.), *aff'd mem. sub nom. Babbit v. Planned Parenthood*, 479 U.S. 925 (1986) 59

Planned Parenthood v. Board of Medical Review, 598 F. Supp. 625 (D.R.I. 1984) 41, 44

Planned Parenthood v. Danforth, 428 U.S. 52 (1976) 18, 40-41, 44, 50-51

Planned Parenthood Ass'n v. Fitzpatrick, 401 F. Supp. 554 (E.D. Pa. 1975), *aff'd mem. sub nom. Franklin v. Fitzpatrick*, 428 U.S. 901 (1976)..... 3

Planned Parenthood Ass'n v. Harris, 670 F. Supp. 971 (N.D. Ga. 1987) 57

Poe v. Ullman, 367 U.S. 497 (1961).....40, 45, 46

Prince v. Massachusetts, 321 U.S. 158 (1944) 44-45

Ragsdale v. Turnock, 841 F.2d 1358 (7th Cir. 1988), *proceedings deferred*, 493 U.S. 987 (1989). 30

Riley v. National Fed'n of the Blind, 487 U.S. 781 (1988).....53, 54

PAGE

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 45

Rochin v. California, 342 U.S. 165 (1952) 26

Roe v. Wade, 410 U.S. 113 (1973) .....*passim*

Ruby v. Massey, 452 F. Supp. 361 (D. Conn. 1978).. 21

Rust v. Sullivan, 111 S. Ct. 1759 (1991)..... 51

San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) 34

Scheetz v. The Morning Call, Inc., 946 F.2d 202 (3d Cir. 1991) 42

Scheinberg v. Smith, 482 F. Supp. 529 (S.D. Fla. 1979), *aff'd in part, vacated in part, and remanded*, 659 F.2d 476 (5th Cir. Unit B Oct. 1981), *on remand*, 550 F. Supp. 1112 (S.D. Fla. 1982)..... 41

Shapiro v. Thompson, 394 U.S. 618 (1969)..... 18

Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) 23, 44, 47

South Carolina v. Gathers, 490 U.S. 805 (1989)..... 21

Stanley v. Georgia, 394 U.S. 557 (1969)..... 23

Stanton v. Stanton, 421 U.S. 7 (1975)..... 33

Superintendent of Belchertown State School v. Saikewicz, 370 N.E.2d 417 (Mass. 1977) 21

Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) .....*passim*

Tinker v. Colwell, 193 U.S. 473 (1904)..... 47

Union Pacific Ry. Co. v. Botsford, 141 U.S. 250 (1891).....22-23, 25-26

PAGE

United States v. Westinghouse Electric Corp., 638 F.2d 570 (3d Cir. 1980)..... 46

Vasquez v. Hillery, 474 U.S. 254 (1986).....19, 22

Virginia v. American Booksellers Ass'n, Inc., 484 U.S. 383 (1988) 61

Webster v. Reproductive Health Servs., 492 U.S. 490 (1989).....*passim*

Weeks v. Connick, 733 F. Supp. 1036 (E.D. La. 1990) 39

Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468 (1987) 19

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).....27, 39, 53, 55

Whalen v. Roe, 429 U.S. 589 (1977).....21, 46

Williams v. Florida, 399 U.S. 78 (1970) 20

Winston v. Lee, 470 U.S. 753 (1985)..... 26

Wooley v. Maynard, 430 U.S. 705 (1977) 27, 53, 54, 55

Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) 30

Zablocki v. Redhail, 434 U.S. 374 (1978).....21, 44, 47

PAGE

Constitutional and Statutory Provisions:

U.S. Const. amend. I..... 2

U.S. Const. amend. IV, § 1..... 2

28 U.S.C. § 1254(1) (1988)..... 2

1991 La. Sess. Law. Serv. 74 (West)..... 39

18 Pa. Cons. Stat. Ann. § 3128 (Supp. 1991)..... 7, 42

18 Pa. Cons. Stat. Ann. § 3203 (Supp. 1991).....2, 4, 12, 60, 62

18 Pa. Cons. Stat. Ann. § 3205 (Supp. 1991) .....*passim*

18 Pa. Cons. Stat. Ann. § 3206 (1983 & Supp. 1991)..*passim*

18 Pa. Cons. Stat. Ann. § 3207(b) (Supp. 1991).....2, 3, 13, 57, 60

18 Pa. Cons. Stat. Ann. § 3208 (Supp. 1991)....2, 3, 8, 60

18 Pa. Cons. Stat. Ann. § 3209 (Supp. 1991) .....*passim*

18 Pa. Cons. Stat. Ann. § 3211(c) (Supp. 1991)..... 14

18 Pa. Cons. Stat. Ann. § 3214(a) (Supp. 1991) .2, 3, 14, 60

18 Pa. Cons. Stat. Ann. § 3214(f) (Supp. 1991).....2, 3, 13, 57, 60

23 Pa. Cons. Stat. Ann. § 6101 et seq. (Supp. 1991). 43

35 Pa. Cons. Stat. Ann. § 6923 (Supp. 1991)..... 12

35 Pa. Cons. Stat. Ann. § 10101 (1977)..... 11

35 Pa. Cons. Stat. Ann. § 10102 (1977)..... 11

35 Pa. Cons. Stat. Ann. § 10103 (1977)..... 11

35 Pa. Cons. Stat. Ann. § 10104 (1977)..... 11

65 Pa. Cons. Stat. Ann. §§ 66.1-66.4 (Supp. 1991)... 58

No. 91-H5310 Rhode Island General Assembly, Jan. Sess. (1991)..... 39

PAGE

Articles:

Alan Guttmacher Institute, Legislative Record, State Legislatures—1984 Bills Enacted (1984)..... 30

American Public Health Association Recommended Program Guide for Abortion Services, 70 Am. Pub. H. J. 652 (1980)..... 10

James Bopp, Jr. and Richard E. Coleson, *What Does Webster Mean?*, 130 U. Pa. L. Rev. 157 (1989).... 35

Willard Cates, Jr., *Legal Abortion: The Public Health Record*, 215 Sci. 1586 (1982)..... 32

Willard Cates Jr. and Roger W. Rochat, *Illegal Abortions in the United States: 1972-1974*, 8 Fam. Plan. Persp. 86 (1976)..... 32

Children's Defense Fund, *The State of America's Children 1991*..... 52

Robert K. Creasy and Robert Resnik, *Maternal-Fetal Medicine: Principles and Practice* (2d ed. 1989) 25

F. Gary Cunningham, Paul C. MacDonald and Norman F. Gant, *Williams Obstetrics* (18th ed. 1989).....24, 25, 26

David N. Danforth and James R. Scott, *Obstetrics and Gynecology* (5th ed. 1986) 24, 25

Walter Dellinger and Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from Roe v. Wade*, 138 U. Pa. L. Rev. 83 (1989) 29, 35-36

Patricia Donovan, *Fertility-Related State Laws Enacted in 1981*, 14 Fam. Plan. Persp. 63 (1982) 30

Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for An Audience of One*, 138 U. Pa. L. Rev. 119 (1989) 24, 38

PAGE

The Federalist, No. 78 (Alexander Hamilton) (H. Lodge ed. 1888) 20

Charles Fried, Correspondence, 6 Phil. & Pub. Aff. 288 (1977) 23

Victor R. Fuchs, *Women's Quest for Economic Equality*, 3 J. Econ. Persp. 25 (1989). 27, 33

Rachel B. Gold, Alan Guttmacher Institute, *Abortion and Women's Health: A Turning Point for America?* (1990).....20, 31, 32, 37

David A. Grimes, *et al.*, *An Epidemic of Antiabortion Violence in the United States*, 165 Am. J. Obst. and Gyn. 1263 (1991)..... 14

Mimi Hall, *Abortion Foes Target Doctors*, USA Today, Feb. 5, 1992, at 3A. 58

Stanley K. Henshaw and Jennifer Van Vort, *Abortion Services in the United States, 1987 and 1988*, 22 Fam. Plan. Persp. 102 (1990) 10

Warren M. Hern, *Abortion Practice* (1984) 33

Charlotte Hord, Henry P. David, Frances Donnay and Merril Wolf, *Reproductive Health in Romania: Reversing the Ceausescu Legacy*, 22 Stud. in Fam. Plan. 231 (1991)..... 40

Dawn M. Johnsen, Note, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights of Liberty, Privacy, and Equal Protection*, 95 Yale L. J. 599 (1986)..... 29

Katherine Koot, Jacqueline D. Forrest, and Susan Harlap, *Comparing the Health Risks and Benefits of Contraceptive Choices*, 23 Fam. Plan. Persp. 54 (1991) 26

PAGE

Lawrence Lader, *Abortion* (1966) 32

Scott A. Lebolt, David A. Grimes, and Willard Cates, Jr., *Mortality From Abortion and Childbirth: Are the Populations Comparable?*, 248 J.A.M.A. 188 (1982) 26

Judy Mann, *Illegal Abortion's Deadly Price*, Washington Post, Aug. 3, 1990, at C3..... 33

Jane Menken, *The Health and Demographic Consequences of Adolescent Pregnancy and Childbearing* in *Adolescent Pregnancy and Childbearing: Findings from Research* (Catherine S. Chilman ed. 1980).... 25

Ellen Messer and Katherine E. May, *Back Rooms: Voices from the Illegal Abortion Era* (1988) 31

National Abortion Rights Action League, *Who Decides? A State-by-State Review of Abortion Rights* (3d ed. 1992) 37

National Research Council, *Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing* (Cheryl H. Hayes ed. 1987) 26

Carl. J. Paverstein, *Clinical Obstetrics* (1987) 25

E.J. Quilligan, *Prenatal Care* in *Gynecology and Obstetrics: The Health Care of Women* (Seymour L. Romney, *et al.* eds., 2d ed. 1981)..... 25

Richard H. Schwarz, *Septic Abortion* (1968)..... 32

Reva Siegal, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261 (1992) .. 26-27

Christine Spokar, *Abortion Foes' Mood Defiant*, Washington Post, Jan. 21, 1992, at B1..... 58

PAGE

Christopher Tietze and Stanley K. Henshaw, *Induced Abortion: A World Review* (6th ed. 1986) 32

Laurence H. Tribe, *Abortion: The Clash of Absolutes* (1990) 39

U.S. Bureau of the Census, Current Population Reports: Special Studies, Series P-23, No. 162, *Studies in Marriage and the Family* 27

Dawn M. Upchurch and James McCarthy, *Adolescent Childbearing and High School Completion in the 1980s: Have Things Changed?*, 21 Fam. Plan. Persp. 199 (1989) 26

Paul Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 Harv. L. Rev. 1728 (1986) 27

Women Flock to London Seeking Abortions Under Liberal Law, Medical World News Vol. 10 (1969).. 31

Women's Work, Men's Work: Sex Segregation on the Job (Barbara F. Reskin and Heidi I. Hartmann eds. 1986).....27, 33

Laurie Zabin, Marilyn Hirsch and Mark Emerson, *When Urban Adolescents Choose Abortion: Effects on Education, Psychological Status and Subsequent Pregnancy*, 21 Fam. Plan. Persp. 248 (1989)..... 26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

Nos. 91-744 and 91-902

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, REPRODUCTIVE HEALTH AND COUNSELING CENTER, WOMEN'S HEALTH SERVICES, INC., WOMEN'S SUBURBAN CLINIC, ALLENTOWN WOMEN'S CENTER, and THOMAS ALLEN, M.D., on behalf of himself and all others similarly situated,

Petitioners and Cross-Respondents,

—v.—

ROBERT P. CASEY, ALLAN S. NOONAN, and ERNEST D. PREATE, JR., personally and in their official capacities,

Respondents and Cross-Petitioners.

BRIEF FOR PETITIONERS AND CROSS-RESPONDENTS

OPINIONS BELOW

The opinion of the district court, issued on August 23, 1990, is reported at 744 F. Supp. 1323 (E.D. Pa. 1990). 104a-288a. The decision of the panel of the United States Court of Appeals for the Third Circuit, issued on October 21, 1991, is reported at 947 F.2d 682 (3d Cir. 1991). 1a-103a.[1]

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1 The opinions and statutes involved are reprinted in the Appendix to the Petition for a Writ of Certiorari in Case No. 91-744. Citations to this Appendix are made to the page number therein as "____a." Citations to the Joint Appendix are made to the page number therein as "J.A.____."

JURISDICTION

The final judgment of the court of appeals was entered on October 21, 1991. Jurisdiction is proper pursuant to 28 U.S.C. § 1254(1) (1988), which provides for review by certiorari "upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." The petition and cross-petition for certiorari were granted on January 21, 1992.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The 1988 and 1989 Amendments to the Pennsylvania Abortion Control Act of 1982, 18 Pa. Cons. Stat. Ann. §§ 3203 (definition of medical emergency), 3205, 3206, 3207(b), 3208, 3209, 3214(a) and (f) (1983 & Supp. 1991) are set forth in the Appendix to the Petition for Certiorari. 289a-304a.

The First Amendment provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I.

The Fourteenth Amendment provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

I. HISTORY OF THE LEGISLATION.

In 1988 and again in 1989, following this Court's ruling in *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989), the Pennsylvania legislature amended the Pennsylvania Abortion Control Act, 18 Pa. Cons. Stat. Ann. §§ 3203-3220 (1983 & Supp. 1991), imposing a series of highly intrusive and burdensome restrictions on women seeking abortion services. In large part, the amendments reenacted the statutory provisions of the 1982 Act, which this Court held unconstitutional in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986). *See also City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983).[2]

Like the provisions of the 1982 Act, the amendments mandate that a physician provide a woman seeking an abortion with a prescribed litany of state-sponsored information discouraging abortion and that the physician delay the procedure for at least 24 hours after she receives this information. 18 Pa. Cons. Stat. Ann. §§ 3205, 3208; 289a-292a, 298a-300a. The amendments also require the collection of detailed, particularized information—some of which must be publicly disclosed—for every abortion performed. 18 Pa. Cons. Stat. Ann. §§ 3207(b), 3214(a) and (f); 298a, 302a-304a.

The amendments also mandate that married women notify their husbands of their abortion decisions, 18 Pa. Cons. Stat. Ann. § 3209; 300a-302a,[3] and that women under the age of eighteen obtain either the "informed consent" of one parent or a court order waiving the requirement. 18 Pa. Cons. Stat. Ann. § 3206; 292a-297a.[4] While compliance with §§ 3205, 3206, and 3209, and other provisions of the Act not before this Court, is exempted where there is a medical emergency,

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2 Following *Akron*, the Commonwealth of Pennsylvania conceded the invalidity of the 24-hour mandatory delay and physician-only counseling provisions of the Act. *American College of Obstetricians & Gynecologists v. Thornburgh*, 737 F.2d 283, 293 (3d Cir. 1984). Thus, the constitutionality of those provisions was not before this Court in *Thornburgh*.

3 The 1974 Abortion Control Act, an earlier version of the 1982 Act, required a married woman to obtain the consent of her husband. It was found unconstitutional in *Planned Parenthood Ass'n v. Fitzpatrick*, 401 F. Supp. 554, 564-66 (E.D. Pa. 1975) (three-judge court), *aff'd mem. sub nom. Franklin v. Fitzpatrick*, 428 U.S. 901 (1976). In 1987, the legislature then passed a "paternal" notification provision. In vetoing this measure, respondent Casey noted that "a state cannot delegate to any third-party—even a husband—a power that the state cannot exercise itself." J.A. 595.

4 The 1974 and 1982 Acts also contained parental consent requirements that were found constitutionally deficient. *See Fitzpatrick*, 401 F. Supp. at 566-68; *American College of Obstetricians & Gynecologists v. Thornburgh*, 656 F. Supp. 879, 887-90 (E.D. Pa. 1987).

the Act's definition of medical emergency is extremely narrow. 18 Pa. Cons. Stat. Ann. § 3203; 289a.

II. HISTORY OF THE LITIGATION.

Six years ago, this Court reaffirmed *Roe v. Wade*, 410 U.S. 113 (1973), and found that provisions of the 1982 Act, nearly identical to the amendments before this Court today, "wholly subordinate[d] constitutional privacy interests . . . in an effort to deter a woman from making a decision that . . . is hers to make." *Thornburgh*, 476 U.S. at 759. Relying principally on this Court's decisions in *Roe*, *Thornburgh*, and *Akron*, and following a three-day bench trial at which ten witnesses testified,[5] the district court issued its opinion and order on August 24, 1990, enjoining virtually all of the challenged provisions. 104a-288a.

The trial court's detailed findings of fact,[6] which demonstrate that the Act endangers women's lives and health, confirm the findings made by this Court in *Thornburgh* on a more limited factual record. The district court rejected the Commonwealth's argument that *Webster*, 492 U.S. at 517-20, and *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990), had overruled or modified the strict scrutiny standard of *Roe*, applied in both *Thornburgh* and *Akron*. 231a-233a. It found, however, that this Court's decision in *Bellotti v. Baird*, 443 U.S. 622, 640 (1979) ("*Bellotti II*"), required it to judge the constitutionality of the "informed" parental consent requirement of § 3206 under the less protective "undue burden" standard. 248a. Nevertheless, based on the evidence, the district court found this provision invalid under this more deferential standard. 248a-252a. The Commonwealth appealed.

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5 In addition, the district court reviewed two sets of stipulated facts and the verifications and testimony of four witnesses from the preliminary injunction hearing. J.A. 608-21.

6 The district court carefully documented the record evidence supporting each of its 387 findings of fact, none of which was reversed on appeal. Given the complete absence of "an extraordinary reason" to examine the district court's findings, they must be accepted by this Court. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

On October 21, 1991, applying an incorrect interpretation of *Marks v. United States*, 430 U.S. 188 (1977), the Court of Appeals for the Third Circuit reversed in part and affirmed in part the district court's judgment, holding that *Roe*, *Akron*, and *Thornburgh* are no longer the law of the land and that women no longer enjoy a fundamental constitutional right to choose abortion. 30a. Rather, the court of appeals held that *Webster* and *Hodgson* established a new and less protective "undue burden" standard for reviewing the constitutionality of abortion restrictions, a standard first suggested in Justice O'Connor's dissenting opinions in *Akron*, 462 U.S. at 453, 461-64 (O'Connor, J., dissenting) and *Thornburgh*, 476 U.S. at 828-29 (O'Connor, J., dissenting). Rather than remanding the case for application of the new standard by the trier of fact, or for further factual development relevant to this new standard, the court of appeals largely ignored the record and upheld all challenged provisions except the husband notification requirement. These consolidated Petitions for Certiorari followed.

III. FACTS.

A. Husband Notification.

Except in extremely limited circumstances, § 3209 of the Act requires every married woman to notify her husband that she is about to undergo an abortion.[7] In the vast majority of marriages, wives discuss their abortion choice with their husbands and reach a decision only after serious dialogue. 193a. In many troubled and dysfunctional marriages, however, the Act forces a woman to involve even an abusive husband in her abortion decision, jeopardizing her own health and safety as well as that of her children.

Marital abuse is surprisingly common in the United States. As the district court found, "one of every two women will be

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7 The Commonwealth neither requires a husband to notify his wife about any medical procedures affecting his capacity to have children within marriage, nor requires a wife to notify her husband of other surgical procedures, including those that affect her capacity to become a mother. 199a.

battered at some time in their [sic] life." 195a. In addition to physical battering,[8] which often intensifies during pregnancy, 196a, some husbands resort to sexual abuse, including rape and sexual mutilation; psychological abuse, including verbal insults; and abuse of the children or other family members. 196a, 199a. In an attempt to control all aspects of their wives' lives, some husbands refuse to provide sufficient support to feed, clothe, and shelter the family, 199a; J.A. 213-14; or closely monitor their wives' whereabouts. J.A. 212-13, 229-30. The court of appeals found that "the number of different situations in which women may reasonably fear dire consequences from notifying their husbands is potentially limitless," and includes:

> women who reasonably fear retaliatory psychological abuse; women who reasonably fear retaliatory physical or psychological abuse of their children; women who are separated following a failed marriage relationship and for whom renewal of contact may produce severe emotional distress; women whose husbands have serious health problems and who reasonably fear that notification will be health threatening; and women whose marriages are severely troubled and who reasonably fear that notice will precipitate the demise of the marital relationship.

70a. The dangerous and potentially deadly consequences of forced notification cannot be overstated. As Dr. Lenore Walker, a national expert on domestic violence, testified, requiring a battered woman to notify her husband is like "giving him a hammer to just beat her." J.A. 228. *See also* 201a.

Two of the exceptions to the husband notification requirement purport to relieve women of the devastating consequences of domestic violence caused by the mandatory

8 Bonnie Jean Dillon, a battered woman, testified at trial of "being thrown on the floor in the kitchen and being kicked around with his feet. I remember being drug [sic] from the back room of the office and thrown down the cellar steps while the secretaries were there. I can remember being thrown against the cellar door and smashing my face against the cellar door." J.A. 381.

notification. Section 3209(b)(3) provides that the mandatory notification does not apply where "[t]he pregnancy is a result of spousal sexual assault . . . which has been reported to a law enforcement agency." Section 3209(b)(4) provides for a waiver of notification where the woman reasonably believes that notifying her husband "is likely to result in the infliction of bodily injury upon her." 301a.

Neither of these exceptions provides any meaningful protection for battered women. Section 3209(b)(4)'s exception is expressly limited to situations where the woman fears "bodily injury" to herself. Thus, as the district court found, a married woman must notify her abusive husband of her decision to obtain an abortion even if he psychologically or economically coerces her or her children; punishes her children with physical violence or sexual abuse; threatens to publicize her decision to have an abortion; or threatens to retaliate against her in future child custody or divorce proceedings. 194a, 199a.

Moreover, § 3209(b)(3) applies only in cases where the pregnancy is the "result" of spousal sexual assault that has been reported to a law enforcement official. 18 Pa. Cons. Stat. Ann. § 3128(c). Consequently, the exception provides no assistance when the sexual abuse occurs after the woman becomes pregnant, when the sexual abuse does not result in pregnancy, or when the woman has not or cannot report the abuse. In some cases, rather than exempting the woman, it actually triggers notification, for once officials launch an investigation or file criminal charges, the husband will be notified.

Even where the exceptions apply, they are unlikely to be of any aid. Battering and sexually abusive husbands often threaten their wives with further violence if they break the shroud of secrecy that surrounds the battering. 197a.[9] Similarly, few survivors of marital rape will be able to report the

9 For example, when asked at trial why she had never told anyone about her husband's battering, even after it put her in the hospital five times, Ms. Dillon said, "I was afraid of how he would react if he found out that I was telling people about our secret, about what he was doing to me." J.A. 383.

rape to law enforcement officials. 198a. As Dr. Lenore Walker testified at trial, women "will rarely report to a law enforcement agency that they have been sexually abused." J.A. 230.[10] Other battered women deny their abuse as a survival strategy for coping with the pain, and will rarely, if ever, discuss their abuse with anyone. 200a-201a. As the district court found, the realistic fear of retaliation by the abuser, or the psychological condition caused by the abuse, will make battered women "unlikely to avail themselves of the exceptions to § 3209 . . . regardless of whether the section applies to them." 198a.

B. Biased Patient Counseling and Mandatory Delay.

Section 3205 of the Act requires that a woman give her voluntary and informed consent to the abortion procedure. 289a. But in a radical departure from accepted medical principles, § 3205 deems consent "informed" only when a physician provides the woman—on pain of criminal penalties and license suspension and revocation[11]—with state-approved information.[12] As the district court found, this information creates the impression that both the Commonwealth and the physician "disapprove[ ] of the woman's decision," *see* 179a,

10 For example, despite years of counseling following the break-up of her marriage, Ms. Dillon had never revealed the fact that she was a survivor of marital rape, until several days before her testimony, and only then after repeated questioning by counsel. J.A. 387.

11 The district court found "no other instance [in which] an informed consent regulation provide[s] for criminal penalties." 180a. The threat of criminal prosecution will deter physicians from performing abortions because medical malpractice insurance contains no coverage for criminal prosecutions. J.A. 144.

12 Included in this information is the nature of the abortion procedure, its risks and alternative treatments, the probable gestational age of the fetus, and the medical risks of carrying the pregnancy to term. Additionally, §§ 3205 and 3208 mandate that physicians or counselors offer the pregnant woman materials that give detailed descriptions and pictures of the fetus at two-week gestational increments from fertilization until full-term, as well as the names of agencies offering alternatives to abortion; and inform the woman of the availability of medical assistance benefits and of the father's liability for child support payments if she carries her pregnancy to term. 289a-290a, 298a-300a.

and is a "poorly veiled attempt[ ] . . . to disguise elements of discouragement of the abortion decision." 180a. By inserting its anti-abortion message into the informed consent dialogue, the Commonwealth has transformed the physician from the impartial counselor mandated by accepted medical standards into a partisan proponent of the state's ideology.

Section 3205 also intrudes heavily on physicians' discretion by requiring them to supply a specified package of information to all patients. This conflicts with the accepted medical practice of giving patients information tailored to their individual needs and circumstances, out of respect for the patient who will be "autonomously making the decision." 177a; J.A. 161.

Much of the required information is not only inflammatory and misleading, but is beyond the expertise of medical professionals. 179a-180a. Physicians or counselors are required to offer women seeking abortions "printed materials which describe the unborn child and list agencies which offer alternatives to abortion." 290a. Some of the listed agencies, however, are ideological anti-abortion groups, notorious for giving women inflammatory and inaccurate information. *See* 169a. Women must also be told that medical assistance benefits may be available if they carry their pregnancies to term, and that the "father of the unborn child is liable to assist in the support of her child . . . ." 290a. But, in truth, most women will be ineligible for medical assistance benefits, or will, in practice, be unable to collect adequate child support payments if they carry their pregnancies to term. *See* 179a-180a. This information will convey the message that the benefits will be adequate to raise a child—a cruel deception for low-income women whose decisions may be based, in part, upon their financial ability to raise additional children.

Before a woman may obtain an abortion, § 3205 also mandates that she delay an additional 24 hours after she is given the state-mandated information.[13] By imposing an inflexible

13 In no other area of medical decision-making does the Commonwealth require a 24-hour delay after a patient gives informed consent. J.A. 173.

waiting period for all women, the Commonwealth significantly burdens their rights to terminate pregnancy. Because of scheduling complications and a shortage of physicians,[14] the 24-hour mandatory delay will often "result in delays far in excess of 24 hours. For the majority of women in Pennsylvania, delays will range from 48 hours to two weeks." 172a. Moreover, the 24-hour delay will force every woman to make a minimum of two visits to an abortion provider. 171a. Solely because of the Act, the thousands of Pennsylvania women who travel hundreds of miles to obtain an abortion, 172a, must assume the additional costs of transportation, overnight lodging, lost wages, food, and childcare. 172a, 186a. The delay will also twice subject "many women to the harassment and hostility of anti-abortion protestors . . . ." 172a.[15]

As the district court found, mandated delay will impose the greatest burdens on low-income women, women who live far from an abortion provider, and women "who have difficulty explaining their whereabouts, such as battered women, school age women, and working women without sick leave." 173a. Indeed, it is likely that many battered women will face additional battering during the mandated delay. 197a-198a; J.A. 227.

14 In 1987, there were no abortions performed in 40 out of 67 counties in Pennsylvania. In 12 other counties, there were ten or fewer abortions performed. Pennsylvania Induced Abortion Report, January-December, 1987. These figures are consistent with national data finding that 83% of the counties in the United States have no abortion provider. Stanley K. Henshaw and Jennifer Van Vort, *Abortion Services in the United States, 1987 and 1988*, 22 Fam. Plan. Persp. 102, 106 (1990).

15 Section 3205's mandatory delay will also damage the health of women by increasing physical and psychological stress, and the risk of complications. For each week of delay, the risk of complications from abortion increases by approximately 30% and the risk of death increases by approximately 50%. *See* 152a-153a. *See also* American Public Health Association Recommended Program Guide for Abortion Services, 70 Am. Pub. H. J. 652, 654 (1980). Moreover, the forced delay will push some women into the second trimester, substantially increasing both the cost and medical risks of an abortion. 173a.

C. "Informed" Parental Consent.

Creating obstacles far harsher than any prior parental involvement statute reviewed by this Court, § 3206's requirement of "informed" parental consent forces both the parent and the young woman to come to the physician at least 24 hours before the abortion for the biased counseling required by § 3205. 292a-297a. The provision thus necessitates at least one visit to the physician by the woman's parent and at least two, and more likely three, visits by the young woman herself, thereby creating "layers of obstacles" that unduly burden a young woman's ability to get an abortion. *See* 172a, 186a.[16]

Moreover, requiring a consenting parent to schedule an appointment with the physician will cause serious delays, even where the young woman's parent is supportive of her decision. For example, many parents will be unable to visit the physician promptly due to work schedules, family obligations, burdensome travel, illness, or lack of financial resources. 183a, 185a; J.A. 617. Where the parent is hostile to the young woman's abortion decision, the provision may result in unnecessary and dangerous delays, or an effective and arbitrary veto of the young woman's abortion choice. J.A. 616.

As the district court found, delays imposed by § 3206 can be "both dangerous and prohibitive" because young women often obtain abortions much later in their pregnancies than

16 "Informed" parental consent for young women seeking abortion is a significant departure from state law that recognizes the importance of providing confidential health services to pregnant women under the age of 18. Pennsylvania law allows pregnant young women to consent to medical or health services to treat pregnancy and venereal disease. 35 Pa. Cons. Stat. Ann. § 10103 (1977). Similarly, following a pregnancy, a young woman may consent to medical, dental, and health services for herself, 35 Pa. Cons. Stat. Ann. § 10101 (1977), and her children. 35 Pa. Cons. Stat. Ann. § 10102 (1977). Additionally, a young woman may consent to medical, dental, or health services in cases where a delay in treatment would increase the risk to the young woman's life or health. 35 Pa. Cons. Stat. Ann. § 10104 (1977).

older women. 183a.[17] Thus, young women are more likely to be forced into having a second trimester abortion, with its increased health risks, 184a, or may be too late in pregnancy to obtain a safe, legal abortion altogether. Some of these women will resort to desperate measures: they may try to obtain illegal abortions, attempt to self-induce an abortion, or attempt suicide. 185a; J.A. 611, 618.

D. Definition of Medical Emergency.

Although §§ 3205, 3206, and 3209 do not apply in medical emergencies, the Act limits this important exception to

> [t]hat condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function.

18 Pa. Cons. Stat. Ann. § 3203; 289a. A far cry from the accepted definition of medical emergency, which gives a physician broad discretion to protect a woman's health,[18] the vague and narrow definition will "interfere[ ] with a physician's ability to act in accordance with his [or her] best medical judgment." 157a.[19] As a result, the Act will cause panic,

17 For a variety of reasons, young women deny that they are pregnant and postpone decision-making. Some are unaware that they are pregnant because they do not know about their menstrual cycles or because they menstruate irregularly. Other young women delay seeking medical help because of fear, anxiety, and hesitation in divulging to parents sexual activity, pregnancy, or their desire to have an abortion. 183a-184a.

18 Pennsylvania's Emergency Medical Services Act, 35 Pa. Cons. Stat. Ann. § 6923 (Supp. 1991), broadly and clearly defines the term as circumstances "resulting in a need for immediate medical intervention." 155a.

19 Although the Act permits physicians to exercise their "good faith judgment" in applying the medical emergency exception, the district court found that this "does not alter the fact that a 'serious risk of substantial and irreversible impairment of major bodily function' must exist for a situation to constitute a medical emergency under the Act." 157a.

confusion, and delay in the provision of emergency medical services to pregnant women, and will hinder the physician's ability "to make a rapid response to the detriment of the health of the [ ] patient. . . ." 156a.[20]

The district court identified three medical conditions—inevitable abortion, premature ruptured membrane, and preeclampsia—that exemplify those that would fall outside the Act's definition of "medical emergency." The court found that failure to perform an immediate abortion in these circumstances would pose a threat to the woman's health, but would not pose a "serious risk of substantial and irreversible impairment of major bodily function."

E. Public Disclosure and Reporting Requirements.

Sections 3207(b) and 3214(f) require that every abortion facility, including individual physicians, file with the Department of Health a quarterly report listing the name and address of the facility, and the total number of abortions performed by trimester of pregnancy.[21] This information is available for public inspection and copying if the abortion provider receives any state funding, even funding for services wholly unrelated to abortion. 298a, 304a.[22]

Like their counterparts across the nation, Pennsylvania abortion providers and the women seeking care face vicious harassment and violence by opponents of abortion. *See NOW v. Operation Rescue*, 726 F. Supp. 1483, 1488-90 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *cert. granted sub nom. Bray v. Alexandria Women's Health Clinic*, 111 S. Ct.

20 Ultimately, some physicians may refuse to offer emergency services out of fear of potential criminal and civil liability. J.A. 188.

21 A nearly identical reporting provision in the 1982 Act was found unconstitutional. *American College of Obstetricians & Gynecologists v. Thornburgh*, 613 F. Supp. 656, 670 (E.D. Pa. 1985).

22 Most abortion providers in Pennsylvania receive Medicaid payments for abortions provided to survivors of rape and incest and women with life-threatening conditions. State funds are also paid to clinics and physicians for related medical care, as well as building costs, and other purposes unrelated to the provision of abortion services. 210a-211a.

1070 (1991). Massive blockades, hate mail, bombings, and kidnapping threats against physicians, clinic employees, and family members are commonplace.[23] Public disclosure of their identity will subject abortion providers to increased harassment, discourage new physicians from offering abortion services, and discourage acceptance of state aid, thereby preventing clinics from offering patients a wide range of health care services. 213a-214a.

Section 3214(a) requires a detailed report for each abortion performed, including the names of the referring physician and those physicians concurring in and assisting late-term abortions.[24] Additionally, the report must disclose the basis for the physician's judgment that an abortion performed after the 24th week was authorized by the Act, § 3214(a)(8), and that a medical emergency existed. § 3214(a)(10). Physicians must also report the basis for their determination of gestational age. § 3214(a)(11).

The evidence demonstrated that these aspects of § 3214(a) serve no legitimate scientific purpose, will deter physicians from referring women to or assisting abortion providers, or from acting in the patient's best interest. 221a-222a. Referring physicians are "extremely protective of their anonymity" for fear that they will be harassed and that they will lose patients or hospital privileges. 219a; J.A. 31-32. Indeed, testimony at trial revealed that physicians would not refer patients to any abortion provider if their names are required on an abortion report. 220a. Evidence also showed that requiring physicians to report the basis for their medical

23 David A. Grimes, *et al.*, *An Epidemic of Antiabortion Violence in the United States*, 165 Am. J. Obst. and Gyn. 1263 (1991). For example, in September, 1989, five opponents of abortion forced their way into the offices of plaintiff Women's Health Services and dumped buckets of tar onto the main patient care area. 212a. The clinic director's sixteen-year-old daughter was threatened with kidnapping, forcing her family to guard her both at home and at school. J.A. 260-63.

24 This report must include the name of the referring physician, agency, or service, and the names of the concurring physician and second physician for any post-24 week abortion authorized by 18 Pa. Cons. Stat. Ann. § 3211(c)(2), (5) (Supp. 1991). *See* § 3214(a)(1).

judgments will make them less willing to act in a pregnant patient's best interests. 222a; J.A. 39.

SUMMARY OF ARGUMENT

Few decisions are more basic to "individual dignity and autonomy" than the right of a woman to choose to terminate or continue a pregnancy. *Thornburgh*, 476 U.S. at 772. So proclaimed this Court only six years ago when it reaffirmed *Roe*, 410 U.S. 113 (1973), and invalidated provisions of a Pennsylvania law virtually identical to those at issue here.

Once again, this Court must reaffirm *Roe* and find unconstitutional Pennsylvania's most recent intrusions on reproductive liberty. Abandoning *Roe* by withdrawing the highest level of constitutional protection would contravene established principles of *stare decisis* and would jeopardize women's dignity and equality. Moreover, history makes clear that overturning *Roe* will not end abortion. Instead, permitting states to criminalize abortion or impose onerous restrictions will tragically and undeniably return thousands of women to back-alley or self-induced abortions. Many will die. Others will be forced by the state to sacrifice their health or to carry unwanted pregnancies to term. *Roe*'s demise will be most devastating for low-income, young, rural, or battered women, who are too vulnerable to overcome state-imposed obstacles.

No legitimate justification supports overturning *Roe*. Fundamental constitutional protection for the abortion right follows logically and necessarily from a century of this Court's decisions recognizing that personal choices affecting bodily integrity, identity, and destiny are largely beyond the reach of government. *Roe*'s trimester framework not only fairly accommodates the interests of the woman and the state, but also serves as a sound guidepost for the courts and state legislatures.

The court of appeals erroneously adopted the vague and unworkable "undue burden" standard of review, which is likely to result in arbitrary and discriminatory applications by

lower courts. In contrast to the clarity and equity of *Roe*, both the "undue burden" and "rational basis" standards would sanction and invite intolerable legislative interference with private reproductive decisions. Adopting these lesser standards would ensure an irrational patchwork of state laws and would return to the vicissitudes of local politics what *Roe* properly removed from that forum.

Even under these deferential standards of review, however, this Court must find unconstitutional the Act's challenged provisions. Mandatory husband notification violates rights of privacy and marital integrity by subjecting intimate marital discussions to state surveillance and control, and endangering the lives and health of married women compelled to notify abusive husbands of their abortion choice. By imposing duties only on women and conferring rights solely on men, the Act also perpetuates the pernicious stereotype that women are subordinate within marriage and incapable of making independent moral decisions. The provision thereby violates the Constitution's equal protection guarantees.

Requiring physicians to provide a litany of state-mandated information violates the longstanding medical principle that the informed consent dialogue must be tailored to the needs of each patient, not used to transform the physician into a partisan proponent of the state's ideology. While furthering no legitimate purpose, the Act's 24-hour mandatory delay forces women to travel to their physicians on at least two, and often three, occasions, thereby increasing the expense and medical risks of abortion.

Far more onerous than other parental consent or notification statutes upheld by this Court, the Act's "informed" parental consent requirement presents so insurmountable an obstacle that even parents who have participated in, support, and consent to their daughter's abortion decision may be unable to comply with the law. Rather than furthering communication between parents and their daughters, the Act forces family life to conform to a state-designed ideal.

Furthering no legitimate state interest, the intrusive public disclosure and reporting requirements merely enhance the

ability of abortion opponents to intimidate physicians through violence and harassment. Finally, the Act's narrow medical emergency exception is inconsistent with well-established medical standards. By denying pregnant women a waiver of the Act's requirements except in the most dire circumstances, this provision will jeopardize women's lives and health and discourage the provision of emergency services to pregnant women.

In view of the immediate harm that will befall women should these provisions go into effect, this Court must resoundingly reaffirm *Roe*. Without its fundamental protection, women will be unable to maintain the measure of equality they have won so far, and this Court will forsake its historic role as guardian of constitutional liberties.

ARGUMENT

I. THIS COURT MUST REAFFIRM THE CENTRAL HOLDING OF *ROE V. WADE* THAT THE RIGHT TO CHOOSE ABORTION IS A FUNDAMENTAL RIGHT PROTECTED BY THE CONSTITUTION.

A. This Court Cannot Uphold the Pennsylvania Statute Without Abandoning the Strict Scrutiny Standard of Review, thereby Overruling *Roe v. Wade*.

This Court's landmark decision in *Roe*, 410 U.S. 113 (1973), holds profound significance for all Americans. In finding a Texas abortion ban unconstitutional, this Court did far more than prohibit the most draconian abortion laws. Rather, this Court held that the right to make private decisions about childbearing is a constitutional liberty of fundamental dimension.

Roe mandates that state laws that intrude upon reproductive choices—whether to carry a pregnancy to term or have an abortion—must be examined with the most exacting scrutiny. *Id.* at 155. Under this standard, only laws necessary and narrowly tailored to serve the most compelling state interests pass constitutional review. *Id.*

This Court has consistently applied *Roe*'s strict scrutiny standard to invalidate not only abortion bans, but also laws that encumber the abortion choice with delay, administrative hurdles, or expense, or that disproportionately harm young, low-income, rural, or battered women. *See, e.g., Doe v. Bolton*, 410 U.S. 179, 193-200 (1973) (accredited hospitalization requirement, hospital review committee approval, and two physician concurrence requirements); *Planned Parenthood v. Danforth*, 428 U.S. 52, 67-75 (1976) (husband and parental consent); *Akron*, 462 U.S. at 432-39, 442-51 (24-hour mandatory delay, biased counseling, doctor-only counseling, and second trimester hospitalization requirements); *Thornburgh*, 476 U.S. at 759-68 (biased patient counseling; reporting and public disclosure requirements). *Roe*'s central premise—that the right to choose abortion is a fundamental right protected by the most exacting scrutiny—thus forbids legislation that places roadblocks before women seeking abortion or that forecloses the abortion option for those women too vulnerable to overcome the state-imposed burdens.[25]

The district court found, and the court of appeals acknowledged, that the Pennsylvania law is unconstitutional under the strict scrutiny standard of *Roe*.[26] In upholding restrictions that this Court already held unconstitutional under *Roe*, the court of appeals found that women no longer enjoy fundamental constitutional protection for the right to choose abortion. Declining to apply strict scrutiny, the court of appeals

25 In this regard, *Roe* is entirely consistent with this Court's jurisprudence in other areas. Recognizing that constitutionally protected freedoms "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference," *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960), this Court has repeatedly invalidated statutes that inhibit the exercise of fundamental rights. *See Shapiro v. Thompson*, 394 U.S. 618 (1969) (one-year residency requirement as a condition on welfare assistance violates the right to travel); *Bates, supra* (compulsory disclosure of membership lists violates right of association); *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (ordinance forbidding distribution of any kind of literature without permission from city manager violates the right of free expression).

26 *See* 30a, 225a. Similarly, the Commonwealth effectively conceded that the Pennsylvania law could not withstand scrutiny under *Roe* when it asked the lower courts to apply a new, less rigorous standard of review. 225a.

measured the constitutionality of the Pennsylvania law under the new, far less protective "undue burden" standard.

Because the invalidity of the instant provisions under *Roe* is indisputable, this Court cannot sustain the decision below without overruling *Roe* or so eviscerating its core holding as to render it meaningless. As shown below, *Roe* is eminently sound in principle and workable in practice. Therefore, no valid justification exists for this Court to take the radical and unprecedented step of withdrawing the highest level of constitutional protection from this fundamental right.[27]

B. The Doctrine of *Stare Decisis* Demands Reaffirmation of *Roe*.

This Court has repeatedly held that the doctrine of *stare decisis* "is of fundamental importance to the rule of law." *Hilton v. South Carolina Pub. Rys. Comm'n*, 112 S. Ct. 560, 563 (1991) (quoting *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987)). Fidelity to precedent

> ensure[s] that the law will not merely change erratically, but will develop in a principled and intelligible fashion. [It] permits society to presume that bedrock principles are founded in law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and fact.

Vasquez v. Hillery, 474 U.S. 254, 265-66 (1986).[28] "[E]ven in constitutional cases, the doctrine carries such persuasive

27 In addition to the "liberty" guarantee of the Fourteenth Amendment, the right to abortion may be grounded in other constitutional rights: equal protection, freedom of religion, the rights to be free from involuntary servitude and cruel and unusual punishment, and the rights retained by the people under the Ninth Amendment. In the event that this Court abandons *Roe*, it should remand this case for consideration of the other constitutional principles that support the right to choose abortion.

28 *See generally Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) ("*[S]tare decisis* is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary

force that . . . departure from precedent [must] be supported by some 'special justification.' " *Payne v. Tennessee*, 111 S. Ct. 2597, 2618 (1991) (Souter, J., concurring) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)).

By overruling *Roe*, this Court would sanction an abrupt departure from 200 years of American constitutional history. Never before has this Court bestowed, then taken back, a fundamental right that has been a part of the settled rights and expectations of literally millions of Americans for nearly two decades.[29] To regress by permitting states suddenly to impose burdensome regulations or criminalize conduct that a full generation of women has always known to be constitutionally protected would be anathema to any notion of principled constitutional decision-making.[30]

Hence, overturning *Roe* would implicate the weightiest of *stare decisis* concerns: as Justice Harlan recognized, *stare decisis* "provides the stability and predictability required for the ordering of human affairs over the course of time . . . ." *Williams v. Florida*, 399 U.S. 78, 127 (1970) (Harlan, J., concurring in part and dissenting in part). More recently, this Court emphasized:

> *Stare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations.

Hilton, 112 S. Ct. at 564.[31]

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discretion.' " (quoting *The Federalist*, No. 78, at 490 (Alexander Hamilton) (H. Lodge ed. 1888)).

29 By 1989, approximately sixteen million women had obtained legal abortions. If current abortion rates continue, nearly half of all women of reproductive age will have had an abortion by the time they reach age forty-five. Rachel B. Gold, *Abortion and Women's Health: A Turning Point for America?* 22 (Alan Guttmacher Institute, 1990) [hereinafter *Abortion and Women's Health*].

30 *Stare decisis* requires adherence to the strict scrutiny standard and trimester framework of *Roe*, as well as its specific holding. *See County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in part and dissenting in part).

31 *Cf. Payne*, 111 S. Ct. at 2610 ("Considerations in favor of *stare decisis* are at their acme . . . where reliance interests are involved").

Further, *Roe* does not stand alone. On the contrary, it defines the contours of privacy, which protects individuals from governmental interference in personal decision-making and is the foundation for numerous important freedoms.[32] As Justice Scalia has noted, "the respect accorded prior decisions increases, rather than decreases, with their antiquity, as the society adjusts itself to their existence, and the surrounding law becomes premised on their validity." *South Carolina v. Gathers*, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting).

Twice in the past decade, this Court has reconsidered and resoundingly reaffirmed *Roe*. In *Akron*, 462 U.S. 416, this Court rejected the argument that *Roe* "erred in interpreting the Constitution," *id.* at 419, and enumerated the "especially compelling reasons for adhering to *stare decisis* in applying the principles of *Roe* . . . ."

> That case was considered with special care. It was first argued during the 1971 Term, and reargued—with extensive briefing—the following Term. The decision was joined by the Chief Justice and six other Justices. Since *Roe* was decided in January 1973, the Court repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy.

Id. at 420 n.1.

In *Thornburgh*, this Court held: "[a]gain today, we reaffirm the general principles laid down in *Roe* and in *Akron*

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32 For example, courts have relied on *Roe* when recognizing the right to use contraceptives, *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-86 (1977); the right to be free from overly restrictive maternity leave regulations, *Cleveland Bd. of Educ. v. La Fleur*, 414 U.S. 632, 639-40 (1974); the right to marry, *Zablocki v. Redhail*, 434 U.S. 374, 384-86 (1978); the right to informational privacy, *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); the right to be free from forced sterilization, *Ruby v. Massey*, 452 F. Supp. 361, 366 (D. Conn. 1978); the right of bodily integrity, *In re Quinlan*, 355 A.2d 647, 663 (N.J. 1976); *Superintendent of Belchertown State School v. Saikewicz*, 370 N.E.2d 417, 424 (Mass. 1977); and the right to be free from court-ordered contraception, *People v. Pointer*, 199 Cal. Rptr. 357, 364 (Ct. App. 1984), or court-ordered abortion, *In re Mary P.*, 444 N.Y.S.2d 545, 546-47 (Fam. Ct. 1981).

. . . . [T]he constitutional principles that led this Court to its decisions in 1973 still provide the compelling reason for recognizing the constitutional dimensions of a woman's right to decide whether to end her pregnancy." 476 U.S. at 759.

Given the certainty of disrupting the lives and settled expectations of countless women, overturning *Roe* would be "a rare and grave undertaking," *Webster*, 492 U.S. at 558 (Blackmun, J., concurring in part and dissenting in part), which could be justified only by a strong showing by the Commonwealth that special circumstances demand that result. Only if the precedent is "unsound in principle," "unworkable in practice," or has led to inconsistent, unforeseen, or anomalous results, *see Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 546-47 (1985); *Vasquez*, 474 U.S. at 266, would this radical step be warranted.[33] None of these justifications is present here.

C. *Roe* Is Soundly Based in the Constitution and Sets Forth a Fair and Workable Standard of Adjudication.

1. The decision to terminate or continue a pregnancy is a fundamental right.

This Court has long recognized rights of privacy and bodily integrity. As early as 1891, it held,

> No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others . . . .

Union Pacific Ry. Co. v. Botsford, 141 U.S. 250, 251-52 (1891). *See also Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("The makers of our Constitution . . . conferred, as against the government, the right to be let alone, the most comprehensive of rights and the right most valued by civilized men"). Throughout the last century, this Court recognized that the fundamental right of privacy protects citizens against governmental intrusion in such intimate family matters as procreation, childrearing, marriage, and contraceptive choice. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). *See also Stanley v. Georgia*, 394 U.S. 557, 564 (1969). These cases embody the principle that personal decisions that profoundly affect bodily integrity, identity, and destiny should be largely beyond the reach of government. *Eisenstadt*, 405 U.S. at 453; *Thornburgh*, 476 U.S. at 772. *See also Thornburgh*, 476 U.S. at 777 n.5 (Stevens, J., concurring) (concept of privacy embodies the "moral fact that a person belongs to himself and not others nor to society as a whole") (quoting Charles Fried, Correspondence, 6 Phil. & Pub. Aff. 288-89 (1977)).

In *Roe*, this Court correctly applied these principles to a woman's right to choose abortion. The decision to terminate or continue a pregnancy has an impact on a woman's life equal to, if not greater than, decisions about contraception or marriage. 410 U.S. at 153.[34] As this Court held in *Thorn-*

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33 Overruling a decision so recently reaffirmed would seriously undermine public confidence in the integrity of this Court, especially when nothing has changed but the Court's composition. *See* Brief *Amici Curiae* of Certain Members of Congress. *See Florida Dep't of Health v. Florida Nursing Homes Ass'n*, 450 U.S. 147, 154 (1981) (Stevens, J., concurring) (*stare decisis* gives citizens "confidence that the rules on which they rely in ordering their affairs . . . are rules of law and not merely the opinions of a small group of men who temporarily occupy high office"). "[I]t should go without saying that the vitality of . . . constitutional principles cannot be allowed to yield simply because of disagreement with them." *Brown v. Board of Education*, 349 U.S. 294, 300 (1955). *See also Thornburgh*, 476 U.S. at 771-72.

34 "Indeed, if one decision is more 'fundamental' to the individual's freedom than the other, surely it is the post-conception decision that is the more serious." *Thornburgh*, 476 U.S. at 776 (Stevens, J., concurring). An individual denied the right to use contraception may be able to avoid pregnancy by avoiding sexual intercourse. A pregnant woman has no alternative besides abortion to avoid forced parenthood, *Carey*, 431 U.S. at 713

burgh, 476 U.S. at 772, few decisions are more basic to "individual dignity and autonomy," or more appropriate to the "private sphere of individual liberty," than the uniquely personal and self-defining decision of whether to continue a pregnancy. *See also Carey*, 431 U.S. at 684.

State restrictions on abortion violate a woman's privacy in two ways.[35] First, compelled continuation of a pregnancy infringes on a woman's right to bodily integrity by imposing substantial physical intrusions and significant risks of physical harm. As Justice O'Connor explained in *Cruzan v. Director, Missouri Dep't of Health*, 110 S. Ct. 2841, 2856 (1990) (O'Connor, J., concurring),

> Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, this Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause.

In addition to the dramatic physical changes that take place during pregnancy,[36] pregnant women also experience a wide range of adverse health consequences. As many as ninety percent of pregnant women develop gastrointestinal problems, including nausea and vomiting.[37] Many women confront potentially more serious problems including gesta-

(Stevens, J., concurring), and pregnancy itself is all too often the result of rape, incest, or contraceptive failure—circumstances outside the woman's control.

35 *See generally* Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. Pa. L. Rev. 119, 126-30 (1989).

36 Pregnancy increases a woman's uterus 500 to 1000 times its original capacity and her body weight by 25 pounds or more. F. Gary Cunningham, Paul C. MacDonald & Norman F. Gant, *Williams Obstetrics* 129-34, 136-37 (18th ed. 1989) [hereinafter *Williams Obstetrics*].

37 David N. Danforth and James R. Scott, *Obstetrics and Gynecology* 334-35 (5th ed. 1986) [hereinafter *Obstetrics and Gynecology*]. Other common problems include back pain, varicose veins, hemorrhoids, headaches, and water retention. *Williams Obstetrics* at 137, 270-73.

tional diabetes, hypertension,[38] preeclampsia (high blood pressure, water retention, and protein in urine), and eclampsia (a severe form of preeclampsia characterized by headaches and seizures potentially leading to coma).[39]

Labor and delivery pose additional health risks and physical demands. Vaginal delivery entails extreme pain, often lasting up to thirteen hours and in many cases longer,[40] and substantial risk of infection and laceration.[41] The nearly twenty-five percent of women who deliver by cesarean section are exposed to even higher risks of death and adverse health consequences.[42]

In sum, as Chief Justice Rehnquist has recognized, pregnancy entails "profound physical, emotional and psychological consequences . . . ." *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464, 471 (1981). Indeed, restrictive abortion laws force women to endure physical invasions far more substantial than those this Court has held to violate the constitutional principle of bodily integrity in other contexts. *See e.g. Botsford*, 141 U.S. at 251-52 (refusing to order phys-

38 Hypertension complicates about six or seven percent of pregnancies. *Williams Obstetrics* at 3. During pregnancy, hypertensive women are at high risk for serious complications, including convulsions and coma. *Id.*

39 *Williams Obstetrics* at 654-72, 818-19. The medical risks of pregnancy are compounded for certain women. Among those facing the greatest risks are teenagers, especially those younger than 15. They suffer high incidences of toxemia, anemia, premature labor, and prolonged labor. *See* Jane Menken, *The Health and Demographic Consequences of Adolescent Pregnancy and Childbearing*, in *Adolescent Pregnancy and Childbearing: Findings from Research* 181, 187 (Catherine S. Chilman ed., 1980).

40 *See* E.J. Quilligan, *Prenatal Care* in *Gynecology and Obstetrics: The Health Care of Women* 579, 614 (Seymour L. Romney, *et al.* eds., 2d ed. 1981) [hereinafter *Gynecology and Obstetrics*].

41 *Id.* at 626-27, 632-33, 637-38.

42 Robert K. Creasy and Robert Resnik, *Maternal-Fetal Medicine: Principles and Practice* 530 (2d ed. 1989). In 25% to 50% of cesarean sections, women face such complications as infection, hemorrhage, aspiration, swelling of the lungs, and pulmonary embolism. *Obstetrics and Gynecology*, at 738. The risk of maternal death is two to four times greater than in vaginal delivery. Carl J. Paverstein, *Clinical Obstetrics* 887 (1987).

ical examination); *Winston v. Lee*, 470 U.S. 753 (1985) (invalidating surgical removal of a bullet from a murder suspect); *Rochin v. California*, 342 U.S. 165 (1952) (invalidating stomach-pumping).[43]

In addition to violating principles of bodily integrity, abortion restrictions also deprive women of the right to make autonomous decisions about reproduction and family planning—critical life choices that this Court has long deemed central to the right of privacy. *Roe*, 410 U.S. at 152-53; *id.* at 211 (Douglas, J., concurring) (Fourteenth Amendment protects "freedom of choice in the basic decisions of . . . life"). Because parenthood has a dramatic impact on a woman's educational prospects,[44] employment opportunities,[45] and self-determination, restrictive abortion laws deprive

43 In contrast, the severity and frequency of death or serious health consequences from abortion is significantly less than with childbirth. A woman is 20 times more likely to die from giving birth than from having an abortion. Katherine Koot, Jacqueline D. Forrest, and Susan Harlap, *Comparing the Health Risks and Benefits of Contraceptive Choices*, 23 Fam. Plan. Persp. 54, 57 (1991). *See also* Scott A. Lebolt, David A. Grimes, and Willard Cates, Jr., *Mortality From Abortion and Childbirth: Are the Populations Comparable?*, 248 J.A.M.A. 188, 191 (1982). Up to the eighth week of pregnancy, abortion is more than 20 times safer than childbirth. *Id.* at 191. Similarly, the non-fatal health risks associated with legal abortion are very limited and substantially lower than the risks of childbirth. *Williams Obstetrics* at 506.

44 Forced parenthood curtails the ability of teenagers to obtain even the most basic education. "[Y]oung women who give birth while they are in junior high school or high school complete on average fewer years of school, are less likely to earn a high school diploma, and are less likely to go on to college and graduate study than those who delay childbearing until their twenties." National Research Council, *Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing* 126 (Cheryl D. Hayes ed. 1987). Indeed, 56% of women who became mothers at age 17 or younger do not complete high school. Dawn M. Upchurch and James McCarthy, *Adolescent Childbearing and High School Completion in the 1980s: Have Things Changed?*, 21 Fam. Plan. Persp. 199, 200 (1989). *See also* Laurie Zabin, Marilyn Hirsch and Mark Emerson, *When Urban Adolescents Choose Abortion: Effects on Education, Psychological Status and Subsequent Pregnancy*, 21 Fam. Plan. Persp. 248 (1989).

45 Employment opportunities for women with children are severely limited. *See generally* Reva Siegal, *Reasoning from the Body: A Historical*

her of basic control of her life. For these reasons, "the decision whether or not to beget or bear a child" lies at "the very heart of this cluster of constitutionally protected choices." *Carey*, 431 U.S. at 685. Indeed, the right to choose abortion partakes of those constitutional freedoms at the heart of a free society: the freedoms of spirit and self-determination. *See West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 636-37, 642 (1943); *Wooley v. Maynard*, 430 U.S. 705 (1977).

2. The *Roe* trimester framework is workable and fairly accommodates competing interests.

In *Roe*, this Court identified only two state interests that are sufficiently compelling to override a woman's fundamental right to choose abortion. The state has "an important and legitimate interest in preserving and protecting the health of the pregnant woman"[46] and an "important and legitimate interest in protecting the potentiality of human life." 410 U.S. at 162.

Perspective on Abortion Regulation and Questions of Equal Protection, 44 Stan. L. Rev. 261, 375-78 (1992); Victor R. Fuchs, *Women's Quest for Economic Equality*, 3 J. Econ. Persp. 25 (1989). Because the workplace typically does not accommodate parental responsibilities, and because child care is often unavailable or unaffordable, women, who bear primary responsibility for young children, are severely disadvantaged in the workplace. Many women are forced to leave their jobs to care for their children. *See Women's Work, Men's Work: Sex Segregation on the Job* 73-74 (Barbara F. Reskin and Heidi I. Hartmann eds. 1986). Others obtain part-time work or move to lower paying, less skilled positions in order to meet parental responsibilities. *Id.* at 74. *See also* Paul Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 Harv. L. Rev. 1728, 1786 (1986) (the "addition of *each* child enhances the man's earnings by another three percent while depressing that of the woman by fully ten percent"). Where a woman raises a child alone, the economic consequences are even more devastating. U.S. Bureau of the Census, Current Population Reports: Special Studies, Series P-23, No. 162, *Studies in Marriage and the Family*, 18 (approximately half the children in households headed by women live in poverty).

46 Petitioners do not dispute that the state possesses a compelling interest in the protection of women's health. The restrictions at issue here, however, fail to further this interest. *See infra*, Section IV.

Roe's trimester framework establishes that the latter interest is not sufficiently compelling to override a woman's right to choose abortion until the point of viability, i.e. that stage in pregnancy when the fetus is capable of independent survival. Even then, the state's interest is paramount only in cases in which the woman's life or health are not endangered by continued pregnancy. *Id.* at 163-64.

The *Roe* trimester framework constitutes a fair and logical means of accommodating the interests of the woman and the state. The compelling state interest in the fetus logically arises at the point of viability:

> The viability line . . . marks that threshold moment prior to which a fetus cannot survive separate from the woman and cannot reasonably and objectively be regarded as a subject of rights or interests distinct from, or paramount to, those of the pregnant woman. At the same time, the viability standard takes account of the undeniable fact that as the fetus evolves into its postnatal form, and as it loses its dependence on the uterine environment, the State's interest in the fetus' potential human life, and in fostering a regard for human life in general, becomes compelling.

Webster, 492 U.S. at 553-54 (Blackmun, J., concurring in part and dissenting in part).[47] Moreover, by placing the compelling point at fetal viability, *Roe* fairly and sensibly "safeguard[s] the constitutional liberties of pregnant women while recognizing and accommodating the State's interest in potential human life."[48] *Id.* at 553.

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47 *Roe* is consistent with the historic legal tradition of assigning greater value to fetal life late in pregnancy. As this Court observed in *Roe*, to the extent that limitations on abortion did exist in ancient and common law, they were imposed after quickening or "viability." *Roe*, 410 U.S. at 132-36. *See generally* Brief *Amici Curiae* of American Historians.

48 The suggestion that the point of viability will recede with advances in medical technology and that *Roe* is therefore on "a collision course with itself," *Akron*, 462 U.S. at 458 (O'Connor, J., dissenting), has no medical foundation. While substantial strides have been made in recent years in saving infants born between 24 and 28 weeks, the earliest point of fetal viability has remained at about 24 weeks gestation—the same as it was at the time *Roe* was decided. *Webster*, 492 U.S. at 554 n.9 (Blackmun, J., concurring in part and dissenting in part). *See generally* Brief *Amici Curiae* of 167 Distinguished Scientists and Physicians, Including 11 Nobel Laureates at 9-13, *Webster*, *supra* (No. 88-605).

This Court must reject the view that the state's interest in potential life is compelling throughout pregnancy.[49] That view would render meaningless this Court's recognition of the abortion choice as a protected liberty interest of fundamental importance.[50] Any restriction, even criminalization of abortion in virtually all circumstances, might be justified by reference to the state's compelling interest in potential life. *Webster*, 492 U.S. at 555-56 (Blackmun, J., concurring in part and dissenting in part). In addition, a compelling interest in potential life throughout pregnancy might justify other extreme intrusions on pregnant women's liberty. For example, would government be free to force pregnant women to act in whatever ways it determined were optimal for the fetus in order to further its compelling interest in fetal life?[51] Could government compel a woman to undergo a cesarean section or fetal surgery to further its interests? Clearly, these

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49 *See, e.g., Thornburgh*, 476 U.S. at 795 (White, J., dissenting).

50 Surely, as the Court of Appeals for the District of Columbia recognized, "a fetus cannot have rights . . . superior to those of a person who has already been born." *In re A.C.*, 573 A.2d 1235, 1244 (D.C. 1990) (*en banc*). *See also Roe*, 410 U.S. at 158.

51 Imagine, for example, that a state made the following findings: complete rest in the first three months of pregnancy reduced miscarriages by 9%, and working at video display terminals increased miscarriages by 4%. On these bases the state passed a law prohibiting all pregnant women from working at display terminals or working anywhere more than four hours a day during the first three months of pregnancy. In both of these cases, if the state justified the imposition by asserting its compelling governmental interest in protecting all fetal life, it could contend that there was no less restrictive alternative to this seemingly Draconian measure.

Walter Dellinger and Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from Roe v. Wade*, 138 U. Pa. L. Rev. 83, 116 (1989). *See also* Dawn M. Johnsen, Note, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights of Liberty, Privacy, and Equal Protection*, 95 Yale L. J. 599 (1986).

profoundly disturbing derailments of personal liberty would be incompatible with this Court's recognition as "fundamental" those rights necessary to a "free, egalitarian and democratic society." *Thornburgh*, 476 U.S. at 793 (White, J., dissenting). *See also International Union, U.A.W. v. Johnson Controls, Inc.*, 111 S. Ct. 1196, 1207 (1991) ("[d]ecisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents").[52]

Finally, the *Roe* trimester framework has been a workable guidepost for courts and state legislatures. During the last nineteen years, lower courts, which have cited the decision in over 3500 cases, have had little difficulty applying *Roe*'s clear mandates. With consistent application and reaffirmation by this Court, questions regarding *Roe*'s meaning were resolved and lower courts were readily able to determine whether state restrictions were constitutional.[53] State legislatures, also understanding *Roe*'s mandates, passed fewer laws restricting abortions for adult women.[54]

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52 In other contexts, this Court has refused to allow a state's interest to ride roughshod over a constitutional right. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989) (interest in redressing societal discrimination deemed not to be sufficiently compelling to justify race-conscious remedies because it " 'has no logical stopping point' ") (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275 (1986) (plurality opinion)).

53 *See, e.g., Charles v. Carey*, 579 F. Supp. 464 (N.D. Ill. 1983), *aff'd in part and rev'd in part sub nom. Charles v. Daley*, 749 F.2d 452 (7th Cir. 1984), *appeal dismissed sub nom. Diamond v. Charles*, 476 U.S. 54 (1986); *Margaret S. v. Treen*, 597 F. Supp. 636, 653-66 (E.D. La. 1984), *aff'd sub nom. Margaret S. v. Edwards*, 794 F.2d 994 (5th Cir. 1986); *Ragsdale v. Turnock*, 841 F.2d 1358, 1372-73 (7th Cir. 1988), *proceedings deferred*, 493 U.S. 987 (1989).

54 For example, in 1979, the year after the Akron ordinance was adopted, 10 states enacted similar laws. In apparent response to lower federal court decisions declaring these laws unconstitutional, the numbers subsequently declined to four laws in 1980, and three in 1981. Patricia Donovan, *Fertility-Related State Laws Enacted in 1981*, 14 Fam. Plan. Persp. 63, 66 (1982). In 1984, the year after *Akron* was decided, only one state legislature enacted a comprehensive anti-abortion statute. The Alan Guttmacher Institute, Legislative Record, State Legislatures—1984 Bills Enacted (1984).

Even if it could be said, however, that the application of *Roe* has posed difficulties, complexity in application has never provided the basis for abandoning constitutional protection for a fundamental right. *Daniels v. Williams*, 474 U.S. 327, 334-35 (1986) (citing *LeRoy Fibre Co. v. Chicago, M. & St. P. R. Co.*, 232 U.S. 340, 354 (1914) (Holmes, J., partially concurring)); *see also Webster*, 492 U.S. at 549-50 (Blackmun, J., concurring in part and dissenting in part). A doctrine's legitimacy is not undermined by the challenge of applying constitutional doctrines and making careful differentiations between similar circumstances. 492 U.S. at 549-52 (Blackmun, J., concurring in part and dissenting in part). Rather, "these careful distinctions reflect the process of constitutional adjudication itself" and the discharge of this Court's "duty to do justice carefully, especially when fundamental rights rise or fall with [its] decision." *Id.* at 550, 552.

D. *Roe*'s Guarantee of Safe, Legal Abortion Has Been of Profound Importance to the Lives, Health, and Equality of American Women.

In addition to its soundness and workability as a constitutional doctrine, *Roe* has proven an enormously wise decision of immeasurable benefit to the lives, health, and equality of American women. First, *Roe* has allowed millions of women to escape the dangers of illegal abortion and forced pregnancy. Despite the illegality or highly restricted availability of abortion in the years before *Roe*, women always obtained abortions.[55] Women who could afford the often extraordinary expense traveled to a place where abortion was legal;[56]

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55 *See generally*, Ellen Messer and Katherine E. May, *Back Rooms: Voices from the Illegal Abortion Era* (1988); *Abortion and Women's Health*, *supra* note 29.

56 Prior to 1970, when abortion was legalized in New York, women traveled to foreign countries to obtain abortions. *Women Flock to London Seeking Abortions Under Liberal Law*, Medical World News Vol. 10, pp. 24-27 (1969). In 1972, 44% of all abortions in the United States were obtained outside a woman's state of residence. *Abortion and Women's Health* at 3. For example, in the two and one-half years preceding *Roe*, nearly 350,000 women traveled to New York State to obtain a legal abortion. *Id.* The need to travel resulted in delayed abortions and, consequently, increased medical risks. *Id.*

less affluent women turned to illegal procedures or self-induced abortions. In the 1950's and 1960's, an estimated 200,000 to 1.2 million illegal abortions occurred annually in the United States.[57] As a result of these back-alley and self-induced abortions, as many as 5000 to 10,000 women died each year,[58] and many other women suffered severe physical and psychological injury. Still other women endured forced pregnancy and its attendant health risks.[59] And history makes clear that, without constitutional protection, low-income women, who are disproportionately women of color, suffered the most.[60]

Second, the nationwide legalization of abortion following *Roe* resulted in dramatic advances in the safety of abortion, and, as a consequence, there were substantial decreases in the total number of abortion-related deaths and complications. Between 1973—the year *Roe* was decided—and 1985, the death rate for abortion fell more than eight times, from 3.4 deaths per 100,000 in 1973 to 0.4 deaths per 100,000 in 1985.[61] Similarly, abortion-related complications requiring hospitalization fell sharply during the 1970's, with the steepest drop following *Roe* in 1973.[62] Today, at all points in preg-

57 Christopher Tietze and Stanley K. Henshaw, *Induced Abortion: A World Review* 43 (6th ed. 1986); Willard Cates, Jr. and Roger W. Rochat, *Illegal Abortions in the United States: 1972-1974*, 8 Fam. Plan. Persp. 86, 89 (1976) [hereinafter *Illegal Abortions*].

58 *See* Lawrence Lader, *Abortion* 3 (1966); *Illegal Abortions* at 86-90; Richard H. Schwarz, *Septic Abortion* 7 (1968).

59 *See* Section I.C.1. *supra*. Women with unwanted pregnancies have a higher rate of post-partum infection, hemorrhage, and post-partum depression, and sometimes lasting psychological damage, than women who want to carry their pregnancies to term. Willard Cates, Jr., *Legal Abortion: The Public Health Record*, 215 Sci. 1586, 1587 (1982).

60 Mortality rates from illegal abortions were as much as 12 times higher for women of color than for white women. *Illegal Abortions* at 87-88. "More than two-thirds of the women who died from illegal abortions from 1972 to 1974 were black or from some other minority group." *Abortion and Women's Health* at 5. *See generally* Brief *Amici Curiae* of NAACP Legal Defense Fund, *et al.*

61 *Abortion and Women's Health* at 28.

62 *Id.* at 32.

nancy, abortion poses a lower risk of death than does childbirth.[63]

Experience throughout this country's history amply demonstrates that overturning *Roe* will not end abortion. Instead, permitting states to criminalize abortion or impose burdensome restrictions, either singularly or cumulatively, will tragically and undeniably return women to illegal, back-alley practitioners or self-abortions.[64] As in the days before *Roe*, the number of abortion-related deaths and injuries will soar and women will be forced to continue unwanted pregnancies against their will.

Finally, by affording women greater control over their childbearing, *Roe* has permitted American women to participate more fully and equally in every societal undertaking. The option of safe, legal abortion has enabled great numbers of women to control the timing and size of their families and thus continue their education, enter the workforce, and otherwise make meaningful decisions consistent with their own moral choices. As a result, women have experienced significant economic and social gains since *Roe*.[65] It is simply unconscionable for this Court to allow hostile state legislatures to force women back to the days when "the female [was] destined solely for the home and rearing of the family, and only the male for the marketplace and the world of ideas." *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975). To do so would wreak havoc on a century of constitutional doctrine

63 Tietze & Henshaw, *supra* note 57, at 107-13. Induced abortion is one of the most common and safest surgical procedures performed in this country, with half the risk of death involved in tonsillectomy and one-hundredth the risk of death involved in appendectomy. Warren M. Hern, *Abortion Practice* 23-24 (1984). *See also supra* note at 43.

64 For example, because Indiana Public Law 106 required parental consent, 17-year-old Rebecca Bell resorted to an illegal abortion, which resulted in a fatal septic infection. Judy Mann, *Illegal Abortion's Deadly Price*, Washington Post, Aug. 3, 1990, at C3.

65 For example, there has been a substantial increase in women's labor force representation and a diminution in the wage gap between men and women. *See* Fuchs, *supra* note 45, at 36-37; *Women's Work*, *supra* note 45, at 23-24.

and "cast[ ] into darkness the hopes and visions of every woman in this country who had come to believe that the Constitution guaranteed her the right to exercise some control over her unique ability to bear children." *Webster*, 492 U.S. at 557 (Blackmun, J., concurring in part and dissenting in part).

II. THE "UNDUE BURDEN" TEST ADOPTED BY THE COURT OF APPEALS IS VAGUE AND UNWORKABLE.

By stretching logic, precedent, and the bounds of its own authority, the court of appeals adopted the less protective "undue burden" standard, which has never commanded a majority or even a plurality of this Court. By so doing, the court of appeals rejected *Roe*, *Akron*, and *Thornburgh* and turned "a single opinion that lacks majority support into national law." *King v. Palmer*, 950 F.2d 771, 782 (D.C. Cir. 1991) (*en banc*) (finding inapplicable *Marks v. United States*, 430 U.S. 188 (1977)). *But see Coe v. Melahn*, No. 90-1552 (8th Cir. Mar. 2, 1992).

More important, the "undue burden" test is seriously flawed. First, this Court has never applied the "undue burden" analysis to legislation targeting constitutionally protected interests.[66] Unlike strict scrutiny, whose hallmarks are

66 Relying upon *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973), *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963), and *Bates v. City of Little Rock*, 361 U.S. 516 (1960), Justice O'Connor argues in *Akron* that the undue burden standard is not novel to constitutional law. 462 U.S. at 462 (O'Connor, J., dissenting). But none of these cases apply an "undue burden" analysis. In *Rodriguez*, Justice Powell focuses on whether the right to education is a fundamental right, not on whether that right had been substantially infringed. 411 U.S. at 34-37. Moreover, the Court makes clear that strict scrutiny is triggered in cases involving "legislation which 'deprived,' 'infringed,' or 'interfered' with the free exercise of some such fundamental personal right or liberty." *Id.* at 38 (citations omitted). In *Gibson*, although Justice Goldberg occasionally discussed the "substantial" infringement of the right of free association, the Court applied the "strict scrutiny" standard and never examined the degree of interference necessary to trigger this exacting level of review. 372 U.S. at 545-46. Similarly, in *Bates*, the Court held that "where there is a significant encroachment upon personal liberty," the state must demonstrate a compelling purpose. 361 U.S. at 524. But the intent of this discussion was to characterize the interference with petitioner's rights as "neither speculative nor remote." *Id.* Indeed, in *Bates* as in *Gibson*, the Court pointed out that constitutional freedoms are protected against "subtle" governmental interference as well as direct restrictions. *Id.* at 523. *See also Gibson*, 372 U.S. at 544. Moreover, the Court's reliance upon *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), makes clear that the traditional strict scrutiny standard was used to invalidate under the First Amendment the state-mandated disclosure of membership lists.

known, and which effectively safeguards the right to choose abortion from governmental interference, *see* Section I.C. *supra*, the "undue burden" test is a novel concept.

Second, the "undue burden" test provides wholly inadequate protection for women seeking abortions. Although some anti-choice commentators have suggested that the "undue burden" test is an acceptable middle ground between the strict scrutiny and rational basis tests, *see* James Bopp, Jr. and Richard E. Coleson, *What Does Webster Mean?*, 130 U. Pa. L. Rev. 157 (1989), all available clues to its application demonstrate that the test provides inadequate protection for the abortion right. *Akron*, 462 U.S. at 466-67, 470-74 (O'Connor, J., dissenting) (upholding second trimester hospitalization, biased counseling, mandatory delay, and physician-only counseling requirements under "undue burden" test); *Thornburgh*, 476 U.S. at 827-33 (O'Connor, J., dissenting) (upholding biased counseling, reporting requirements, degree of care for post-viability abortions, and second physician requirement when fetus is possibly viable under "undue burden" test). *See also Akron*, 462 U.S. at 420 n.1.

Third, if this Court addresses the constitutionality of each state restriction in a piecemeal fashion—as Justice O'Connor did in *Akron* and *Thornburgh*—the test is inadequate for yet another reason. *Roe* mandates that courts ultimately assess

> the degree of burden that the entire regime of abortion regulations places on a woman, . . . [examining] how a given regulation *incrementally* adds to the cumulative burden on the fundamental right. In contrast, the undue burden standard may allow a state to pile on 'reasonable

> regulation' after 'reasonable regulation' until a woman seeking an abortion first had to conquer a multi-faceted obstacle course.

Dellinger and Sperling, *supra* note 51, at 100 (emphasis in original). *Cf. Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) ("cumulative effect" of small license tax could crush religious practice when "exacted town by town").

Fourth, the "undue burden" test is likely to result in arbitrary and discriminatory applications by the lower courts. In *Akron* and *Thornburgh*, Justice O'Connor reiterated that heightened judicial scrutiny is reserved for only those instances in which the state has imposed " '*absolute* obstacles or *severe* limitations on the abortion decision,' not whenever a state regulation 'may "inhibit" abortions to some degree.' " *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting) (quoting *Akron*, 462 U.S. at 464 (O'Connor, J., dissenting)) (emphasis added). A burden is not "undue" unless the measure has the effect of " '*substantially* limiting access to the means of effectuating th[e] decision' " to have an abortion. *Akron*, 462 U.S. at 463 (quoting *Carey*, 431 U.S. at 688 (emphasis in original)).[67] Thus lower courts are required to make quantitative and subjective judgments of what constitutes a severe or substantial limitation in order to determine whether the state bears the burden of proving a compelling purpose for the law's enactment.

Even the United States as *amicus curiae* has abandoned the "undue burden" test as flawed. While its *amicus curiae* brief in *Akron*, 462 U.S. 416, urged this Court to adopt the "undue burden" test, its briefs in both *Webster*, 492 U.S. 490, and *Hodgson*, 110 S. Ct. 2926, rejected the standard, finding that the "concept of an undue burden obviously is not self-defining." *See* Brief For the United States As *Amicus Curiae* Supporting Appellants at 22, *Webster*, *supra* (No. 88-605). In *Hodgson*, the United States continued:

67 The court of appeals would also examine whether a particular regulation would have a *severe* or *drastic* impact upon the time, cost, or number of legal providers of abortions. 33a.

> Asking whether a particular measure unduly burdens the right provides no meaningful guidelines for assessing the weight of the competing interests, or for determining how much deference to give to legislative judgments. The only measure of constitutionality would be the courts' own subjective assessment of what is "due" or "undue" in any particular context. In these circumstances, the undue burden analysis would offer "no guide but the Court's own discretion," *Baldwin v. Missouri*, 281 U.S. 586, 595 (1930) (Holmes, J., dissenting); *see Webster*, 109 S. Ct. 3066 n.* (Scalia, J., concurring in part and concurring in the judgment), and would serve only to mask judgments made on the basis of assumptions that would remain unarticulated. In our view, great caution should be exercised in resolving important constitutional controversies under the "undue burden" mantle.

Brief For the United States As *Amicus Curiae* at 21, *Hodgson*, *supra* (Nos. 88-1125, 88-1309).

In the several years since this Court decided *Webster*, state legislators have proposed hundreds of restrictions on abortion[68] which, if enacted, would deter, and in many instances prevent, women from obtaining appropriate health care. Because it offers no guidance to lower courts, the "undue burden" standard will require this Court to determine separately whether each and every one of these numerous provisions imposes an undue burden on a right of reproductive privacy and to analyze that question separately for different classes of women.[69] In that event, fears, expressed by some members of this Court, of encouraging unnecessary litigation and sitting as a super-legislature will be magnified tenfold.

68 *See* National Abortion Rights Action League, *Who Decides? A State-by-State Review of Abortion Rights*, iii (3d ed. 1992), *Abortion and Women's Health* at 39.

69 Restrictions that appear a mere affront or inconvenience to wealthy, educated women acting with the support of their families may impose prohibitive burdens on women with other life circumstances.

Finally, the "undue burden" test will oblige the women already suffering from an act's coercive influence to demonstrate its onerous burdens through costly, time-consuming litigation. Under *Roe*, once plaintiffs prove that a statute will create more than a *de minimis* impact upon a woman's right to choose abortion, the burden shifts to the state to demonstrate that the law furthers a compelling purpose. This allocation is fair, because the state enjoys substantial resources to make its case, resources that women facing unwanted pregnancies are less able to secure. Placing this extraordinary burden upon women facing unwanted pregnancies will be particularly disadvantageous to low-income women, young women, rural women, and battered women, who also are the very citizens least able to defend their interests in the legislative arena.[70]

III. THE RATIONAL BASIS TEST WILL PROVOKE AND SANCTION EXTREME GOVERNMENTAL INTERFERENCE WITH PRIVATE REPRODUCTIVE DECISIONS.

Unfettered deference to legislative action resulting from the adoption of a rational basis standard will sanction and encourage intolerable legislative interference with women's reproductive choices. In *Webster*, a plurality of this Court abandoned *Roe*'s trimester framework on the assumption that modern legislatures would be unlikely to pass legislation "reminiscent of the dark ages." 492 U.S. at 521. However, the state legislative experience during the last several years has belied any notion of legislative moderation.[71]

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70 As commentators recently noted: "[I]t is simply unfair, and unnecessary, to require that a woman actually sacrifice her constitutional liberty *before* she or anyone else can challenge a restriction on her freedom. The Court should not demand an unwanted child, or a woman maimed by an illegal abortion, as proof that strict scrutiny is warranted." Estrich & Sullivan, *supra* note 36, at 136 (emphasis in original).

71 For example, Utah passed a restrictive abortion law that would have subjected doctors to the death penalty for providing illegal abortion. *See Jane L. v. Bangerter*, No. 91-C-345-G (D. Utah filed Apr. 4, 1991). In 1990, Louisiana attempted to revive its pre-*Roe* law subjecting physicians to ten years at hard labor for performing an abortion. *Weeks v. Connick*, 733 F. Supp. 1036 (E.D. La. 1990). In 1991, after that attempt failed, the Louisiana legislature passed a law banning abortions and contraceptive methods that operate after conception. 1991 La. Sess. Law Serv. 74 (West). In 1990, the territory of Guam passed a law banning virtually all abortions, as well as counseling, encouraging, or advising a woman to obtain an abortion. *Guam Society of Obstetricians & Gynecologists v. Ada*, 766 F. Supp. 1422 (D. Guam 1990), *appeal pending*, No. 90-16706 (9th Cir.). A bill just recently introduced in Rhode Island not only bans abortions except to prevent the immediate death of the pregnant woman, but also prohibits advertisements and referrals about abortion. No. 91-H5310, Rhode Island General Assembly, January Sess. (1991).

While courts must give appropriate deference to the legislative process in the economic arena, *see Ferguson v. Skrupa*, 372 U.S. 726, 727-31 (1963), the framers of the Constitution never intended the political process to resolve questions of individual rights. As this Court has recognized:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Barnette, 319 U.S. at 638.

Adoption of a rational basis test will also permit state legislatures to impose numerous restrictions adversely affecting women's lives and health and subjecting women of different states to differing standards. A woman's right to choose abortion will vary solely because she does not live in or cannot afford to travel to a state that is more respectful of her constitutional liberty. The result will be an irrational patchwork of state and local laws that "would not conform to the American legal norm of equality." Laurence H. Tribe, *Abortion: The Clash of Absolutes* 75 (1990); *see also* Brief *Amici Curiae* of Certain State Elected Officials; Brief *Amici Curiae* of the City of New York, *et al.*

Moreover, the rational basis test might sanction a wide variety of other incursions on the personal liberty of pregnant women. To further mere rational state interests, could government dictate the lifestyle or working conditions of pregnant women? Could government compel childbirth to further population expansion?[72] Conversely, could it justify forced contraception, abortion, or sterilization to support its rational interests? *See* cases cited *supra* note 32. These intrusive deprivations of personal liberty and autonomy would conflict with this Court's recognition that "the full scope of the liberty guaranteed by the Due Process Clause . . . includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . [and] that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

IV. THE CHALLENGED PROVISIONS ARE INVALID UNDER ANY STANDARD OF REVIEW.

A. Mandatory Husband Notification Violates Rights of Privacy, Marital Integrity, and Equal Protection.

1. In violation of the right of privacy, the Act's husband notification restriction increases the likelihood of violence against women and fails to further any legitimate state interest.

Both the district court and the court of appeals correctly invalidated § 3209's requirement that every married woman first notify her husband that she is about to undergo an abortion. Ever since this Court established that a state may not empower a husband to veto a woman's abortion choice, *Dan-*

72 For example, the pro-natalist policies of the former Ceausescu regime in Romania—including a ban on all forms of contraception and sterilization except in extremely limited circumstances, extra taxation for childless marriages, and monthly birth quotas for factory employees—might be constitutional if rationally related to governmental interests. *See* Charlotte Hord, Henry P. David, France Donnay and Merril Wolf, *Reproductive Health in Romania: Reversing the Ceausescu Legacy*, 22 Stud. in Fam. Plan. 231, 232 (1991).

forth, 428 U.S. at 67-72, no court has upheld as constitutional a husband notification requirement.[73]

As this Court recognized, a notification statute may give the notified person a veto of the woman's decision, by giving that person the opportunity to prevent the abortion or to penalize the woman severely for exercising her choice. *See Hodgson*, 110 S. Ct. at 2939, 2945 n.36; *Bellotti v. Baird*, 443 U.S. 622, 647 (1979) ("*Bellotti II*"). The record in this case amply demonstrates the onerous burden the husband notification requirement would impose. As the court of appeals explained:

> The district court found that § 3209's notification requirement creates a substantial risk that women who would otherwise have an abortion will be prevented from having one. . . . In those situations where a husband is sufficiently opposed to abortion or sufficiently desirous of having a child that the wife will not voluntarily share the fact of her pregnancy and her intention to abort with him, the clinics' experts testified that coerced notification will predictably result in an effort to prevent the abortion.

66a. Indeed, as the court of appeals observed, the district court found that the number of situations in which "women may reasonably fear dire consequences from notifying their husbands is potentially limitless." 70a; *see also* 257a n.42. "Even if the woman is not deterred from pursuing an abortion, the same arsenal of physical, economic, and psychological abuse is available to the notified husband to penalize the wife for exercising her constitutionally bestowed right." 68a.

The limited exceptions to the husband notification requirement do not relieve women of these severe burdens. Like the "less than effectual" abuse and neglect exception to Minne-

73 *See Planned Parenthood v. Board of Medical Review*, 598 F. Supp. 625, 636 (D.R.I. 1984); *Eubanks v. Brown*, 604 F. Supp. 141, 148 (W.D. Ky. 1984); *Doe v. Deschamps*, 461 F. Supp. 682, 686 (D. Mont. 1976); *Scheinberg v. Smith*, 482 F. Supp. 529 (S.D. Fla. 1979), *aff'd in part, vacated in part, and remanded*, 659 F.2d 476 (5th Cir. Unit B Oct. 1981), *on remand*, 550 F. Supp. 1112 (S.D. Fla. 1982).

sota's two-parent notification statute, *Hodgson*, 110 S. Ct. at 2950 (O'Connor, J., concurring); *see also id.* at 2932 n.7, 2939 n.26, the Act's exceptions for sexual assault and bodily injury will leave battered women vulnerable to a range of coercion and abuse. As the district court found and the court of appeals acknowledged, the pattern of random violence inflicted on them ensures that many "battered spouses are psychologically incapacitated from making the assertion required by the statute even when there is ample objective basis for the required fear." 68a-69a; *see also* 197a-198a, 201a. Survivors of marital rape will also be unable to make the exception's required report to law enforcement officials "[g]iven the devastating effect that a report . . . is likely to have on the marital relationship and the economic support provided the wife by the marriage." 70a; *see also* 198a.

Moreover, like the inadequate abuse and neglect exception in *Hodgson*, the spousal sexual assault exception at issue here is, in reality, a means of notifying the husband. *Hodgson*, 110 S. Ct. at 2950 (O'Connor, J., concurring); *see also id.* at 2932 n.7. To avail herself of the exception, the woman must report the assault "to a law enforcement agency having the requisite jurisdiction," § 3209(b)(3), within 90 days. 18 Pa. Cons. Stat. Ann. § 3128(c) (Supp. 1991). Her husband will be notified of her action once an investigation begins or criminal charges are filed. Further, once the woman reports the marital rape to the police, the information becomes part of the public record and is therefore no longer confidential. *See Scheetz v. The Morning Call, Inc.*, 946 F.2d 202, 207 (3d Cir. 1991). The "combination of the abused [woman's] reluctance to report sexual or physical abuse, . . . with the likelihood that invoking the . . . exception for the purpose of avoiding notice will result in notice, makes the . . . exception less than effectual." *Hodgson*, 110 S. Ct. at 2950 (O'Connor, J., concurring).

In addition, even though "physical violence is *not* the only burden reasonably predictable," the harsh exceptions apply only to acts of *physical* violence against the married woman. 69a. As the district court found, the exceptions would not apply where a husband would if notified,

> threaten to (1) [sic] publicize her intent to have an abortion to family, friends or acquaintances; (b) retaliate against her in future child custody or divorce proceedings; (c) inflict psychological intimidation or emotional harm upon her, her children or other persons; (d) inflict bodily harm on other persons such as children, family members or other loved ones; or (e) use his control over finances to deprive [her] of necessary monies for herself or her children.

194a. A woman protected by a restraining order under the Protection From Abuse Act, 23 Pa. Cons. Stat. Ann. § 6101 et seq. (Supp. 1991), also may be unprotected by the exception. 195a; 199a.[74]

Moreover, this burdensome provision serves no legitimate state interest whatsoever.[75] The district court found that in the absence of a forced notification provision, "[t]he vast majority of women consult their husbands prior to deciding to terminate their pregnanc[ies]." 193a. As this Court recognized in *Hodgson*, 110 S. Ct. at 2945, "[a] statute requiring . . . notification would not further any state interest in those instances." Where women choose not to notify their husbands, the state interests, to the extent they are legitimate at all, would actually be *disserved* by forced notification. As the district court found,

> The record clearly establishes that instead of fostering marital communication and bolstering the state's interest in marital integrity, the exact opposite effect would likely occur. . . . Not only could forced notice hasten

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74 The exception for a woman unable to locate her husband through "diligent effort" is also of doubtful utility. The district court found that, because the Act does not define "diligent effort," the threat of civil and criminal penalties will compel abortion providers to construe the term in a narrow fashion, imposing another layer of delay before the woman may obtain an abortion. 194a.

75 The statute itself enumerates the interests that it purports to further: "the Commonwealth's interest in promoting the integrity of the marital relationship," and "a spouse's interest in having children within marriage and protecting the prenatal life of that spouse's child." § 3209(a).

> the dissolution of a troubled marriage, but it could have potentially disastrous consequences, including subjecting the woman to physical abuse.

262a (citations omitted). *See also* 201a; *Planned Parenthood v. Board of Medical Review*, 598 F. Supp. at 640-41.[76]

Nor can the Commonwealth's purported interest in protecting the husband's "interests in having children within marriage and in protecting the prenatal life of [his] child," § 3209(a), justify the violation of the woman's right of privacy. Although both men and women have a constitutionally protected interest against state interference in their ability to procreate, *see Skinner*, 316 U.S. at 541, and in their children's welfare, *see, e.g., Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989), neither interest is served by the husband notification requirement. Instead, the statute protects only the husband's "interest" in compelling his wife to bear children for him. That decision, however, must remain with the pregnant woman, "who physically bears the child and who is the more directly and immediately affected by the pregnancy." *Danforth*, 428 U.S. at 71.

2. The Act's husband notification provision unconstitutionally interferes with the protected marital relationship.

This Court has held that the marital relationship is protected by "a right of privacy older than the Bill of Rights" for marriage is regarded as "intimate to the degree of being sacred." *Griswold*, 381 U.S. at 486. It " 'has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.' " *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion) (quoting *La Fleur*, 414 U.S. at 639-40); *see Zablocki*, 434 U.S. at 383-85 (1978); *Prince v. Massachusetts*,

76 Dr. Walker testified that forced notification would not guarantee discussion among spouses or improve communications in dysfunctional relationships. J.A. 229. Rather than improving marital integrity in any way, forced notification "will make family communication much more difficult and much more dangerous in [battering] relationships." J.A. 233.

321 U.S. 158, 166 (1944). As Justice Stevens reiterated in *Hodgson*:

> While the State has a legitimate interest in the creation and dissolution of the marriage contract . . . the family has a privacy interest in . . . the intimacies of the marital relationship which is protected by the Constitution against undue state interference . . . . Far more than contraceptives, at issue in *Poe* and *Griswold v. Connecticut*, 381 U.S. 479 (1965), the married couple has a well-recognized interest in protecting the sanctity of their communications from undue interference by the State.

110 S. Ct at 2943, 2944 n.33.

In addition, this Court has "emphasized that the First Amendment protects . . . family relationships, that presuppose 'deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.' " *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 545 (1987) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 619-20 (1984)). *See Employment Division, Dep't of Human Resources v. Smith*, 110 S. Ct. 1595, 1601 (1990); *City of Dallas v. Stanglin*, 490 U.S. 19, 24 (1989); *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 18 (1988) (O'Connor, J., concurring).

In the guise of "protecting marital integrity," § 3209 flies in the face of these principles, subjecting marital discussions to state surveillance, censorship, and control. For couples whose relationships do not include discussion of plans regarding childbearing, the state now requires a dialogue which could profoundly alter their most intimate affairs. Even for those who already discuss reproductive choices, an allegation that the wife falsely certified notification would subject the timing, substance, and content of private colloquies to the scrutiny of law enforcement officials who are charged with determining whether the certification is true or whether the couple's discussions are sufficient to meet the vague and undefined level of notification mandated by the Act. This

prospect is every bit as intrusive as Connecticut's birth control statute, which "allow[ed] the State to enquire into, prove and punish married people for the private use of their marital intimacy." *Poe v. Ullman*, 367 U.S. at 548 (Harlan, J., dissenting). *See Griswold*, 381 U.S. at 485-86.

In *Hodgson*, this Court observed that while "full communication among all members of a family" may be desirable,

> such communication may not be decreed by the State. The State has no more interest in requiring all family members to talk with one another than it has in requiring certain of them to live together . . . . [A] state interest in . . . making the "private realm of family life" conform to some state-designed ideal, is not a legitimate state interest at all.

Hodgson, 110 S. Ct. at 2946 (citations omitted). *Cf. Gilbert v. Minnesota*, 254 U.S 325, 335-36 (1920) (Brandeis, J., dissenting).[77]

3. Section 3209 denies women equal protection of the laws.

Although the interests § 3209 purports to advance are framed in gender-neutral terms, the provision imposes duties on women alone, and confers rights solely on men. The district court found that "[m]any medical and surgical procedures, including . . . sterilization, prostate operations and chemotherapy, affect the capacity of males to have children

77 The court of appeals recognized that § 3209 also violates women's rights to informational privacy by forcing them to disclose intimate details of their lives without a guarantee of confidentiality. 67a-68a. *See Whalen v. Roe*, 429 U.S. 589, 599-605 (1977); *Nixon v. Administrator of General Servs.*, 433 U.S. 425, 457-59 (1977); *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 577 (3d Cir. 1980). Once disclosure of the abortion decision is made, the husband remains free to broadcast this private and intimate information to others. As the court of appeals observed: "When the state forces spousal notification on a wife in a seriously troubled marriage, or even a wife in an untroubled marriage with a husband unalterably opposed to abortion, it compels disclosure of very intimate information with no assurance of confidentiality to someone highly motivated to make a public disclosure." 67a.

within marriage." 199a. Nevertheless, neither this Act nor any other Pennsylvania law requires that a married man notify his wife before undergoing a medical procedure that would affect her "interest in having children within marriage." Married men are free to exercise reproductive choices without interference by, or knowledge of, their wives.

The pattern of sex-differentiated roles in marriage implicit in § 3209 is an old one, not unlike the discredited proposition that the husband is the "head and master" of the marital unit;[78] government enforcement of this pattern violates the commands of the Equal Protection Clause. This Court has made clear that, at the very least, a state cannot constitutionally classify on the basis of gender without demonstrating an "exceedingly persuasive justification" for the classification. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982) (quoting *Kirchberg*, 450 U.S. at 461); *see also Craig v. Boren*, 429 U.S. 190, 204 (1976). Here, where the offending statute also heavily intrudes on basic interests in autonomy, bodily integrity, and health, this Court must undertake the most exacting review of the statutory objectives to determine whether the Commonwealth has a compelling justification for the gender-based discrimination. *See Zablocki*, 434 U.S. 374 (1978) (applying strict scrutiny under Equal Protection Clause to law forbidding marriage); *Skinner*, 316 U.S. 535 (1942) (applying strict scrutiny under Equal Protection Clause to compulsory sterilization law); *cf. Eisenstadt*, 405 U.S. 452 (1972) (invalidating prohibition on contraception under Equal Protection Clause).[79]

78 *See Kirchberg v. Feenstra*, 450 U.S. 455 (1981) (striking down Louisiana statute making husband "head and master" of community property upon marriage). At common law, under the doctrine of coverture, a husband had rights to control his wife's person as well as her property. *See Tinker v. Colwell*, 193 U.S. 473, 481 (1904) ("husband has certain personal and exclusive rights with regard to the person of his wife which are interfered with and invaded by criminal conversation with her . . . [and] the wife is in law incapable of giving any consent to affect the husband's rights").

79 Indeed, in *Thornburgh* this Court emphasized that restrictions on abortion also implicate women's equality. The promise of individual liberty

Section 3209 must fall by application of these principles. As outlined above, the trial court found and the court of appeals confirmed that § 3209 is a "totally irrational vehicle" with which to further marital integrity. 72a, 262a. The Constitution prohibits the state from relying on out-dated gender-based stereotypes that perpetuate women's image as the "weaker sex" or "child rearers." *Califano v. Webster*, 430 U.S. 313, 317 (1977); *see also Orr v. Orr*, 440 U.S. 268, 279 (1979). The Commonwealth's attempt to further asymmetrically the husband's "interest in having children within marriage," embodies precisely the prohibited stereotype that wives should bear children. To the extent that the statute may be based on an assumption that women, unlike men, need spousal guidance in their reproductive choices, it transgresses Justice O'Connor's admonition that "if the statutory objective is to exclude or 'protect' . . . one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate." *Hogan*, 458 U.S. at 725.

B. The Act's Mandatory Delay Will Jeopardize Women's Health and Furthers No Legitimate State Interest.

In *Akron* this Court held that no

> legitimate state interest is furthered by an arbitrary and inflexible waiting period. There is no evidence suggesting that the abortion procedure will be performed more safely. Nor [is] . . . the State's legitimate concern that the woman's decision be informed . . . reasonably served by requiring a 24-hour delay as a matter of course.

Akron, 462 U.S. at 450. Consistent with this holding, the district court confirmed the onerous burdens imposed by the Act's mandatory delay. In particular, the district court found that:

"*extends to women as well as to men* . . . . A woman's right to make that choice freely is fundamental. *Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.*" 476 U.S. at 772 (emphasis added).

(a) The 24-hour waiting period will force every woman seeking an abortion to make two separate trips to the physician.

(b) Because of scheduling complications, the waiting period will "result in delays far in excess of 24 hours"; for most women, the delay will range from forty-eight hours to two weeks.

(c) For many women, the 24-hour delay will significantly increase the cost of obtaining an abortion, including the costs of transportation, overnight lodging, and lost wages.

(d) The requirement of two visits to the provider will subject "many women to the harassment and hostility of anti-abortion protestors . . . ."

(e) The mandatory delay will be especially burdensome for low-income women, young women, women from rural areas, and women—such as battered women—who may have difficulty explaining their whereabouts.

(f) A delay of 24 hours or more will adversely affect the physical and psychological health of some patients, and will increase medical complications.

(g) Where the delay pushes a patient into her second trimester of pregnancy, there will be a substantial increase in the costs of the abortion. Moving the procedure from the early to the middle stages of the second trimester would result in an increased medical risk, including a substantial increase in the risk of death.

171a-174a. In addition, the district court confirmed the lack of any legitimate state interest served by this provision. 174a. Thus, the mandatory delay is unconstitutional under even the least protective standard of review.

The court of appeals did not dispute *any* of the lower court's factual findings. Indeed it acknowledged both the "adverse consequences" of the mandatory delay, 52a-53a, and the Act's failure to "serve any purpose" for women who

have already decided to have an abortion. 55a.[80] Nonetheless, the appeals court concluded that the mandatory delay created no "undue burden" on the right to abortion, because this Court in *Hodgson* upheld a parental notification provision which caused delays of a week or more. *See* 53a (quoting *Hodgson v. Minnesota*, 648 F. Supp. 756, 853 (D. Minn. 1986)).

The flaws in this reasoning are apparent. First, the court of appeals substituted for the record actually developed here a factual finding implicitly adopted in a different case involving completely distinct issues. If undisputed factual findings may be discarded so cavalierly, then the "undue burden" test is truly meaningless. Second, and equally important, in *Hodgson* the state's legitimate interest in allowing parents an opportunity to consult with the young woman was served by the delay. This same interest is not present here. Indeed, in *Hodgson*, Justice O'Connor joined Justice Stevens in expressly distinguishing *Akron* on the ground that no similar interest was served by imposing a 24-hour delay on an adult woman. *See Hodgson*, 110 S. Ct. at 2944-45 n.35.[81]

C. The Act's Biased Counseling Restrictions Violate the Right of Privacy and the First Amendment.

1. Biased patient counseling interferes with the provision of quality medical care and serves no legitimate state interest.

A state may require that a woman give her voluntary and informed consent to the abortion procedure. *Danforth*, 428

80 "If a physician has concluded that any other type of obstetrical or gynecological procedure is medically necessary and has obtained the informed consent of the patient, there is simply no medical reason to delay performance of the procedure any longer." 174a.

81 The court of appeals suggested that the mandatory delay served an interest in ensuring that the woman's decision is "well-considered." 54a. This too, however, is refuted by the undisputed findings of the district court and by this Court in *Akron*, 462 U.S. at 450-51. Only "[a] very small percentage of women are ambivalent concerning whether to have an abortion when they come to a clinic. Arrangements for special counseling sessions are made for women demonstrating any ambivalence about her decision." 171a.

U.S. at 67. But precisely because the validity of an informed consent requirement rests on the state's interest in protecting the health of the pregnant woman, the state may not, under the guise of "informed consent," attempt to intimidate women into continuing their pregnancies by forcing physicians to deliver irrelevant, inaccurate, misleading, or inflammatory information. This is true under any standard of review. *Thornburgh*, 476 U.S. at 759-64. This Court has twice invalidated biased patient counseling requirements virtually identical to those at issue here. *Thornburgh*, 476 U.S. at 759-64; *Akron*, 462 U.S. at 442-45. As this Court recently found:

> Critical to our decisions in *Akron* and *Thornburg[h]* to invalidate a government intrusion into the patient/doctor dialogue was the fact that the laws in both cases required *all* doctors within their respective jurisdictions to provide *all* pregnant patients contemplating an abortion a litany of information, regardless of whether the patient sought the information or whether the doctor thought the information necessary to the patient's decision.

Rust v. Sullivan, 111 S. Ct. 1759, 1777 (1991) (emphasis in original). Nothing in this record would compel a different result.

As the district court found, the Act's biased counseling provisions "represent a substantial departure from the ordinary medical requirements of informed consent." 170a. Because it requires "the supply of specific information to *all* patients regardless of their specific circumstances, the Act *is contrary to the standard medical practice that informed consent be specifically tailored to the needs of the specific patient.*" 177a (emphasis added). Far from promoting informed consent, the Act will undermine this dialogue because it "may actively discourage the free flow of information . . . by relieving any physician 'who complies with the provisions' of section 3205 from civil liability for failure to obtain informed consent." 177a.

For many women, some of the specific information mandated by the Act will be irrelevant, misleading, inaccurate, or inflammatory. For example, the Act requires a disclosure of medical risks of carrying a pregnancy to term. If a woman needs an abortion because she is carrying an anencephalic fetus, *no legitimate purpose is served* by detailing her risk of death from preeclampsia or informing her that she may require a cesarean section at the time of delivery. 178a. Similarly, "[i]nforming women of the availability of medical assistance benefits or paternal support for the child has no legitimate medical justification. The information may mislead or confuse the patient, and, in the vast majority of the cases, is plainly inappropriate given the circumstances of the individual patient." 179a.[82]

Similarly, requiring physicians to offer to their patients state-prepared materials describing the fetus and listing agencies that provide alternatives to abortion is simply "an attempt by the Commonwealth to alter a woman's decision after she has determined that an abortion is in her best interest." 179a. This mandated information "will create the impression in women that the Commonwealth disapproves of the woman's decision," and "will create undesirable and unnecessary anxiety, anguish and fear." 178a-179a.

In short, "[u]nder the guise of informed consent, the Act requires the dissemination of information that is not relevant to such consent, and thus, *it advances no legitimate state interest.*" *Thornburgh*, 476 U.S. at 763 (emphasis added). The provisions are therefore unconstitutional under any standard of review.

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82 "Advising a patient of the general availability of such benefits or payments may cause a woman to rely upon those statements and elect against an abortion only to discover that the benefits or payments were unavailable or insufficient." 179a-180a. For example, in 1988 only one-quarter of child support payments orders issued by Pennsylvania state courts were actually enforced. Children's Defense Fund, *The State of America's Children 1991* 152 (1991). Moreover, child support payments may be wholly insufficient to allow any meaningful economic support for a woman to raise a child. Ms. Dillon's case exemplifies this problem. After waiting 18 months to obtain a child support order, the order was only $125 per week, clearly insufficient to provide for her four children. J.A. 386.

Moreover, the Act's requirement that only physicians deliver certain portions of the state-mandated information will increase the costs of the procedure, require extensive changes in the operating schedules of physicians and clinics, and ultimately reduce the availability of abortion services. 175a-176a. Yet, the district court found that non-physician counselors by virtue of their training and experience, are fully capable of providing information, discussing the alternatives to abortion, and securing the patient's informed consent. 175a. Indeed, "[i]n many instances, trained counselors . . . are more understanding than physicians and have more time to spend with patients." 175a. Thus, the "state's interest in ensuring that a woman's consent to an abortion procedure is informed and unpressured *is in no way furthered* by mandating the identity of the person that must obtain the informed consent." 176a (emphasis added). As this Court has held, the "critical factor is whether [the woman] obtains the necessary information and counseling from a qualified person, not the identity of the person from whom she obtains it." *Akron*, 462 U.S. at 448. *See also Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972, 2983 (1990).

2. In violation of the First Amendment, the biased counseling provisions force the physician to communicate the state's ideology.

The First Amendment's guarantee "includes both the right to speak freely and the right to refrain from speaking at all"; it protects "the right of individuals . . . to refuse to foster . . . an idea they find morally objectionable." *Wooley*, 430 U.S. at 714, 715 (citations omitted).[83] Even when a speaker is free to disavow the government's message, it is a violation of

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83 *See Barnette*, 319 U.S. at 642 (no official may "prescribe what shall be orthodox" in matters of opinion or "force citizens to confess by word or act their faith therein"); *see also Lehnert v. Ferris Faculty Ass'n*, 111 S. Ct. 1950, 1957 (1991); *id.* at 1960 (opinion of Blackmun, J.); *id.* at 1970 (Marshall, J., concurring in part and dissenting in part); *id.* at 1978 (Scalia, J., concurring in part and dissenting in part); *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 796-97 (1988); *Pacific Gas & Elec. Co. v. Public Utilities Comm'n*, 475 U.S. 1, 10-11 (1986) (plurality opinion).

the First Amendment to "require speakers to affirm in one breath that which they deny in the next." *Pacific Gas & Elec. Co.*, 475 U.S. at 16. When the government compels an individual to be an instrument for the dissemination of "an ideological point of view he finds unacceptable,"[84] *Wooley*, 430 U.S. at 715, the government imposes "a content-based regulation of speech." *Riley*, 487 U.S. at 795. Thus the statute "is subject to exacting First Amendment scrutiny" and may survive only if it is "narrowly tailored" to promote a compelling governmental interest. *Id.* at 798.[85]

Section 3205 cannot survive this test. Under duress of law, physicians and counselors must recite a litany of government-mandated information, as well as offer information prepared and provided by the Commonwealth. These requirements "will undermine the physician's or counselor's ability to counsel a patient according to her individual needs, and will force the physician or counselor to act in a manner inconsistent with their [sic] professional judgment." 179a. Thus, no less than the plaintiffs in *Wooley* and *Riley* and the appellants in *Pacific Gas & Elec. Co.*, the Pennsylvania physicians find themselves forced to convey the state's message at the cost of violating their own conscientious beliefs and professional commitments.[86]

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84 Justice O'Connor recognized that "[e]ven the requirement that women . . . be informed of the availability of those materials, and furnished with them on request, may create some possibility that the physician or counselor is being required to 'communicate [the State's] ideology.' " *Thornburgh*, 476 U.S. at 830 (citing with approval *Akron*, 462 U.S. at 472 n.16, and *Wooley*, 430 U.S. 705).

85 This doctrine is not confined to speech with an ideological viewpoint. *Riley*, 487 U.S. at 797-98. In *Riley*, this Court observed that compelling statements of "fact" regarding the percentage of charitable funds that went to overhead was no more permissible than compelling statements of "opinion": "either form of compulsion burdens protected speech." *Id.* In any case, the compelled speech at issue here clearly conveys an ideological message. *Cf. Bigelow v. Virginia*, 421 U.S. 809, 822 (1975).

86 These requirements also violate the First Amendment rights of the woman who must listen to the state's litany in order to obtain an abortion. "While [the government] clearly has a right to express [its] views to those who wish to listen, [it] has no right to force its message upon an audience incapable of declining to receive it." *Lehman v. City of Shaker Heights*, 418 U.S. 298, 307 (1974) (Douglas, J., concurring).

The Commonwealth's asserted interest in assuring that the woman's consent is informed and voluntary cannot validate these infringements. As discussed above, although a state may require that a woman "give what is truly a voluntary and informed consent," *Thornburgh*, 476 U.S. at 760, "[i]t remains primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances." *Akron*, 462 U.S. at 443. *See also Thornburgh*, 476 U.S. at 762. The principles of *Wooley* and *Barnette*, which establish the "individual's First Amendment right to avoid becoming the courier for [the government's] message," *Wooley*, 430 U.S. at 717, thus render unconstitutional the biased counseling provisions of § 3205.

D. The Act's "Informed" Parental Consent Restriction Unduly Burdens the Right of Privacy and Forces Family Life to Conform to a State-Designed Ideal.

A state may promote parental involvement in a young woman's abortion decision when necessary to protect its "interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely," *Hodgson*, 110 S. Ct. at 2942 (opinion of Stevens, J.), and to "protect[ ] a parent's interest in shaping a child's values and lifestyle . . . ." *Id.* at 2946. However, in promoting parental involvement, the state is limited by "the constitutional protection against unjustified state intrusion . . . [which] extends to pregnant minors as well as adult women." *Hodgson*, 110 S. Ct. at 2937 (opinion of Stevens, J.). Consequently, the state may not " 'unduly burden' the fundamental right" to abortion. *Id.* at 2949 (O'Connor, J., concurring) (quoting *Akron*, 462 U.S. at 453).[87]

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87 In contrast to the strict scrutiny standard for adult women, the district court correctly recognized that the "undue burden" standard was appropriate to judge restrictions affecting young women. 248a.

Pennsylvania's "informed" parental consent statute goes far beyond the parental notification and consent statutes at issue in *Hodgson*, 110 S. Ct. 2926 (1990), and *Bellotti II*, 443 U.S. 622 (1979). As the district court held, "informed consent" is a term of art, and

> personal contact between the patient and the person rendering the informed consent is essential. The physician's or counselor's observation of the person's demeanor and reactions . . . is essential to permit the physician or counselor to determine whether the patient is competent to give informed consent and whether the patient fully understood the information . . . .

170a. Thus, consistent with the "standard medical principles of informed consent," the district court found that "informed" parental consent under the Act will require in-person consultation with the parent. 182a-183a, 248a.

By mandating face-to-face counseling for parents, the Act undermines, rather than promotes, the state's interests in protecting parental involvement and the well-being of young women. There can be no dispute that by increasing the delay, costs, and medical risks of abortion, the "informed" parental consent requirement will harm young women. As the district court found, the requirement of parental counseling could "cause delays of several days or possibly weeks." 183a; *see also* 182a. Coupled with other requirements of the Act, § 3206 "will create layers of obstacles which could unduly burden a minor woman's ability to get an abortion . . . . In some cases, the provisions may act in such a way as to deprive her of her right to have an abortion." 186a; *see also* 184a.[88]

The statute's "informed" parental consent requirement will have a particularly irrational and perverse impact on the parents of pregnant young women. As the district court found, even when prepared to consent, some parents will be unable to come to the clinic for several days because of work schedules or family obligations, or because they cannot afford the additional cost of travel, lost wages, and child care expenses. 185a-186a. The requirement presents so insurmountable an obstacle that even parents who have participated in, support, and consent to their daughter's abortion, may be unable to comply with the law. 185a. *See also Planned Parenthood Ass'n v. Harris*, 670 F. Supp. 971, 987-88 (N.D. Ga. 1987).

88 Unlike the regulation of any other medical procedure, the Act requires a physician performing an abortion to evaluate the competency and obtain the informed consent of two separate individuals, with the irrational but inevitable result that if the parent is not competent to give informed consent, the physician cannot perform the abortion, even though a parent has been notified and is involved, and the young woman is fully capable of giving her own informed consent.

Where the parents choose to "shap[e] [their] child's values and lifestyle," *Hodgson*, 110 S. Ct. at 2946, by permitting her to exercise independent judgment, the Pennsylvania statute perversely forces the parents to act contrary to their own beliefs, "slic[ing] deeply into the family itself." *Hodgson*, 110 S. Ct. at 2946 (quoting *Moore*, 431 U.S. at 498). As the district court explained, "The parent may be reluctant to explain his or her absence from work, or may not wish to be seen entering an abortion clinic." 249a. In some cases, "a parent may refuse to accompany their daughter to the facility even though he or she has agreed to consent to the daughter's abortion." 185a. Thus, rather than protect parental rights, the statute merely "substitut[es] its conception of family life for the family's own view." *Hodgson*, 110 S. Ct. at 2946. Such an asserted "state interest in standardizing its children and adults, making the 'private realm of family life' conform to some state-designed ideal, *is not a legitimate state interest at all.*" *Id.* (emphasis added).

E. The Act's Public Disclosure and Reporting Requirements Burden Women's Right of Privacy and Fail to Further Legitimate State Interests.

The Act's reporting and disclosure requirements also burden the right to abortion without serving any legitimate state interest. First, §§ 3207(b) and 3214(f) require every facility that performs abortions to file with the Commonwealth quarterly reports of the total number of abortions performed. The reports of facilities that received state funds within the year prior to filing are available to the public for inspection and copying.

As the district court found, most abortion providers have suffered a wave of extreme anti-abortion violence and harassment. 211a-213a. The public's access to the quarterly reports gives the clinics reasonable basis to fear that this harassment and violence will increase, 213a, and will cause some providers to forego state funds for both abortion and other health services. "The likely result will be that indigent patients who have been the victims of rape or incest or who suffer from a life-threatening condition will find it difficult, if not impossible . . . to obtain abortion services." 213a-214a. Moreover, for physicians who now perform abortions only several times a year, public disclosure and its attendant threat of harassment is enough to deter the performance of abortion altogether.[89]

Recognizing that the disclosure provisions further no legitimate or compelling interests in health, the only interest asserted by the Commonwealth to support the requirement is the public's right to know how its funds are spent. 83a. The reports do not, however, accomplish this objective because they include no information about the nature or amount of state funds that trigger public disclosure under the Act.[90] Rather, the requirements merely enhance the ability of abortion opponents to intimidate abortion providers. The provision must therefore be invalidated. *Thornburgh*, 476 U.S. at 765-66.[91]

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89 The harassment of physicians is expected to increase in light of the recent strategic announcement by the anti-choice organization Operation Rescue that it plans to drive doctors who perform abortions out of business. Mimi Hall, *Abortion Foes Target Doctors*, USA Today, Feb. 5, 1992, at 3A (quoting Randall Terry) ("We're going to shame [doctors], humiliate them, embarrass them, disgrace them and expose them until they quit"). *See also* Christine Spokar, *Abortion Foes' Mood Defiant*, Washington Post, Jan. 21, 1992, at B1.

90 Records of state appropriations and expenditures are maintained and generally available, however, under Pennsylvania's Right-to-Know Law, 65 Pa. Cons. Stat. Ann. §§ 66.1-66.4 (Supp. 1991). *See* 210a.

91 By coercing providers into public disclosure as a condition of receiving state aid, the Act also improperly conditions the receipt of a public benefit on the surrender of a constitutionally protected right. This Court has explicitly applied the unconstitutional conditions doctrine to the right to choose abortion. *See Planned Parenthood v. Arizona*, 718 F.2d 938 (9th Cir. 1983), *appeal after remand*, 789 F.2d 1348 (9th Cir.), *aff'd mem. sub nom. Babbitt v. Planned Parenthood*, 479 U.S. 925 (1986) (state funds may not be conditioned on an organization's relinquishment of privately funded abortion-related activities). *See also Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980).

In addition to placing an impermissible burden on the right to abortion, the district court also found that the requirement that abortion providers report the name of the referring physician "serves no legitimate scientific purpose." 219a. It "does not add to the pool of scientific knowledge concerning abortion. Nor is it reasonably related to the Commonwealth's interest in promoting maternal health." 272a.[92] Consequently, the provision is invalid.

Even though these reports are to be confidentially maintained, referring physicians "are extremely protective of their anonymity because of fears (often based upon past experience) that any kind of documentation or record-keeping connecting them with any phase of the abortion decision will have adverse effects on their medical practices and patients or their ability to reside peacefully in their communities." 219a.[93] By reducing the number of physicians willing to make referrals for abortion, the Act's reporting requirement unconstitutionally burdens the right to abortion. 272a.[94]

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92 As the district court pointed out, although the referring physician may provide some of the state-mandated information, the abortion provider must review the information with the patient, "regardless of what the referring physician may or may not have done . . . . Therefore, the performing physician or abortion facility will have all information the Commonwealth might seek . . . at their disposal." 272a-273a.

93 The district court found specific instances where doctors would stop referring patients for abortions if their names were reported as required by the Act. 220a, 221a.

94 Similarly, the district court found that the Act's requirement that physicians report the basis for their medical judgments concerning viability,

F. This Court Must Enjoin Enforcement of the Act's Medical Emergency Exception to the Extent that Compliance Would Pose a Threat to the Life or Health of Women or Must Find the Provision Unconstitutional.

Section 3203 provides an exception to several of the Act's provisions in the case of a "medical emergency." As the district court found, "[w]ithout question, the definition of medical emergency is more restrictive than any other as applied in medical situations." 235a-236a. The Act's definition is "contrary to generally accepted standards of emergency medical care, and interferes with a physician's ability to act in accordance with his best medical judgment." 157a.[95] As a result, compliance with the Act could "ultimately jeopardize the health of the pregnant woman." 162a.

The court of appeals agreed that it was bound by this Court's holding in *Thornburgh*, 476 U.S. at 770-71, that "any abortion regulation which might delay or prevent an abortion must contain a medical emergency exception," 36a, and that a valid medical emergency exception would necessarily include the conditions of inevitable abortion, premature ruptured membrane, and preeclampsia. 37a. Nevertheless, to assure that compliance with Pennsylvania law would "not in any way pose a significant threat to the life or health of a woman," the court of appeals construed the Act to include these conditions within its narrow definition. 40a.

The court of appeals correctly intended to remove the constitutional infirmity in § 3203. Its effort to do so, however, failed for two reasons. First, the court of appeals' holding that the medical emergency definition need only protect

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the existence of a medical emergency, and the determination of gestational age would "serve no useful scientific purpose," and would interfere with the physician's exercise of medical judgment. 222a, 274a (citation omitted).

95 The district court found that the Act's definition of medical emergency "departs from the normal medical definition of an emergency and is inconsistent with that contained in Pennsylvania's Emergency Medical Services Act." 155a. "No other law infringes so heavily on a physician's discretion to decide when he or she is faced with a medical emergency as the provisions of the Act." 156a.

women from "significant" threats to their life or health, is inconsistent with this Court's holding in *Thornburgh*. It unfortunately fails to ensure that a woman's health remains the physician's paramount consideration. *Thornburgh*, 476 U.S. at 768-69.[96]

Second, the interpretation runs afoul of the principle that a federal court may not "rewrite a state law to conform it to constitutional requirements." *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988). A federal court's interpretation of state legislation is "not binding on state courts and may be discredited at any time—thus essentially rendering the federal-court decision advisory and the litigation underlying it meaningless." *Moore v. Sims*, 442 U.S. 415, 428 (1979). *See also Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 770 (1988) (federal courts "will not write nonbinding limits into a silent state statute").[97] Therefore, physicians cannot rely on the court of appeals' narrowing construction to insulate them from criminal prosecution, and must sacrifice their patient's health to avoid the threat of criminal penalties.

To solve these dilemmas, this Court must either find the provision unconstitutional or enjoin enforcement of the definition to the extent that compliance with its requirement would in any way pose a threat to the life or health of a woman. With an injunction in place, a physician could, without risk of criminal prosecution, treat the medical emergency exception as inclusive of those conditions, like inevitable abortion, premature ruptured membrane, and preeclampsia, which threaten a pregnant woman's life or health.

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96 The saving construction also fails to include other complications of pregnancy similar to those recognized by the district court. *See* Brief *Amici Curiae* of American College of Obstetricians & Gynecologists, *et al.*

97 The court of appeals cited neither legislative history nor decisional law as an authoritative basis for its construction. Nor could the court of appeals rely on the interpretation offered by the Attorney General. As this Court held in *Virginia v. American Booksellers*, 484 U.S. at 395, because "the Attorney General does not bind the state courts or local law enforcement authorities, we are unable to accept her interpretation of the law as authoritative."

CONCLUSION

For the reasons set forth above, petitioners ask that this Court reaffirm the strict scrutiny standard of *Roe v. Wade*. Any other decision by this Court would forsake the promise of liberty and equality that has safeguarded the lives and health of American women for almost two decades. The judgment of the court of appeals finding unconstitutional the Act's husband notification provision in § 3209 must be affirmed and the judgment finding constitutional §§ 3203 (definition of medical emergency), 3205, 3206, 3207(b), 3208, 3214(a) and (f) must be reversed.

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Nos. 91-744 and 91-902

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, et al.,
Petitioners/Cross-Respondents

v.

ROBERT P. CASEY, et al.,
Respondents/Cross-Petitioners

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in upholding the constitutionality of the following provisions of the Pennsylvania Abortion Control Act:

a. 18 Pa. Cons. Stat. Ann. Sec. 3203 (definition of medical emergency)

b. 18 Pa. Cons. Stat. Ann. Sec. 3205 (informed consent)

c. 18 Pa. Cons. Stat. Ann. Sec. 3206 (parental consent)

d. 18 Pa. Cons. Stat. Ann. Sections 3207, 3214 (reporting requirements)?

2. Did the court of Appeals err in holding 18 Pa. Cons. Stat. Ann. Sec. 3209 (spousal notice) unconstitutional?

LIST OF PARTIES

Petitioners in No. 91-744 (respondents in No. 91-902) are Planned Parenthood of Southeastern Pennsylvania; Reproductive Health and Counseling Center; Women's Health Services, Inc.; Women's Suburban Clinic; Allentown Women's Center; and Thomas Allen, representing himself and a class of similarly situated physicians.

Respondents in No. 91-744 (petitioners in No. 91-902) are Robert P. Casey, the Governor of Pennsylvania; Allan S. Noonan, Acting Secretary of the Pennsylvania Department of Health[1]; and Ernest D. Preate, Jr., the Attorney General of Pennsylvania.

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[1]Substituted for former Secretary of Health N. Mark Richards, see Sup. Ct. R. 35.3.

TABLE OF CONTENTS

		PAGE
QUESTIONS PRESENTED		i
LIST OF PARTIES		ii
TABLE OF CONTENTS		iii
TABLE OF AUTHORITIES		vi
OPINIONS BELOW		1
STATEMENT OF JURISDICTION		2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED		3
STATEMENT OF THE CASE		4
I.	Procedural History	4
II.	Facts	8
	A. The Definition of Medical Emergency	9
	B. Informed Consent	12
	C. Parental Consent	18
	D. Spousal Notice	19
	E. Confidential Medical Reports	22

F. Publicly Available Reports..... 25

SUMMARY OF ARGUMENT..... 28

ARGUMENT

I. **THE COURT NEED NOT REVISIT ROE v. WADE IN THIS CASE, EXCEPT TO REAFFIRM WHAT IT HAS SAID ABOUT THE LIMITS OF THE RIGHT ROE RECOGNIZED**..... 34

A. Roe Established Only A Limited Right To Abortion, Subject To Reasonable State Regulation To Safeguard Important State Interests... 34

B. Under Roe And Its Progeny, State Regulation Of Abortion Is Properly Evaluated Under The "Undue Burden" Standard..... 42

II. **PENNSYLVANIA'S STATUTE IS IN ALL RESPECTS CONSTITUTIONAL UNDER THIS STANDARD**..... 54

A. Definition Of Medical Emergency..... 55

B. Informed Consent. 59

1. Information Given By Physicians... 60

2. Information Given By Others..... 67

3. First Amendment Issues.. 69

4. Waiting Period..... 71

C. Parental Consent With Bypass..... 76

D. Spousal Notice... 80

1. Right to Abortion..... 81

2. Other Issues. 96

E. Confidential Reports..... 99

F. Publicly Available Reports..... 101

III. **IN THE ALTERNATIVE, THE COURT SHOULD RECONSIDER AND OVERRULE ROE v. WADE, RETURNING THE REGULATION OF ABORTION TO THE STATES' DEMOCRATIC PROCESS**..... 104

CONCLUSION..... 117

TABLE OF AUTHORITIES

CASES — **PAGE(S)**

Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983)..... passim

Beal v. Doe, 432 U.S. 438 (1977)..... 45

Bellotti v. Baird, 428 U.S. 132 (1976) (Bellotti I)..... 38,45, 98

Bellotti v. Baird, 443 U.S. 622 (1979) (Bellotti II)..... 77,82, 87

Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.), cert. denied, 409 U.S. 1064 (1972)..... 65

Carey v. Population Services International, 431 U.S. 678 (1977)..... 36

Colautti v. Franklin, 439 U.S. 379 (1979)..... 41

Doe v. Bolton, 410 U.S. 179 (1973)..... 37,49 111

EEOC v. Westinghouse Electric Corp., 925 F.2d 619 (3d Cir. 1991)..... 54

Eisenstadt v. Baird, 405 U.S. 438 (1972)..... 109

Ferguson v. Skrupa, 372 U.S. 726 (1963)..... 116

Griswold v. Connecticut, 381 U.S. 479(1965)..... 110

H. L. v. Matheson, 450 U.S. 398 (1981)..... passim

Harris v. McRae, 448 U.S. 297 (1980)..... 38,45, 70

Hodgson v. Minnesota, 110 S.Ct. 2926 (1990)..... passim

Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. 470 (1987)..... 50

Lochner v. New York, 198 U.S. 45 (1905)..... 33,115, 116

Loving v. Virginia, 388 U.S. 1 (1967)..... 109

Maher v. Roe, 432 U.S. 464 (1977). 39,45

Marks v. United States, 430 U.S. 188 (1977)..... 7,53

Meyer v. Nebraska, 262 U.S. 390 (1923)..... 110

Ohio v. Akron Center for Reproductive Health, 110 S.Ct. 2972 (1990)..... passim

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)..... 50

Pierce v. Society of Sisters, 268 U.S. 510 (1925)..... 110

Planned Parenthood Ass'n. v. Ashcroft, 462 U.S. 476 (1983). passim

Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976).. 38,79, 84,93

Roe v. Wade, 410 U.S. 113 (1973)... passim

Skinner v. Oklahoma, 316 U.S. 535 (1942)..... 110

Stanley v. Georgia, 394 U.S. 557 (1969)..... 109

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986).....passim

Vance v. Bradley, 440 U.S. 93 (1979)..... 62,67

Webster v. Reproductive Health Services, 492 U.S. 490 (1989). passim

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985).. 71

CONSTITUTION

Amend. XIV, § 1..... 3

STATUTES

28 U.S.C. § 1254(1).....2

Pennsylvania Abortion Control Act, 18 Pa. Cons. Stat. §§ 3201 through 3220..... passim

Pa. Stat. Ann., tit. 40, § 1301.103 (Purdon 1991 Supp.)..... 60,64, 65

Pa. Stat. Ann., tit. 65, §§ 66.1 and 66.2 (Purdon 1959 & 1991 Supp.)..... 104

Pa. Stat. Ann., tit. 73, § 201-7(a) (Purdon 1991 Supp.)..... 76

REGULATIONS

42 C.F.R. § 441.253..... 76

RULES OF COURT

Fed. R. Civ. Proc. 36..... 75

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 947 F.2d 682 and is reprinted at 1a.[2] The opinion of the District Court is reported at 744 F. Supp. 1323 and is reprinted at 104a.

[2]Citations to "___a" are to the Appendix to the Petition for Certiorari in No. 91-744.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on October 21, 1991. Petitioners and respondents both filed petitions for certiorari within 90 days thereafter, and the Court granted both petitions, limited to the questions set forth above, on January 21, 1992. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment's Due Process Clause provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const., Amend. XIV, § 1.

2. The relevant provisions of the Pennsylvania Abortion Control Act, 18 Pa. Cons. Stat. §§ 3201 through 3220, are reprinted at 289a-304a, except for the Act's severability clause, which is uncodified and reads as follows:

> The provisions of this Act are severable. If any word, phrase or provision of this Act or its application to any person or circumstance is held invalid, the invalidity shall not affect any other word, phrase or provision or application of this Act which can be given effect without the invalid word, phrase, provision or application.

Act of Nov. 17, 1989, P.L. 592, No.64, § 6.

STATEMENT OF THE CASE

This action challenges the constitutionality of amendments enacted in 1988 and 1989 to Pennsylvania's Abortion Control Act, 18 Pa. Cons. Stat. §§ 3201-3220 (1990). Petitioners, five abortion facilities and a class of physicians who provide abortions, J.A. 42-43 (order certifying class), sought declaratory and injunctive relief against a wide array of the 1988 and 1989 amendments. The challenged provisions regulate but do not prohibit abortions. The one provision of the Act which does contain an outright prohibition, § 3204(c)(no abortion to be performed solely because of the sex of the unborn child), was not challenged.

I. PROCEDURAL HISTORY

The United States District Court for the Eastern District of Pennsylvania

issued a preliminary injunction against certain provisions of the Act before their effective date. J.A. 72-73 (order).

After a bench trial, the District Court issued a permanent injunction granting petitioners virtually all the relief they had requested. The District Court enjoined implementation of provisions of the Act relating to informed consent, parental consent for abortions on minors, spousal notification, public disclosure of certain reports, and the collection of certain other information. 238a-262a, 266a-279a, 285a-287a. In addition, the District Court enjoined implementation of all provisions of the Act that contain an exception for medical emergencies on the ground that that exception was inadequate. 235a-237a,

286a. Respondents appealed.[3]

The Court of Appeals largely reversed the District Court, the three-judge panel unanimously holding most of the challenged provisions of the Act constitutional. 1a-86a. The sole exception was the spousal notice provision, on which the panel divided. The two judges of the majority held this provision unconstitutional, 60a-80a, while the dissenting judge, believing the spousal notice provision to be constitutional, would have reversed the District Court on this point as well. 96a-103a.

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[3] Petitioners had asked the District Court to enjoin the collection of virtually all information on abortions, and to enjoin the Act's requirement that the gestational age of the unborn child be ascertained, but the District Court was unwilling to go so far. 263a-266a, 269a-279a. These were the only respects in which the petitioners were unsuccessful in the District Court, and they did not appeal.

To ascertain the correct standard of review, the Court of Appeals turned for guidance to Marks v. United States, 430 U.S. 188 (1977). 20a-21a. Applying the principles of Marks to the Court's fragmented decisions in Webster v. Reproductive Health Services, 492 U.S. 490 (1989) and Hodgson v. Minnesota, 110 S.Ct. 2926 (1990), the Court of Appeals identified Justice O'Connor's concurring opinions in Webster and Hodgson as embodying the controlling standard of those cases. That standard, which the Court of Appeals called the "undue burden" standard, "appl[ies] strict scrutiny review to regulations that impose an undue burden [on the right to abortion] and rational basis review to those which do not." 30a.

Applying this undue burden standard to Pennsylvania's Abortion Control Act,

the Court of Appeals held that except for the spousal notice provision, none of the challenged provisions imposed an undue burden and all had some rational basis on their face.[4] 32a-85a.

II. FACTS

Despite what the petitioners say, Br. for Cross-Respondents, No. 91-902, at 3 n.4, the respondents did challenge the District Court's findings of fact on appeal, and continue to do so here.[5] Many of the District Court's errors were of

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[4] Because the Act has never been allowed to go into effect, the petitioners' attack on it could only be a facial one.

[5] Again despite what the petitioners say, Pet. Br. at 4 n.6, the Court of Appeals held that some of these findings were unsupported by the record, 38a-40a, 79a-80a, 83a, while others were insufficient to establish the statute's unconstitutionality under the more deferential standard of review the Court of Appeals employed. E.g., 46a, 49a, 51a, 53a-54a, 78a.

omission. The following discussion therefore relies not only on the District Court's findings, but also upon facts which, although omitted by the District Court, were either admitted by the petitioners or testified to by witnesses whom they called and whom the District Court found "credible in all respects." 115a, 117a-122a.

A. The Definition of Medical Emergency.

In cases of medical emergencies, defined in Section 3203 of the Act, compliance with a number of the Act's requirements is excused.[6] A medical emergency is:

> that condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate termination of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.

Id.

The petitioners contended that this definition was too narrow, and the evidence centered around three medical conditions--preeclampsia, inevitable abortion, and premature ruptured membrane--which the petitioners claimed required immediate termination of pregnancy and yet would not fall within the Act's definition of a medical emergency.[7]

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[6] Medical emergencies permit physicians and women to forego the requirements concerning determination of gestational age, §3204; informed consent, §3205; parental consent, §3206; spousal notification, §3209; and conditions placed on third trimester abortions, §3211(c).

[7] The petitioners' witness Dr. Bolognese, who is certified as a specialist by the American College of Obstetricians and Gynecologists (ACOG), 121a-122a, was asked on cross-examination if there were any other such situations.

The expert witnesses called by both sides agreed that preeclampsia places the patient at risk of liver and kidney destruction, eclampsia (a seizure disorder of the brain), cerebral hemorrhage, and respiratory distress, all leading to death. J.A.195-196, 201-202 (testimony of Dr. Bolognese), 332-335 (testimony of Dr. Bowes). Inevitable abortion can cause severe hemorrhaging, leading to shock, infection and death. J.A. 120-126 (testimony of Dr. Davidson), 331-332 (testimony of Dr. Bowes). Premature

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He could identify only two: a patient with severe and uncontrolled hypertension, or with severe and uncontrolled diabetes. He testified that if these pregnancies are not terminated, the hypertensive patient could "stroke out" and suffer permanent paralysis or die, while the diabetic patient faces a diabetic coma or diabetic seizures. J.A. 198-199. The petitioners did not rely on either of these scenarios in the courts below, and indeed it seems obvious that both are medical emergencies within the meaning of Section 3203.

ruptured membrane can produce an overwhelming sepsis, loss of the ability to clot blood, hemorrhaging, shock and death. J.A. 190-195, 200-201 (testimony of Dr. Bolognese), 335-336 (testimony of Dr. Bowes). In fact, these conditions are three of the major causes of maternal death in the United States. J.A. 195 (testimony of Dr. Bolognese).

B. Informed Consent

The Act's informed consent provisions require that, twenty-four hours before an abortion, a physician provide the pregnant woman with medical information on the risks and alternatives to abortion, the gestational age of the unborn child, and the risks of carrying to term. In addition, either a physician or counselor must advise the woman of possible childbirth and paternal support benefits, and the availability of printed materials

concerning fetal development and agencies offering alternatives to abortion. 18 Pa. Cons. Stat. §§3205(a), 3208.

All of the petitioners currently do inform their patients of the risks and alternatives to abortion, using standardized forms and rote recitations. 134a, 138a; J.A. 398 (counseling guidelines), 410 (consent form), 449, 451-456 (procedure manual), 461-463 (disclosure form), 479-482 (consent form). One of the petitioners processes patients in groups of four, 134a, and two of them use consent forms whose wording is identical to that of § 3205(a)(1)(i). J.A. 464, 469 (consent forms). All of the petitioners likewise determine the gestational age. J.A. 105 (stipulation); and two of them advise all women, regardless of circumstances, of the risks of carrying to term. J.A. 449, 455-456

(procedure manual), 461 (disclosure form).

To convey this information, the petitioner clinics rely on counselors rather than physicians. These counselors are often part-time employees paid $15,000 or less per year. J.A. 109 (stipulation), 537 (testimony of Sherley Hollas).[8] Most of the petitioners have no minimum educational requirements for these counselors, 149a, J.A. 109-110 (stipulation), 524 (testimony of Sue Roselle), 529 (testimony of Carol Wall),[9] who are not qualified to answer questions on, for example, fetal development. J.A. 266-267 (testimony of Sue Roselle). The

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[8]Hollos is executive director of petitioner Women's Suburban Clinic. J.A. 532.

[9]Roselle is executive director of petitioner Women's Health Services, 117a; Wall is executive director of petitioner Planned Parenthood of Southeast Pennsylvania. Defendants' Exhibit 56, p. 7.

petitioners produced no evidence that quantified what the effect would be upon the cost or availability of abortions if this information were to be conveyed by physicians, as § 3205 requires, rather than by-counselors.

In addition to conveying the medical information just discussed, most petitioners also require counselors to provide "options counseling" to women about the alternatives to abortion. 49a, 138a, 142a, 146a-147a; J.A. 393, 398, 410, 448, 461, 469, 474 (forms, guidelines, procedure manuals). The clinics either offer, or provide upon request, information and referrals on fetal development (including photographs), financial support, medical assistance benefits, and agencies providing an alternative to abortion. J.A. 153 (testimony of petitioner Allen), 257-258,

267-68 (testimony of Sue Roselle), 401-405, 444-447, 458-459, 474 (forms, guidelines, procedure manuals).

As to the 24-hour waiting period, the evidence showed that a delay as short as this adds no measurable risk to the abortion procedure. J.A. 136 (testimony of petitioner Allen). In the first trimester, which is when 94% of abortions in Pennsylvania are performed, 150a, a delay of even a week results in no additional risk. J.A. 552 (Rule 36 admission by petitioners). Increases in risk are measurable only over spans of two to three weeks,and even then are very small. For example, if an abortion is delayed from the 9-10 week range to the 11-12 week range, the mortality rate rises from 0.8 per 100,000 to 1.1 per 100,000. 153a. Even in the 15th and 16th weeks, abortion is twice as safe as a

tonsillectomy and a hundred times safer than an appendectomy. 153a; J.A. 137 (testimony of petitioner Allen).

Some delay is already built into the petitioners' procedures. Most women make two trips to the abortion provider, once for a pregnancy test and once for the actual abortion. The petitioners will not even schedule an abortion until the patient has a positive pregnancy test, and the abortion is then scheduled within one to two weeks thereafter. 133a, 136a, 141a-142a, 146a; J.A. 87, 90-91, 95, 98 (stipulation). The petitioners encourage and sometimes require additional delays when a minor wishes to involve her parents, J.A. 105 (stipulation), when a woman appears ambivalent about her decision, J.A. 93, 96, 98-99, 104-105 (stipulation), and, in one case, when a woman expresses a "politically incorrect"

view on abortion. J.A. 486 (consent form), 546 (testimony of Sylvia Stengle).[10]

C. Parental Consent

In 1988, about 12% of the abortions in Pennsylvania were performed on minors under the age of 18. 150a. Section 3206 of the Act requires the informed consent of one parent for a minor who desires an abortion, but provides a judicial bypass option if the minor does not, or cannot, obtain a parent's consent. 18 Pa. Cons. Stat. § 3206.

All of the petitioners encourage minors to discuss their decision with their parents, and encourage parents to accompany their daughter to the abortion clinic. J.A. 105 (stipulation). One petitioner requires that all minors be accompanied by an adult, although not

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[10]Executive director of petitioner Allentown Women's Center. 118a; J.A. 541.

necessarily a parent. 135a. Between 50% and 60% of the minors whom petitioners see are in fact accompanied by one or more parents. 131a, 135a, 139a. In such cases, two of the petitioners require that both the parent and the child sign consent forms. 139a; J.A. 475 (counseling checklist). In addition, the hospital where petitioner Allen practices requires written parental consent before any minor has an abortion. J.A. 104 (stipulation).

D. **Spousal Notice**

Under Section 3209, a married woman who is about to undergo an abortion must notify her husband of her intention, unless her husband is not the father, or she cannot locate her husband, or the pregnancy is the result of a spousal sexual assault reported to a law enforcement agency, or she fears physical injury. The woman must provide her doctor

with a signed statement under penalty of perjury that she has so notified her husband or that she qualifies for one of the exceptions. 18 Pa. Cons. Stat. § 3209.

Section 3209 effects few women. Only 20% of women who obtain abortions are unmarried, 93a; of those, 95% notify their husband. J.A. 243 (testimony of Sue Roselle). The most common reasons for nondisclosure are the husband's illness, the failure of the marriage, or the husband's opposition to abortion. J.A. 244-245 (testimony of Sue Roselle).

Although women who fear physical abuse are exempted from notifying their husbands, petitioners focused on the adequacy of this exception. Petitioners' expert testified that some women who are in a "battering relationship" can suffer from a form of mental disorder called Post-Traumatic Stress Disorder. As a

result, some of these women have a psychological inability to avail themselves of Section 3209's exception for fear of physical abuse. 200a-201a; J.A. 219-227, 231-32 (testimony of Lenore Walker).

There was no testimony, however, on how many of the small group of married women seeking abortions without disclosing it to their husbands are battered. 95a; J.A. 235, 239-240 (testimony of Lenore Walker), 392 (testimony of Jean Dillon).[11] Nor was there any testimony on how many of these battered women--who are able to conceal their pregnancies, arrange and have an abortion, and pay for it without

[11]Dillon is a counselor at the Women's Resource Center of Monroe County and is a member of the Pennsylvania Coalition Against Domestic Violence. 124a-125a, J.A. 387-388.

their battering husband's knowledge[12]--would be psychologically unable to check a line on a form. 93a-95a & n.6; J.A. 504-505 (spousal notice form). Nor was there evidence on how many women would be unable to invoke Section 3209's other exceptions to notification, or suffer ill effects with disclosure. 93a.

E. <u>Confidential Medical Reports</u>

For the purpose of collecting data for medical and public health knowledge, Section 3214(a) requires each abortion provider to file a confidential report for

[12]Petitioner's expert testified that batterers constantly monitor their wives' activities, thoughts, and feelings--making it difficult for the woman to obtain an abortion. J.A. 212-213, 227, 237 (testimony of Lenore Walker). Yet, any woman must first obtain a pregnancy test to even schedule an appointment J.A. 95, 98 (stipulations), 263 (testimony of Sue Roselle). Scheduling delays up to two weeks typically occur. J.A. 90-95 (stipulations), 241 (testimony of Sue Roselle).

each abortion performed. 18 Pa. Cons. Stat. § 3214(a). 302a-304a. A variety of information is to be collected, including the basis for a physician's medical judgment concerning the necessity of third-trimester and medical emergency abortions, and the determination of gestational age. Id., § 3214(a)(8), (10), (11). A referring physician's identify, in addition to the performing physician's identify, also is to be collected. Id., § 3214(a)(1). The reports are not open for public inspection, with various safeguards ensuring that the reports are kept confidential.[13] Id., § 3214(b); 75a, 206a-208a, 269a, 277a.

[13]Defendants' Exhibit 47C (J.A. 500-503) is the data collection form the Pennsylvania Department of Health will use to collect the date if petitioners' challenge is rejected. Defendants' Exhibit 47A (J.A. 493-96) is the data collection form presently used.

The reporting requirements concerning a physician's medical judgment gathers relevant data relating to maternal health, especially in the area of medically necessary abortions. 78a-79a. Recording the information also ensures compliance with the Act's provisions. 79a.

As to the referring physician's identify, a referring physician may make the required gestational age determination, § 3210(a), and provide informed consent, § 3205(a). 80a. In reviewing reporting forms, the Department of Health occasionally finds it necessary to contact the performing physician directly, 220a; it may be equally necessary to contact the referring physician for information. 80a.

These reporting requirements increase abortion costs only by "at most a few dollars per abortion." 78a; J.A. 91

(stipulation), 246 (testimony of Sue Roselle). Otherwise, there was no evidence to establish a drastic increase in delays or the reduced availability of abortions. [14] 78a-80a.

F. **Publicly Available Reports**

Sections 3207(b) and 3214(f) require every abortion facility to file two reports--one identifying its name, address, and corporate affiliations, and the other showing the total number of abortions performed the preceding year, broken down by trimester. 18 Pa. Cons. Stat. §§ 3207(b), 3214(f) (reporting forms). If a facility receives state-appropriated money for the preceding 12

[14]In concluding that physicians might stop referring women for abortions if their names are identified in a confidential report, the District Court relied solely upon hearsay over respondents' repeated objections. 220a-221a; J.A. 30-31, 144, 153-54 (testimony of Sue Roselle, petitioner Allen).

months, these reports are available for public inspection and copying. [15] Id. Petitioners oppose public availability of these reports due to their fear that such would expose them to harassment and protests.

Presently, petitioners advertise in telephone directories, newspapers, radio broadcasts, and other media. J.A. 111 (stipulation); 441-43, 473, 484-485 (advertisements), 525 (testimony of Sue Roselle). Petitioners also encounter public protests on a regular basis--even though Sections 3207(b) and 3214(f) have never been in effect. 83a, 211a-213a; J.A. 259-260, 270 (testimony of Sue Roselle). The only evidence that the

[15]For the facility registration report, which a facility files only once, the 12 months run from the date of the request to inspect and copy. For the quarterly statistical report, the 12 months run from the date of the report.

public availability of the facility and statistical reports would somehow increase these ongoing protests was petitioners' fear that it would happen. 82a-83a, 213a.

SUMMARY OF ARGUMENT

1. Roe v. Wade, properly understood and applied, permits states to regulate abortions as Pennsylvania has done in its Abortion Control Act. Contrary to what the petitioners say, the Court therefore need not, although it certainly may, use this case as a vehicle for re-examining Roe.

Roe does not establish an absolute or unlimited right to abortion on demand, but instead attempts to establish a limited right which also respects the important state interests which exist in protecting fetal life and maternal health, and in other areas. As Justice O'Connor has demonstrated, the Court early formulated the undue burden test to accommodate these important state interests, and that test remains the most appropriate standard for fulfilling Roe's promise that those interests will be respected.

The strict scrutiny of all abortion regulation which petitioners demand is not consistent with Roe. This standard's undisguised hostility to any state regulation of the abortion industry would eviscerate Roe's expressed concern for the important state interests at stake, and would instead convert Roe into a regime of abortion on demand.

2. None of the provisions of Pennsylvania's law imposes an undue burden on abortion, and all of them further one or more legitimate state interests. The Act contains an adequate exception for medical emergencies, which excuses compliance with many of the Act's requirements. Petitioners failed to show, in any concrete way, that this provision would operate to affect medical care adversely.

The Act's informed consent provisions

require the petitioners to provide their patients with accurate, objective and relevant information at a time and in a manner that encourages well-informed and well-considered decision-making. These provisions are in principle no different from the disclosures which other industries must make to their consumers; and they are consistent with other Pennsylvania law on informed consent, and even with many of the petitioners' own practices. Since the petitioners' scheduling practices require most women to make two trips to an abortion provider in any event, complying with the Act's informed consent provisions will impose little or no burden.

The Act's parental consent provision, with its judicial bypass, complies with this Court's decisions which repeatedly have upheld such requirements. The

petitioners' argument that Pennsylvania may require such consent, but may not require that it be "informed," cannot be taken seriously.

To support their facial challenge to the Act's spousal notice provision, the petitioners rely on a worst case scenario that may never happen; there is no evidence that this provision will have the broad practical effect of severely inhibiting access to abortions. The requirement does, however, serve the legitimate purpose of enabling a husband to protect his interests, which the Court has recognized, in the life of the fetus and in his marriage. The petitioners' equal protection claim ignores the Court's repeated admonition that abortion, which involves the purposeful destruction of the fetus, is different from all other medical procedures and may be treated differently.

Their claim that the right of privacy in marital communications shields an attempt by one spouse to conceal something from the other is nonsensical.

The Act's reporting requirements serve obvious and legitimate state purposes in protecting maternal health and ensuring compliance with the Act, and they impose no undue burden, either by disclosing confidential information or impeding access to abortion.

As to the disclosure of the identity of abortion facilities which receive tax dollars, the public certainly has a legitimate interest in knowing how its money is being spent. In any event, the petitioners, all of whom advertise their identity and location to the public, can hardly complain that they are harmed by the "disclosure" of information which is already known. All of the Act's

provisions are therefore constitutional under Roe.

3. Having said all this, it is nevertheless true that Roe v. Wade was incorrectly decided, and the Court may wish to take this occasion to review and overrule it. Roe's identification of the abortion right as fundamental finds no support in the Constitution, in history, in a societal consensus, or in the Court's own precedents, and its use of trimesters and viability to define the contours of that right is at bottom arbitrary. Because of these flaws, Roe stands as a source of instability in the law and as a barrier to public understanding of the proper function of the Court in our system of government. Roe should share the fate of Lochner v. New York, its equally ill-conceived forerunner in substantive due process.

ARGUMENT

I. THE COURT NEED NOT REVISIT ROE v. WADE IN THIS CASE, EXCEPT TO REAFFIRM WHAT IT HAS SAID ABOUT THE LIMITS OF THE RIGHT ROE RECOGNIZED.

A. Roe Established Only A Limited Right To Abortion, Subject To Reasonable State Regulation To Safeguard Important State Interests.

The linchpin of the petitioners' argument is their assertion that Roe v. Wade, 410 U.S. 113 (1973), demands "the most exacting scrutiny," Pet. Br. at 17, of all state laws regulating abortion; that Pennsylvania's statute, which they regard as "highly intrusive and burdensome," Pet. Br. at 2, cannot survive such exacting review; and that the Court therefore cannot uphold any part of this statute without overruling Roe. Pet. Br. at 17-19. Petitioners are mistaken. While there are certainly good reasons to

overrule Roe, and while the Court may well decide that this is an appropriate occasion for re-examining that decision, see 104-116 infra, there is no necessity for the Court to do so. Pennsylvania's statute comports with Roe in all respects; in upholding it, the Court need not address the issue of whether to overrule Roe. This is so, partly because the statute is neither burdensome nor intrusive, but mainly because the petitioners seriously misperceive the holding in Roe.

The petitioners evidently regard Roe as establishing a right to abortion which is absolute, or nearly so, and as holding that virtually all state regulation of abortion is presumptively invalid, sustainable, if at all, only after the most searching--and hostile--judicial

scrutiny.[16] Pet. Br. at 38. In doing so, the petitioners largely ignore what Roe actually says, and likewise ignore the way the Court has, for the most part, applied Roe.

Roe held that "the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Id. at 153. In Roe itself, however, the Court emphasized the limited

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[16]Not content with the traditional formulation of "strict scrutiny"--that, to survive it, laws "may be justified only by compelling state interests, and must be narrowly drawn to express only those interests," Carey v. Population Services International, 431 U.S. 678, 686 (1977)--petitioners have invented a new "ultra-strict scrutiny," under which "only laws necessary and narrowly tailored to serve the most compelling state interests pass constitutional review." Pet. Br. at 17 (emphases added). There is, of course, no warrant for this novel standard in Roe or any other of the Court's abortion-related cases.

nature of the right it had just recognized:

> appellant...argue[s] that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree.... The privacy right involved...cannot be said to be absolute.... [There is no] unlimited right to do with one's body as one pleases....

Id. at 153-154. Roe's companion case, Doe v. Bolton, 410 U.S. 179 (1973), underscored this point: "a pregnant woman does not have an absolute constitutional right to abortion on her demand." Id. at 189. As Roe, 410 U.S. at 159, pointed out, "[t]he pregnant woman cannot be isolated in her privacy. She carries an embryo and later, a fetus," and some measure of state regulation is therefore "reasonable and appropriate."

States have legitimate and important

interests in "safeguarding health, in maintaining medical standards, ... in protecting potential life[,]" id. at 154, and in other respects as well, see, e.g., H. L. v. Matheson, 450 U.S. 398, 411 (1981) (family integrity and protection of minors). In furthering these interests, States may treat abortion, because of its unique nature, differently than other medical procedures. Matheson, 450 U.S. at 412; Bellotti v. Baird, 428 U.S. 132, 148-149 (1976)(Bellotti I); Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 67 (1976). A State need not "fine-tune its statutes so as to encourage or facilitate abortions[,]" Matheson, 450 U.S. at 413. To the contrary, States may adopt policies "'encouraging childbirth'" over abortion "'except in the most urgent circumstances.'" Ibid, quoting Harris v. McRae, 448 U.S. 297, 325 (1980); accord,

Maher v. Roe, 432 U.S. 464, 473-474 (1977).

Of all this, there is not the slightest hint in the petitioners' brief. Petitioners' one-sided reading of Roe would jettison its carefully limited holding in favor of abortion on demand, and would engraft onto the Constitution their own implacable hostility to any state regulation of their industry.[17] Roe recognized not just a right, but necessary and appropriate limits on that right, and this case requires the Court to take seriously, as the petitioners do not, what Roe said about those limits.

Regrettably, the Court has not always

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[17]Petitioners, it bears remembering, are not "women facing unwanted pregnancies," Pet. Br. at 38, but a group of organizations and individuals who are in the business of providing abortions. J.A. 86-87, 89, 91-92, 94, 96-97 (stipulation).

done so in the past. While this case does not require the Court to repudiate Roe, it does require that the Court again repudiate the approach to review of abortion laws of such cases as Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986), and Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983), in which the Court seemed eager to seize upon any excuse to strike down any state regulation of abortion. See, e.g., Thornburgh, 476 U.S. at 812 (White, J., dissenting)(Court strains to avoid a permissible reading of the statute). Petitioners see this overt hostility to state interests as the essence of Roe, but we believe that the dissenting Justices in those cases were correct in asserting that it was the Court's approach, and not the state regulations under attack, which was

inconsistent with Roe. See Thornburgh, 476 U.S. at 783 (Burger, C.J., dissenting)("The Court has departed from the limitations expressed in Roe"); id. at 808 (White, J., dissenting)("The Court's ruling...is not even consistent with...Roe")(emphasis in original); id. at 829 (O'Connor, J., dissenting)(Court's new test a "dangerous extravagance"); Akron, 462 U.S. at 462-463 (O'Connor,J., dissenting)(Court's analysis inconsistent with previous abortion cases); see also Colautti v. Franklin, 439 U.S. 379, 401 (1979)(White, J., dissenting)(Court withdrawing from the States some of the power reserved to them in Roe). The Court has, we think, already repudiated this approach in Webster v. Reproductive Health Services, 492 U.S. 490, 521 (1989)(opinion of Rehnquist, C.J.)("no doubt that our holding today will allow some governmental

regulation of abortion that would have been prohibited under the language of such cases as Colautti...and Akron...."), Hodgson v. Minnesota, 110 S.Ct. 2926 (1990), and Ohio v. Akron Center for Reproductive Health, 110 S.Ct. 2972 (1990).

In this case, the Court should again reaffirm Roe's holding that the right to abortion is not absolute or unlimited, but must accommodate legitimate and important state interests. In our view, that accommodation is best served, short of overruling Roe, by employing the "undue burden" standard for reviewing state regulation of abortion.

B. Under Roe And Its Progeny, State Regulation Of Abortion Is Properly Evaluated Under The "Undue Burden" Standard.

In her dissenting opinion in Akron, 462 U.S. at 452, Justice O'Connor,

writing for herself and two other Justices, stated her understanding of the correct standard for evaluating state abortion regulations under Roe and its progeny.

> [N]ot every regulation that the State imposes must be measured against the State's compelling interests and examined with strict scrutiny. This Court has acknowledged that "the right in Roe v. Wade can be understood only by considering both the woman's interest and the nature of the State's interference with it. Roe did not declare an unqualified 'constitutional right to an abortion'... Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." ... If the impact of the regulation does not rise to the level appropriate for our strict scrutiny, then our inquiry is limited to whether the state law bears "some rational relationship to legitimate state purposes."
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> . . . .
>
> The "undue burden" required in the abortion cases represents the threshold inquiry that must

> be conducted before this Court can require a State to justify its actions under the exacting "compelling state interest" standard.

Id. at 461-463; Thornburgh, 476 U.S. at 828 (O'Connor, J., dissenting); Hodgson, 110 S.Ct. at 2949-2950 (O'Connor, J., concurring in part and concurring in the judgment in part).

This formulation has come to be known as the "undue burden" standard. Petitioners dismiss it as a "novel concept," Pet. Br. at 35, "which has never commanded a majority or even a plurality of this Court," id. at 34, but in this they are quite wrong. As Justice O'Connor has demonstrated, "[t]hese principles for evaluating state regulation of abortion were not newly minted" in her Akron dissent. Thornburgh, 476 U.S. at 828 (O'Connor, J., dissenting). The "undue burden" standard first appeared shortly

after Roe, in Bellotti I, 428 U.S. at 147, and Danforth,[18] and was then "articulated and applied with fair consistency...in cases such as Harris v. McRae, 448 U.S. 297, 314 (1980), Maher v. Roe, 432 U.S. 464, 473 (1977), [and] Beal v. Doe, 432 U.S. 438, 446 (1977)...." Thornburgh, 476 U.S. at 828 (O'Connor, J., dissenting). See Akron, 462 U.S. at 461-462, n. 8 (O'Connor, J., dissenting)(collecting cases). Even in Akron, the majority followed this undue burden approach in some respects, id. 476 U.S. at 829 (O'Connor, J., dissenting). It was not until Thornburgh that the Court made a

[18]The Court in Danforth did not explicitly use the undue burden standard, but in Bellotti I, decided the same day, the Court explained that "we held [in Danforth] that a requirement of written consent...is not unconstitutional unless it unduly burdens the right to seek an abortion." Bellotti I, 428 U.S. at 147.

"clean break with precedent," id. at 829 (O'Connor, J., dissenting), discarding any variant of the undue burden standard in favor of the "dangerous extravagance," ibid, of striking down any abortion regulation which "pose[d] an unacceptable danger of deterring the exercise of [the] right." Id. at 767-768.

"An undue burden will generally be found in situations involving absolute obstacles or severe limitations on the abortion decision...." Id. at 828 (O'Connor, J., dissenting) (citations and quotations omitted). Thus, in Roe itself, the Court struck down a Texas law that prohibited all abortions except those necessary to save the life of the mother. In Danforth, the Court invalidated parental consent and spousal consent provisions which allowed third parties to interpose an absolute, and possibly

arbitrary, veto on the right to seek an abortion; and likewise invalidated a ban on saline amniocentesis because it had the practical effect of prohibiting most abortions after 12 weeks.

On the other hand, an undue burden does not exist just because a state regulation "may inhibit abortions to some degree." Thornburgh, 476 U.S. at 828 (O'Connor, J., dissenting). Thus, in Planned Parenthood Ass'n. v. Ashcroft, 462 U.S. 476 (1983), five members of the Court joined in upholding a Missouri statute that required a pathology report for all abortions, even though it added about $20 to the cost of each abortion. Id. at 490 (opinion of Powell, J.)(extra cost does not "significantly burden" the abortion decision); id. at 505 (O'Connor, J., concurring in part and dissenting in part)("no undue burden"). Similarly, in

Matheson the Court held, "[t]hat the requirement of notice to parents may inhibit some minors from seeking abortions is not a valid basis to void the statute." Id. 450 U.S. at 413. See Akron, 462 U.S. at 466-467, 472-473 (O'Connor, J., dissenting)(no undue burden imposed by hospitalization for second-trimester abortions and 24-hour waiting period).

The respondents are of course aware of the substantial criticism leveled against the undue burden standard -- that it is a standard essentially without content, licensing judges with unchanneled discretion to follow their own subjective leanings.[19] See Webster, 492 U.S. at 536

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[19]The petitioners' other attacks on the undue burden standard, see Pet. Br. at 34-38, require little comment. Their complaint that it is "novel" and therefore unknown, id. at 34-35, we have already shown to be unfounded. Their complaint that it is "inadequate" because it would allow forms of regulation that they

n. * (Scalia, J., concurring in part and concurring in the judgment). This criticism is to some degree unfair. The undue burden standard is, after all, not the only test the Court uses that lacks mathematical precision: if the concept of an "undue burden" is not self-defining, neither is that of a "compelling state interest." And, to take an example from another area, when, exactly, does state regulation go "too far" and become a taking of property for which compensation is required? Cf. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), with Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470 (1987).

Moreover, as Justice O'Connor has pointed out, "[t]he 'unduly burdensome' standard is particularly appropriate in the abortion context because of the nature and scope of the right that is involved. The privacy right in the abortion context 'cannot be said to be absolute.' Roe, 410 U.S. at 154." Akron, 462 U.S. at 463-464 (O'Connor, J., dissenting)(emphases in original). Roe is an attempt to establish a limited fundamental right, while at the same time recognizing and accommodating the important interests of the state; and unless the Court is prepared to overrule

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oppose, id. at 35, is pure question-begging. Their final complaint, that the undue burden standard somehow pits "suffering" women against the state in an unequal contest of litigation resources, id. at 38, is odd in a brief with the names of fourteen lawyers on its cover; the petitioners at any rate do not lack litigation resources. Nor is this an accident: as a glance at the captions on the Court's abortion cases will confirm, ever since the Court's holding in Bolton, 410 U.S. at 188-189, that abortion providers have standing to assert the rights of pregnant women, the brunt of the litigation against abortion regulation has been borne by the abortion providers who have an economic stake in it.

Roe, [20] the Court should employ a judicial standard which reflects this attempt.

Neither of the obvious alternatives to undue burden analysis accommodates both of the interests which Roe recognized as important. The adoption of rational basis analysis for all abortion regulation is, we believe, simply a way of overruling Roe's attempt to carve out a special constitutional status for the abortion decision. Webster, 492 U.S. at 532 (Scalia, J., concurring in part and concurring in judgment); id. at 556 (Blackmun, J., dissenting); Thornburgh, 476 U.S. at 789-90, 796 (White, J., dissenting); Roe, 410 U.S. at 172-173 (Rehnquist, J., dissenting). Similarly, to degree strict scrutiny for all such

[20]As an alternative argument, we ask the Court to do just that. See 104-116 infra.

regulation does equal violence to Roe, albeit in a very different way, by reducing to "shallow rhetoric" its expressed concern for the important state interests at stake. Thornburgh, 476 U.S. at 784 (Burger, C.J., dissenting). To the extent, then, that the criticism of undue burden analysis as indeterminate and standardless is valid, the fault lies not so much with the undue burden test as with Roe itself. If the undue burden test is unworkable, it is because Roe itself is unworkable.

The respondents are also aware that, however impeccable its lineage, the undue burden standard apparently does not now command a majority on the Court, and may indeed retain the support of only a single Justice. Nevertheless, in the next part of this brief, we analyze the provisions of Pennsylvania's law under this standard.

We do this, first, because we believe Justice O'Connor is correct that this is the appropriate standard under Roe and its progeny. Second, whether Justice O'Connor's analysis is historically accurate or not, her opinions in Webster and Hodgson embody, as the Court of Appeals pointed out, 18a-30a, the currently governing standard under the principles of Marks v. United States, 430 U.S. 188 (1977). Finally, abortion regulations that pass muster under the undue burden standard will perforce satisfy any less demanding test. We turn, then, to the specific provisions of Pennsylvania's statute.[21]

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[21]The petitioners suggest that, if their challenge to the statute under Roe is rejected, the Court should remand the case for "consideration of other constitutional principles that support the right to choose abortion." Pet. Br. at 19, n. 27. In some specific instances, the petitioners have made and preserved

II. PENNSYLVANIA'S STATUTE IS IN ALL RESPECTS CONSTITUTIONAL UNDER THE UNDUE BURDEN STANDARD.

The petitioners attack the Abortion Control Act's provisions dealing with medical emergencies (§ 3203), informed consent (§ 3205), parental consent for minors (§ 3206), spousal notice (§ 3209), and reporting and disclosure of information (§§ 3207, 3214). We discuss these in turn.[22]

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alternative challenges to provisions of the statute; these are discussed in their brief and in ours. In all other respects, while the petitioners did raise alternative grounds for relief in their complaint, J.A. 67 (complaint), they did not rely on these theories when the case was submitted to the District Court for decision, or in the Court of Appeals. See Plaintiff's Proposed Findings of Fact and Conclusions of Law, p. 57-72 (filed June, 1990). They must therefore be considered to have abandoned these claims. E.g., EEOC v. Westinghouse Electric Corp., 925 F.2d 619, 631 (3d Cir. 1991).

[22]As the Court of Appeals said, 74a, n. 27, the Act contains a broad severability provision that "the invalidity [of any word, phrase or

A. Definition Of Medical Emergency.

Section 3203 of the Act defines a "medical emergency" as

> [t]hat condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.

The existence of a medical emergency, as so defined, excuses compliance with the Act's requirements as to informed consent (§ 3205), parental consent for minors

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provision] shall not affect any other word, phrase or provision or application of this Act which can be given effect without the invalid word, phrase, provision or application." Supra at 3. Except for the medical emergency provision, which does implicate several other provisions, see 35a, we believe that all the challenged sections are severable from the Act and from each other; petitioners have not argued otherwise.

(§ 3206), spousal notice (§ 3209), the determination of gestational age (§ 3210) and procedure in post-viability abortions (§ 3211).

The petitioners attacked the exception for medical emergencies as too narrow and as void for vagueness, and the District Court agreed, 235a-238a, but the Court of Appeals did not.[23] 35a-43a. In this Court, the petitioners claim that the Court of Appeals improperly re-wrote the medical emergency provision, broadening it to save it from unconstitutionality, and that even as thus construed it is still too narrow. Pet. Br. at 60-61. They do not, however, mention their earlier claim that the provision is void for vagueness,

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[23]Technically, the District Court did not reach the petitioners' void-for-vagueness claim, but he did remark that he found it "persuasive." 237a-238a, n. 32.

and this issue is therefore not before the Court.

Pressed in the courts below to identify concrete medical situations whose urgency would preclude complying with the Act's requirements, but which nevertheless would not constitute medical emergencies within the meaning of Section 3203, petitioners identified three: inevitable abortion, premature ruptured membrane, and preeclampsia. 36a, 237a. The petitioners' own witnesses, as well as the witness for the respondents, agreed that the proper treatment for each of these conditions is to terminate the pregnancy quickly, and that to delay this treatment exposes the patient to the destruction of vital organs, hemorrhaging, shock, infection and death. Supra at 11-12. There is, we submit, no conceivable reading of Section 3203's definition of

medical emergency that does not encompass these life-threatening situations.

The Court of Appeals was thus not engaged in a strained "rewrit[ing of] a state law to conform it to constitutional requirements," Pet. Br. at 61 (quotation marks and citation omitted), but in a straightforward application of the law to an undisputed set of facts. The petitioners were unable to identify any real-life situation in which the operation of the medical emergency provision would adversely affect patient care, and their challenge to that provision is thus without merit.[24]

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[24]Despite what they said in the courts below, the petitioners now hint that there may be "other complications of pregnancy" whose proper treatment may be obstructed by the medical emergency provision. Pet. Br. at 61, n. 96. They rely on the amicus brief submitted by ACOG, which in turn contains a laundry list of "conditions that may be exacerbated by pregnancy."

B. Informed Consent.

In their determination to rid themselves of the Act's provisions on informed consent, the petitioners have placed themselves in the odd position of arguing that many of their own practices, now that they are mandated by the Act, "jeopardize women's health," "interfere[] with the provision of quality medical care," and "serve no legitimate... interest." Pet. Br. at 48, 50. Their attack on these provisions is thus best

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Br. of American College of Obstetricians and Gynecologists, et al., at 3 n. 17 and 27. Neither brief explains under what circumstances these conditions may require termination of the pregnancy, what the consequences are to the patient if the abortion is neglected or delayed, or why these situations do not fit within § 3203's definition of a medical emergency. Nor is this the time for such explanations. If these matters were worth exploring, they should have been explored at trial, not in footnotes before this Court. See supra at 10, n.7 (testimony of ACOG-certified specialist).

viewed not as the product of a principled disagreement with them, but simply as the knee-jerk reaction of an industry unaccustomed to regulation, to any governmental action that threatens its own prerogatives.

1. Information Given by Physicians.

Section 3205(a)(1) of the Act requires that the operating physician, or the referring physician, inform the woman of "the nature of the proposed procedure...and of those risks and alternatives to the procedure...that a reasonable patient would consider material to the decision whether or not to undergo the abortion";[25] the probable gestational

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[25]This provision is identical to the general definition of "informed consent" in Pennsylvania law, see Pa. Stat. Ann., tit. 40, § 1301.103 (Purdon 1991 Supp.), and is identical to the recitation on the consent forms used by two of the petitioners. See J.A. 464, 469 (consent forms).

age of the fetus;[26] and the medical risks of carrying the child to term.

Petitioners make no real effort to show that these provisions impose an undue burden. They do argue that the requirement that physicians personally deliver this information will increase the cost of abortions, but neither they nor the District Court made any effort to quantify this effect, cf. Ashcroft, 462 U.S. at 489-90 ($20 increase not a significant burden), or to show that it will limit the availability of abortions significantly, or at all.

Rather, petitioners argue that these provisions do not further any legitimate state interest. As the Court of Appeals said, however, "this type of information

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[26]All of the petitioners determine probable gestational age before performing an abortion. J.A. 105 (stipulation).

'clearly is related to maternal health and to the State's legitimate purpose in requiring informed consent.'" 47a, quoting Akron, 462 U.S. at 446. Petitioners do not contend that any of this information is inaccurate, unverifiable or inflammatory. Indeed, the worst that petitioners can find to say about any of the required information is that one item--the risks of carrying to term--may be irrelevant to those women who are forced to seek an abortion for medical reasons.[27] But a law is not irrational merely because it is overinclusive or underinclusive; laws need not be perfect to be rational. Vance v. Bradley, 440 U.S. 93, 108 (1979).

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[27]In 1986, the five petitioner clinics accounted for about 40% of all the abortions in Pennsylvania. 149a; J.A. 488 (quarterly reports). Of these, only about 0.7% were performed for medical reasons. Ibid.

More broadly, the petitioners appear to be arguing for a per se rule that an informed consent law can never require the provision of any specific piece of information, on the ground that "'the supply of specific information to all patients regardless of their specific circumstances...is contrary to the standard medical practice that informed consent be specifically tailored to the needs of the specific patient.'" Pet. Br. at 51, quoting 177a (District Court opinion). There is no warrant for such a rule: even in Akron, the Court said that an informed consent law that required the disclosure of specific information, including gestational age, was "certainly...not objectionable." 462 U.S. at 445-446, n. 37. Nor do the facts of this case support such a rule. Despite what the District Court said, it is not

"standard medical practice" to tailor information to each patient; at least, it is not the petitioners' standard practice. The petitioners themselves uniformly use standardized forms and rote recitations to inform their patients; one of them even takes patients in batches of four. Supra at 13.

Nor is it the standard practice in Pennsylvania for other areas of medical practice. Quite apart from the Abortion Control Act, Pennsylvania law on informed consent requires that all patients be given the information that a "reasonable patient" would consider material, Pa. Stat. Ann., tit. 40, § 1301.103 (Purdon 1991 Supp.); see supra at 60, an approach which allows the patient to decide what information is relevant to his or her specific circumstances. The approach the petitioners advocate, not surprisingly,

would allow the petitioners to decide this question for their patients, on the paternalistic ground that patients must be protected from "anxiety."[28] Pet. Br. at 52. This approach, simultaneously patronizing and self-serving, see Canterbury v. Spence, 464 F.2d 772 (D.C.Cir.), cert. denied, 409 U.S. 1064 (1972), is certainly not the norm in Pennsylvania.

Finally, the petitioners argue that it is irrational to require physicians personally to deliver this information. Pet. Br. at 53. As the Court of Appeals said, however, it is "patent that a state

[28]The Abortion Control Act, like Pennsylvania informed consent law generally, does allow a physician to omit information if he reasonably believes that providing it will have a "severely adverse effect" on the patient's health. 18 Pa.Cons. Stat. § 3205(c). Cf. Pa. Stat. Ann., tit. 40, § 1301.103 (Purdon 1991 Supp.).

may rationally decide that physicians are better qualified than counselors to impart this information and answer questions about the medical aspects of the available alternatives."[29] 47a-48a; see J.A. 266-267 (testimony of Sue Roselle)(counselors not qualified to answer questions on fetal development). The District Court's statements to the contrary, 242a, simply represent his own disagreement with the considered judgment of the legislature, and do not show that that judgment is irrational. Under rational basis analysis,

> those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true.... The District Court's responsibility

[29]Counselors are often poorly paid, part-time employees who may have little formal education. Supra at 14.

> for making findings of fact does not authorize it to resolve conflicts in the evidence against the legislature's conclusion or even to reject the legislative judgment on the basis that [there are no] convincing statistics in the record to support it.

Vance, 440 U.S. at 111 (citations and quotation marks omitted).

2. Information Given by Others.

Section 3205(a)(2) requires that the pregnant woman also be informed that the Pennsylvania Department of Health publishes materials which "describe the unborn child and list agencies which offer alternatives to abortion," and that a free copy will be provided on request; that medical assistance benefits may be available for prenatal, childbirth and neonatal care, with more specific information available in the Department's printed materials; and (except in rape cases) that the father of the unborn child

is liable for child support, even if he has offered to pay for the abortion. Unlike the medical information required by Section 3502(a)(1), this information need not be conveyed by a physician.

Much of what we said in the preceding section applies here as well. Once again, petitioners rely mainly on the idea that some of this information will be irrelevant to some patients; once again, they offer nothing beyond their own conclusory statements to show that the information required is either inaccurate or inflammatory; and once again, Section 3205 will occasion little or no change in their existing practices. As the Court of Appeals noted, 49a, most of the petitioners already offer some form of "options counseling" that explores the alternatives to abortion and the resources that might be available to support the

woman's decision not to abort. Among them, the petitioners already offer every item required by Section 3205(a)(2), including pictures describing fetal development. Supra at 15-16, J.A. 153 (testimony of petitioner Allen). Since the petitioners presumably are not in the business of obstructing access to abortions, it seems safe to conclude that these practices do not impose an undue burden, and that they are rationally related to ensuring that the woman's choice is fully informed and not the product of coercion. 49a-50a. If, as the result of receiving this information, a woman decides not to abort her pregnancy, so much the better, for the Commonwealth also has a legitimate interest in preserving the life of the unborn child, and may adopt policies "encouraging childbirth except in the most urgent

circumstances." Matheson, 450 U.S. at 413, quoting Harris, 448 U.S. at 325.

3. First Amendment Issues.

The petitioners also argue that the Act's informed consent provisions violate their First Amendment rights, and those of their patients, by forcing them to be unwilling conveyers and recipients of "the state's message, at the cost of violating their own conscientious beliefs and professional commitments." Pet. Br. at 54.[30] The Court of Appeals held, however, that the petitioners were engaged in commercial speech; that the disclosure

[30]As the Court of Appeals said, the information required by Section 3205 is objective, accurate and relevant. 49a. It would be interesting to know what forbidden "message" the petitioners think is conveyed by telling women about the risks, alternatives and resources that bear on their decision, and equally interesting to know just what "conscientious beliefs and professional commitments" require that this information be withheld.

requirements of Section 3205 are similar to those imposed upon a long list of other industries and professions; and that they are entirely appropriate under the Court's decision in Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985). 50a-52a.

We believe that the Court of Appeals' analysis is unanswerable, and note that the petitioners have not attempted to answer it. They do not dispute the Court of Appeals' holding that they are engaged in commercial speech, or even mention it; nor do they mention, much less try to distinguish, the holding in Zauderer.

4. **Waiting Period.**

Section 3205 requires that the information needed for an informed consent be provided to the woman at least 24 hours before the abortion is performed. This Court, as the Court of Appeals noted, 53a,

n. 20, has held repeatedly that procedures which effectively delayed abortions for far longer periods do not unconstitutionally burden the abortion decision. Ohio, 110 S.Ct. at 2980-2981 (judicial bypass of parents that could consume 14 days), citing Ashcroft, 462 U.S. at 477, n. 4, 491, n. 16 (same, 17 days). The record in this case supports the same outcome.

Petitioners and the District Court rely on the arguments that the 24-hour waiting period necessitates two trips to the abortion provider, which increases costs, especially for women who must travel; and that, because abortion clinics do not perform abortions every day, the waiting period in practice will produce delays much longer than 24 hours, which in turn increases the risk of the abortion procedure. Pet. Br. at 49; 239a-240a.

They ignore the facts that most women already make two trips--once for a pregnancy test and once for the abortion itself--and that there is typically a time lag between the two. Supra at 17; J.A. 87, 90-91, 95, 98 (stipulation). None of the petitioners will even schedule an abortion without a positive pregnancy test, and the abortion is then typically scheduled within one to two weeks thereafter. Ibid. No reason appears in the record why women could not be given the information Section 3205 requires at their first visit, thus obviating any additional delay.[31] Petitioners might have to adjust their procedures somewhat, but they can hardly claim that the

[31]Of course, not all women get their pregnancy test from an abortion provider, but Section 3205 allows a referring physician, as well as an operating physician, to provide the necessary information for informed consent.

Constitution protects their accustomed office routine; "[t]he Constitution does not compel [Pennsylvania] to fine-tune its statutes" for the petitioners' convenience. Matheson, 450 U.S. at 413.

As to the idea that a delay in performing an abortion increases the risk to the patient, this is true only in the most general sense, and provides no real support for the petitioners. The record is clear that there is no measurable increase in risk from a delay as short as a day, or even a week. Supra at 16-17. Increases in risk show up only over periods of two to three weeks, and even then the increase is from one very small number to another very small number.[32] Ibid; see 153a. Petitioners themselves

[32]For example, from .8 to 1.1 deaths per hundred thousand abortions. Supra at 16.

entered into a binding admission in this case, see Fed. R. Civ. Proc. 36, that "[a] week delay in the first trimester will not likely result in a harm...," J.A. 552, and their own practices, which allow, encourage or even require delay for a variety of reasons, confirm this. Supra at 17-18. The Court of Appeals thus correctly concluded that the waiting period imposes no undue burden on the abortion decision.

Likewise, the Court of Appeals was correct that the waiting period rationally furthers the Commonwealth's interest "in ensuring that such a decision is both informed and well-considered [, which is] rationally related to the states' legitimate interest in the life and health of the mother as well as its interest in the potential life of the fetus." 54a

(emphases in original).[33] As Justice O'Connor said in Akron,

> the decision to abort is a stressful one, and the waiting period reasonably relates to the State's interest in ensuring that a woman does not make this serious decision in undue haste.... The waiting period is surely a small cost to impose to ensure that the woman's decision is well considered in light of its certain and irreparable consequences on fetal life, and the possible effects on her own.

Id., 462 U.S. at 474 (O'Connor, J., dissenting) (quotation marks omitted).

C. Parental Consent.

Section 3206(a) requires the informed consent of one parent or guardian for an

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[33]Such waiting periods are not unique to abortion. See 42 C.F.R. § 441.253 (30-day waiting period for Medicaid-funded sterilizations); Pa. Stat. Ann., tit. 73, § 201-7(a)(Purdon 1991 Supp.)(3 business days for consumer to rescind certain sales contracts). The state's interest in informed and well-considered decisions is surely as weighty in the area of abortion as in the area of consumer sales contracts.

abortion on any unemancipated woman under the age of 18.[34] This section also establishes a judicial bypass to this requirement, both expeditious and anonymous, in which a minor may establish that she is mature and capable of giving informed consent to the abortion, or that an abortion is nevertheless in her best interests. § 3206(c)-(h). The Court has consistently approved parental consent laws, provided that the judicial bypass is adequate. See Hodgson, 110 S.Ct. at 2942 (opinion of Stevens, J.)(Court has never challenged state's judgment that the abortion decision be made only after consultation with parent); Akron, 462 U.S. at 439-440; Bellotti II, 443 U.S. at 639-

[34]Where neither a parent nor guardian is available "within a reasonable time...and manner," the consent of any adult standing in loco parentis is sufficient. § 3206(b).

651 (opinion of Powell, J.)

The petitioners do not quarrel with the desirability of parental involvement when a minor faces so grave a decision; all of the petitioners encourage such involvement and encourage parents to accompany their daughter. Supra at 18. Between 50% and 60% of the minors whom the petitioners now see are accompanied by at least one parent, and one petitioner requires that all minors be accompanied by an adult, if not by a parent. Supra at 18-19.[35]

The petitioners concede that Pennsylvania may require parental consent for minors as long as there is an adequate judicial bypass, Pet. Br. at 55, and they do not attack the adequacy of Pennsylvania's judicial bypass. Their

[35]In 1988, about 12% of Pennsylvania abortions were on minors. 150a.

only argument is that, while a state may require parental consent, it may not require informed parental consent, id. at 56, that is, a state may not require that parents be informed about the risks, alternatives and resources that may bear on their own and their daughter's decision.

To call this argument outlandish seems inadequate. The point of requiring parental consent is not to collect a meaningless signature, but to provide the pregnant minor with the benefit of an adult's advice and judgment about the "nature and consequences" of the decision she faces, Danforth, 428 U.S. at 67, an objective which is obviously not achievable if the adult is herself not cognizant of these matters. A requirement of informed consent is permissible here for the same reasons it is permissible in

all other cases, and for another as well: as the court recognized in both Matheson, 450 U.S. at 411, and Ohio, 110 S.Ct. at 2983, parents are important sources of medical information on their children, and the informed consent process facilitates this exchange of information. Finally, to the extent that petitioners rely on logistical and other obstacles that may make it burdensome for even a supportive parent to comply with Section 3206, Pet. Br. at 57, the existence of the judicial bypass option obviates any such difficulties.

D. Spousal Notice.

Spousal notice is governed by Section 3209 of the Act. Enacted "to further the Commonwealth's interest in promoting the integrity of the marital relationship and to protect a spouse's interests in having children within marriage and in protecting

the prenatal life of that child," ibid, Section 3209 requires that a married woman who is about to undergo an abortion notify her husband and provide her doctor with a signed statement that she has done so. Id., § 3209(a).

The spousal notice requirement does not apply in the case of a medical emergency, id., § 3209(c). Nor does it apply where the woman provides a statement that she has not notified her husband because he is not the father of the child or could not, after diligent effort, be located; or because the pregnancy resulted from a reported incident of spousal sexual assault; or because she has reasons to believe that notifying her spouse will likely subject her to bodily injury. Id., § 3209(b).

1. Right to Abortion.

The Court of Appeals recognized that

in most respects these provisions do not even arguably impose an undue burden on the decision to seek an abortion: they impose no "drastic or severe time delay, increase in costs, or decrease in the number of abortion providers. Nor [do they] give a state-sanctioned veto power over the woman's abortion decision to another person." 63a. The two judges of the majority, however, held that an undue burden inheres in the possible consequences of spousal notification. Relying on Hodgson, and on the plurality opinion in Bellotti v. Baird, 443 U.S. 622 (1979)(Bellotti II), they held that spousal notification exposes the woman to the possibility of physical, economic or emotional pressure from her husband to forego an abortion, or to punish her if she does not, 63a-68a, and that this possibility constitutes a "severe

limitation on the woman's abortion decision." 63a. We submit that the Court of Appeals was mistaken, for substantially the reasons advanced by Judge Alito in his dissenting opinion. 87a-96a.

The majority judges, we believe, misapplied the undue burden standard in this instance. To establish that a law imposes an undue burden, it is surely not enough--at least in a facial challenge--to show that it may deter or inhibit some women from getting an abortion. As the Court has said in the related context of parental notice, "[t]hat [a statutory] requirement...may inhibit some minors from seeking abortions is not a valid basis to void the statute." Matheson, 450 U.S. at 413. Virtually any regulation could be said to deter someone from seeking an abortion, but the Court has not for that reason outlawed all regulation of

abortion. Any regulation that increases the cost of an abortion, for example, is likely to make an abortion marginally unaffordable for someone, and yet the Court has refused to strike down regulations on this ground. See Ashcroft, 462 U.S. at 489-90 (requirement for pathology report that added $20 to cost not unconstitutional); Akron, 462 U.S. at 466-467 (O'Connor, J., dissenting)(no undue burden in hospitalization requirement for second-trimester abortions even though costs more than doubled). Rather, those who would strike down an abortion regulation must show that it will have what Judge Alito called the "broad practical impact," 91a, of severely limiting access to abortions. See Danforth, 428 U.S. at 79 (law banning use of saline amniocentesis unconstitutional where it had the practical effect of

making abortions unavailable after twelve weeks). Thus properly understood, it is apparent that petitioners failed here to make their case.

First, unlike the record in Hodgson, the record in this case shows that the number of women who even theoretically could be affected adversely by spousal notice is very small. In Hodgson, which involved a requirement that both parents of a minor be notified before that minor had an abortion, the record showed that about half the children in Minnesota did not live with both parents, id., 110 S.Ct. at 2938, and that the most common reason for not notifying the second parent was fear of physical abuse. Id. at 2945, n. 36. In this case, the record shows that only about 20% of the women who obtain abortions are married; and of these, about 95% notify their husbands already. Supra

at 20. In other words, of all women who obtain abortions, only about 1% are married women who have not notified their husbands.

Of those women who did not notify their husbands and who offered a reason, none cited a fear of abuse. Ibid. Moreover, as Judge Alito correctly observed, of these few women, surely some, if Section 3209 were to go into effect, would notify their husbands without adverse consequences, while still others would avail themselves of the statutory exceptions to spousal notice. 93a. The number of women who might actually be deterred from seeking an abortion by the spousal notice provision is thus unknown, and possibly nonexistent, but certainly, at less than one per cent, very small.

Second, the statutory exceptions just referred to further distinguish this case

from Bellotti II and Hodgson. In Bellotti II, the statute provided no exception for minors who feared abuse from their parents,[36] while in Hodgson the statutory exception turned out to be, in practice, simply an alternative route to parental notification. Id., 110 S.Ct. at 2932, n. 7. Pennsylvania's statute, however, does have such an exemption in § 3209(b)(4), and others as well, and unlike the statute in Hodgson, the fear-of-physicial-injury exemption does not set in motion a series

[36]Reliance on Bellotti II on this issue is problematic in any event, since no opinion in that case commanded a majority of the Court. Four justices did say that a requirement of parental notice would place an undue burden on minors because some parents might then obstruct the minor's access to an abortion. Id. 443 U.S. at 647 (opinion of Powell, J.). The other four justices who concurred in the judgment, however, noted specifically that the case involved only a requirement for parental consent, and did not decide the constitutionality of notice provisions. Id. at 655, n. 1 (Stevens, J., concurring in the judgment).

of events that results in the abusive husband being notified.

The petitioners and the majority in the Court of Appeals, however, rely heavily on the District Court's finding that "most battered women do not have the psychological ability to avail themselves" of this exception, 68a-69a, 201a, thus, they believe, making this exception as ineffective as the one in Hodgson. Even if this assertion is taken at face value, it does nothing to undermine the point made above, that the spousal notice provision could adversely affect, at most, fewer than 1% of the women who seek abortions. Even this is too generous, however, for there is rather less to the District Court's finding than meets the eye.

The witness upon whom the District Court relied testified about women who are

in a "battering relationship." According to this witness, women in such relationships are subjected not only to a recurring cycle of violence, J.A. 219-221, but also to the constant monitoring of their activities and even their thoughts, J.A. 212-213; "most batterers are so sensitive to what the women are behaving and thinking and feeling that he [sic] will pick up something [that] is different...." J.A. 227 (testimony of Lenore Walker). Women in such relationships can suffer from a form of mental disorder called Post-Traumatic Stress Disorder, one manifestation of which is "learned helplessness," the perception by the woman that no action of hers will enable her to escape the violence. 200a. It is women manifesting this "learned helplessness" whom the District Court found would not be able to

avail themselves of Section 3209's exception for physical abuse. 201a.

This finding, however, does not address the question of how many of these women would ever seek an abortion without their husband's knowledge in the first place. Battered women who perceive themselves as so helpless that they would never even try such a thing are indeed cruelly burdened, but by their batterers, not by the statute. In real life, the opportunity to invoke the fear-of-abuse exception will not be encountered by these battered women, but only by those battered women who have <u>already</u> mustered the psychological and physical resources necessary to verify their pregnancies, contact abortion providers, wait for their

appointments, [37] arrange for payment, and physically present themselves at the abortion sites--all without letting their husbands find out. Neither the District Court nor the witness --who had no actual experience with spousal notification provisions, J.A. 239-240 (testimony of Lenore Walker)-- said how many of <u>these</u> women would find themselves "psychologically incapable" of checking off a line on a form, which is all that Section 3209 requires. <u>See</u> J.A. 504-505 (spousal notice form).

The petitioners thus did not show that Section 3209 would have anything close to the "broad practical effect" of severely limiting access to abortions.

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[37]Typically, the woman must have a pregnancy test before her abortion will even be scheduled, and the abortion itself is typicaly schedule within two weeks thereafter. <u>Supra</u> at 17.

Their challenge is more accurately characterized as an attempt to rely on a "worst-case analysis" which may never happen, and which is simply inadequate to support their facial challenge to the statute. <u>Ohio</u>, 110 S.Ct. at 2981.

In the absence of any undue burden, the only remaining question is whether Section 3209 is reasonably related to any legitimate state interest. Despite what the petitioners say, Pet. Br. at 43-44, there is no real question that a husband has a "deep and proper concern" in his wife's pregnancy and in the fetus she carries, <u>Danforth</u>, 428 U.S. at 69; that the abortion decision may profoundly affect the marriage, in which he also has an interest, <u>id</u>. at 70; and that the State legitimately may act to enable him to

protect those interests.[38]

Nor can there be any real question that the law is reasonably designed to further those ends. The petitioners argue that wives either tell their husbands about their abortion decisions already, or have good reasons for not telling them. In the first case, they say, the law is unnecessary, in the second case it is harmful, and in either case it is an irrational means of furthering whatever legitimate interests the state may have. Pet. Br. at 43-44. This argument was well answered in Justice Stevens' concurring

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[38]The petitioners say that Section 3209, like the law in Danforth, gives a husband the power to "compel[] his wife to bear children for him." Pet. Br. at 44. They ignore the distinction, which the Court has always recognized, between laws requiring consent and laws requiring mere notice. See, e.g., Matheson, 450 U.S. at 411 n. 17; Hodgson, 110 S.Ct. at 2969. (Kennedy, J., concurring in judgment in part and dissenting in part).

opinion in Matheson. Speaking in the admittably different context of parental notice, and harking back to his earlier concurrence in Danforth, Justice Stevens rejected similar arguments against Utah's statute:

> It is unrealistic, in my judgment, to assume that every parent-child relationship is either (a) so perfect that communication and accord will take place routinely or (b) so imperfect that the absence of communication reflects the child's correct prediction that the parent will ... [act] arbitrarily to further a selfish interest rather than the child's interest. A state legislature may conclude that most parents will be primarily interested in the welfare of their children....
>
> Utah's interest in its parental-notice statute is not diminished by the fact that there can be no guarantee that meaningful parent-child consultation will actually occur.... The possibility that some parents will not react with compassion and understanding... does not undercut the legitimacy of the State's attempt to

> establish a procedure that will enhance the probability that a pregnant young woman exercise as wisely as possible her right to make the abortion decision.

Matheson, 450 U.S. at 423-424 (Stevens,J., concurring in judgment)(footnote and citation omitted, bracketed matter in original), quoting Danforth, 428 U.S. at 103-104 (Stevens, J., concurring in part and dissenting in part).

The same is true here.[39] It may well

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[39]We do not suggest that the relationship between spouses equates with the parent-child relationship. Clearly, the interest served by parental notice--making available to the child the advice and support of her parents--is different from the interest served by spousal notice--preserving the possibility for a husband to participate in a decision that profoundly affects his own interest. This, however, does not undercut Justice Stevens' points that notice statutes are a rational way to pursue these interests, and that the possibility that such statutes might not always work out as intended does not destroy their legitimacy.

be true that a state cannot simply decree inter-familial communication that conforms to some idealized model of its own. But Section 3209 does nothing of the sort; rather, it seeks only to preserve the husband's interest in the possibility of such communication by making sure that the husband knows of his wife's intentions.

2. Other Issues.

The petitioners' remaining arguments require little discussion.[40] First, they claim that Section 3209 interferes with marital privacy. It is not entirely clear, however, what they mean by this, nor is it clear how a right to marital privacy--that is, the right to protect "the sanctity of their [marital] communications," Hodgson, 110 S.Ct. at

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[40]The Court of Appeals found it unnecessary to reach these arguments, 103a, n. 8, as did the District Court.

2944, n. 33 (opinion of Stevens, J.)(emphasis added)--can create a privacy interest in one spouse's unilateral decision to conceal important matters from the other. If the woman's own privacy interest is, as argued above, insufficient to justify this concealment, it is hard to see what is added by the invocation of the marital interest.

Lastly, the petitioners claim that Section 3209 violates the Equal Protection Clause. Pet. Br. at 47-48. Noting that Pennsylvania's law does not require that a husband notify his wife before undergoing a medical procedure that would affect his fertility, they claim that Section 3209 "embodies precisely the prohibited stereotype that wives should bear children." Id. at 48. The short answer to this is that the Court has repeatedly recognized the unique nature of the

abortion procedure and has repeatedly held that States are justified, because of its unique nature, in treating it differently from other medical procedures. Matheson, 450 U.S. at 412; Bellotti I, 428 U.S. at 148-149; Danforth, 428 U.S. at 67. Such state laws are based not upon a value judgment that all women should bear children, but upon the biological fact that only women bear children. Petitioners' reliance on the fact that spousal notice is not required in procedures that produce male sterility is thus misplaced. Pet. Br. at 46-47. The true analog to such procedures is not abortion, but female sterilization procedures. Pennsylvania requires neither wives nor husbands to notify their spouses of such procedures, and petitioners' equal protection claim is without merit.

E. **CONFIDENTIAL REPORTS.**

Section 3214 requires abortion facilities to file with the Department of Health an individual report for each abortion performed. These reports are kept confidential, as the law requires, and there is no evidence that any information from these reports identifying either a patient or a physician has ever been disclosed; in fact, neither this nor any other report even contains patients' names. Supra at 23; 205a-208a. The reports are used to gather a wide variety of information on maternal health, which is then released only in the form of statistical compilations. See, e.g., 149a-152a.

Among the information Section 3214 requires is the name of the referring physician, if any, § 3214(a)(1); and the bases for the following medical judgments:

that a third-trimester abortion was necessary to protect the life and health of the mother, § 3214(a)(8);[41] that a medical emergency existed, § 3214(a)(10); and the determination of gestational age, § 3214(a)(11). The petitioners claim that if these matters must be reported, physicians will be reluctant to refer or perform abortions, and that this in turn will reduce the availability of abortions. Pet Br. at 59. As the Court of Appeals said, however, these fears are at best unfounded, 79a-80a; and, we add, they are at worst self-fulfilling and self-serving. "Laws are not declared unconstitutional because of some general reluctance to follow a statutory scheme the legislature finds necessary to accomplish a legitimate

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[41]Second and third trimester abortions together accounted for only 6% of Pennsylvania abortions in 1988. 150a.

state objective." Hodgson, 110 S.Ct. at 2968 (Kennedy, J., concurring in judgment in part and dissenting in part).

These reporting requirements obviously further the Commonwealth's interest in collecting accurate information on maternal health, especially in the area of medically necessary abortions, and in ensuring compliance with the requirements of the Act.[42] 78-79a, 80a. They do not impose an undue burden on the abortion decision, and are

[42]Under the Act, a referring physician may make the required determination of gestational age, § 3210(a), and may obtain the patient's informed consent, § 3205(a). In reviewing the reporting forms, the Department of Health sometimes finds it necessary to contact the reporting physician directly. 220a. While it may be true that the Department could rely on abortion clinics to obtain whatever information is needed from the referring physician, 272a-273a, it is not irrational for the legislature to prefer the Department to collect its data from the primary, and therefore most reliable, source.

therefore constitutional.

F. PUBLICLY AVAILABLE REPORTS.

Section 3209 requires each abortion facility to file a report with the Department of Health disclosing its name and address, and the names and addresses of any parent, subsidiary or affiliate organizations. Section 3214(f) requires each facility to file with the Department quarterly reports specifying the total number of abortions performed, broken down by trimester. Both of these reports are available for public inspection and copying only in the case of any facility which has received any state-appropriated money within the preceding 12 months. The petitioners claim that the public availability of these reports exposes them and their patients to abuse and harrassment from persons and groups who

are opposed to abortion.[43] Pet. Br. at 58. This claim, and the District Court's acceptance of it, 267a-268a, simply ignores two facts.

The first is that the identity and location of abortion providers is, and in the nature of things must be, easily accessible to the public. The petitioners could not function otherwise, and in fact all of them advertise in telephone directories, print or broadcast media. Supra at 26. The second fact, which follows unfortunately but naturally from the first, is that the petitioners are already the targets of substantial public protest, ibid., even though the public

[43]They claim also that the public availability of these reports is an unconstitutional condition on their receipt of public funds, Pet. Br. at 58-59, n. 91. But as the Court of Appeals explained, 83a-85a, this adds nothing to the petitioners' case.

disclosure provisions of Sections 3209 and 3214 have never gone into effect. However disruptive and even illegal some of these protests may be, they are obviously not caused by these provisions of the Act. The petitioners, relying solely on their own self-serving speculations, claim that the public disclosure provision will result in an increase in such protests, 211a-213a, but the Court of Appeals correctly rejected their conclusory statements as insufficient to establish that these provisions will unduly burden the right to an abortion. 82a-83a.

On the other hand, the public disclosure provisions do further a legitimate state interest: that the public should know how its money is being spent. Such information is generally available to the public under Pennsylvania law, Pa. Stat. Ann., tit. 65, §§ 66.1 and 66.2

(Purdon 1959 & 1991 Supp.), and it hardly seems necessary to belabor either the legitimacy of the state's interest or the rationality of the means chosen to further it.

III. IN THE ALTERNATIVE, THE COURT SHOULD RE-EXAMINE AND OVERRULE ROE V. WADE, RETURNING THE REGULATION OF ABORTION TO THE STATES' DEMOCRATIC PROCESS.

In the preceding sections, we have argued at length that Roe v. Wade, properly understood and applied, does not forbid the abortion regulations contained in Pennsylvania's statute, and that this case therefore does not confront the Court with the necessity of reconsidering Roe. Nevertheless, it remains true that Roe is a deeply flawed decision, and it may be that the time has come to reconsider it.

The reasons for and against taking this step are familiar to the Court and need only be summarized here. On the one

hand, the Court is generally reluctant to formulate a rule of law broader than is necessary to decide the case that is actually before the Court. Webster, 492 U.S. at 525-526 (O'Connor, J., concurring in part and concurring in the judgment). On the other hand, the Court does overlook this rule fairly frequently, and it would be ironic if Roe, which itself decided a question so much more broadly than was necessary, should now be insulated from review by this rule. In addition, the no-broader-than-is-necessary rule, rigidly applied, would mean that many constitutional decisions could never be reconsidered until someone squarely defies them, a process that is unlikely to enhance either the development of the law or respect for the Court's decisions. Webster, 492 U.S. at 532-537 (Scalia, J., concurring in part and concurring in the

judgment).

If the Court does decide to reach the question of Roe's continuing validity--or, alternatively, if the Court must reach it because the Court holds that Pennsylvania's statute cannot be squared with Roe--the respondents have no doubt of the correct outcome. Justice White's formulation of the abortion right, in our view, is the correct one: "a woman's ability to choose an abortion is a species of 'liberty' that is subject to the general protections of the Due Process Clause. I cannot agree, however, that this liberty is so 'fundamental' that restrictions upon it call into play anything more than the most minimal judicial scrutiny." Thornburgh, 476 U.S. at 790 (White, J., dissenting); accord, Roe, 410 U.S. at 172-173 (Rehnquist, J., dissenting). The Court should overrule

anything in Roe to the contrary.

The arguments that support this position are, again, well known to the Court from the dissenting opinions in Thornburgh, in Akron, and in Roe itself. See also Br. of the United States as Amicus Curiae. Again, we do no more than summarize them here.

First and most importantly, Roe's holding that abortion is a fundamental constitutional right is untenable. The text of the Constitution obviously creates no such right; the text of the Constitution does not even mention abortion. Nor can such a right plausibly be located among the unenumerated, but still fundamental, rights protected by the Due Process Clause. The hallmark of such rights is that they are grounded in

> some source of constitutional value that reflects not the philisophical predilections of

> individual judges, but basic choices made by the people themselves in constituting their system of government...
> [Fundamental rights are located] either in the traditions and consensus of our society as a whole or in the logical implications of a system that recognizes both individual liberty and democratic order.

Thornburgh, 476 U.S. at 791 (White, J., dissenting). The holding in Roe has no such grounding--not in history and tradition, Roe, 410 U.S. at 174-177 (Rehnquist, J., dissenting), not in the necessary implications of a system of ordered liberty, Thornburgh, 476 U.S. at 793 (White, J., dissenting), and most certainly not in any consensus of society as a whole.

Nor can Roe be defended as the logical extension of the Court's "privacy" decisions. See Eisenstadt v. Baird, 405 U.S. 438 (1972); Stanley v. Georgia, 394 U.S. 557 (1969); Loving v. Virginia, 388

U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma, 316 U.S. 535 (1942); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). The Court's decision in Roe underlined the difference between itself and these earlier privacy cases:

> The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus.... The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which Eisenstadt and Griswold, Stanley, Loving, Skinner, and Pierce and Meyer were concerned.

Id., 410 U.S. at 159. The decision in Roe was thus in no way preordained by the decisions in Eisenstadt, Griswold and the rest of the cases cited.[44] Roe's creation

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[44]By the same token, Roe's demise would in no way undermine those other decisions.

of a "fundamental" right which has no sound basis in the Constitution, in history, in a societal consensus, or even in the Court's own precedents, is simply an illegitimate exercise of "raw judicial power," Doe v. Bolton, 410 U.S. at 222 (White, J., dissenting), which the Court should disavow for this reason alone.

Second, the key points in Roe's analysis of the abortion right--viability and trimesters--are themselves arbitrary. As Justice White pointed out in his dissenting opinion in Thornburgh, the Court has never explained satisfactorily why the state's interest in protecting fetal life is "compelling" at the point of viability but not before. Id., 476 U.S. at 794-795. And as Justice O'Connor pointed out in her dissenting opinion in Akron, the trimester approach depends upon medical and technological factors which

are of no constitutional significance, and which in turn make the trimester approach so unreliable that the Court has already been forced to abandon it in part. Id., 462 U.S. at 454-456.

Third, Roe has had an "institutionally debilitating effect," Thornburgh, 476 U.S. at 814 (O'Connor, J., dissenting), on several levels. Roe stands as an anomaly among the Court's cases on fundamental constitutional rights, Akron, 462 U.S. at 452 (O'Connor, J., dissenting), working "a major distortion in the Court's constitutional jurisprudence." Thornburgh, 476 U.S. at 814 (O'Connor, J., dissenting). Far from being a source of stability in the law, Roe's arbitrariness has forced the Court to return to the issue of abortion time and time again, drawing ever finer lines to govern the states' attempts to regulate

in this area. Webster, 492 U.S. at 518 (opinion of Rehnquist, C.J.). This arbitrariness at times has infected other areas of the law as well, making it "painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion." Thornburgh, 476 U.S. at 814 (O'Connor, J., dissenting). In addition, by reinforcing the idea that the Court's proper function is to impose its own notions of sound public policy, Roe "continuously distorts the public perception of the role of this Court," Webster, 492 U.S. at 535 (Scalia, J., concurring in part and concurring in the judgment), in a way that in the long run is bound to damage the Court as an institution.

That damage is not to the Court

alone, but also to the very "principles of self-governance" in a democracy. Id. at 536 n.*. Abortion is "a field where [the Court] has little proper business since the answers to most of the cruel questions posed are political and not juridical." Id. at 532. "Leaving the matter to the political process is not only legally correct, it is pragmatically so. That alone...can produce compromises satisfying a sufficient mass of the electorate that this deeply felt issue will cease distorting the remainder of our democratic process." Ohio, 110 S.Ct. at 2984 (Scalia, J., concurring). For all these reasons, the Court should overrule Roe.

The petitioners protest, however, that "[n]ever before has this Court bestowed, then taken back, a fundamental right that has been part of the settled rights and expectations of literally

millions of Americans...." Pet. Br. at 20. This, of course, is not true, and the parallel with the earlier case is instructive. Lochner v. New York, 198 U.S. 45 (1905), was, before Roe, the Court's last venture into substantive due process.[45] In Lochner as in Roe, the Court began with an undoubted liberty interest--in Lochner, the right of the individual to work as "may seem to him appropriate or necessary for the support of himself and his family," id., 198 U.S. at 56--which the Court then elevated into a fundamental right immune from state regulations which today seem innocuous indeed. In phrases that might have come from Thornburgh, the Court struck down New York regulations that allowed bakers to

[45]The suggestion that Roe and Lochner have much in common is, of course, not a new one. See Roe, 410 U.S. at 174 (Rehnquist, J., dissenting).

work "only" ten hours per day and "only" sixty hours per week, as "mere meddlesome interferences with the rights of the individual," Lochner 198 U.S. at 61, enacted from "some other motive...than the purpose to subserve the public health or welfare." Id. at 63. Cf. Thornburgh, 476 U.S. at 759 (disparaging the motives presumed to underlie measures regulating abortion).

The Court has long since disavowed Lochner--in the petitioners' terms, it "took back" the right it had "bestowed"--see Ferguson v. Skrupa, 372 U.S. 726 (1963), and it should do the same with Roe. The petitioners' very phraseology betrays their, and Roe's, error. In this country, rights are not "bestowed" by this Court, but by the people, through the Constitution which they have ordained. When the Court finds itself usurping this

function, as it did in Lochner and as we think it did in Roe, it is time to change course.

CONCLUSION

Respondents ask the Court to reverse the Court of Appeals' judgment that the Act's spousal notice provisions are unconstitutional, and in all other respects to affirm the judgment of the Court of Appeals.

Respectfully submitted,

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PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, REPRODUCTIVE HEALTH AND COUNSELING CENTER, WOMEN'S HEALTH SERVICES, INC., WOMEN'S SUBURBAN CLINIC, ALLENTOWN WOMEN'S CENTER, and THOMAS ALLEN, M.D., on behalf of himself and all others similarly situated,

Petitioners and Cross-Respondents,

—v.—

ROBERT P. CASEY, ALLAN S. NOONAN, and ERNEST D. PREATE, JR., personally and in their official capacities,

Respondents and Cross-Petitioners.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. THIS COURT MUST REJECT THE COMMONWEALTH AND SOLICITOR'S PLEA TO ABANDON *ROE*'S CENTRAL HOLDING 1

A. *Roe* Held that the Right to Abortion Is a Fundamental Right Protected by the Strict Scrutiny Standard of Review; This Court Cannot Uphold the Pennsylvania Law Without Abandoning that Standard 1

B. The Doctrine of *Stare Decisis* Requires Reaffirmation of *Roe* 4

C. The Decision To Terminate or Continue a Pregnancy Must Continue To Be Afforded Fundamental Constitutional Protection ... 5

II. THE PENNSYLVANIA STATUTE IS UNCONSTITUTIONAL UNDER ANY STANDARD OF REVIEW 12

A. The Factual Findings of the District Court Are Relevant to the Constitutional Issue Before This Court and Are Fully Supported by the Factual Record..... 12

B. This Court Should Reject the Commonwealth's "Rights by Numbers" Approach and Find Unconstitutional the Husband Notification Provision..... 14

PAGE

C. The Biased Counseling Provisions Will Harm Women and Force Physicians To Disseminate Pennsylvania's Anti-abortion Ideology 18

1. The biased counseling provisions interfere with the provision of appropriate medical care 18

2. The biased counseling required by § 3205 is not commercial speech 20

D. The Judicial Bypass Procedure Does Not Cure the Constitutional Defects of the Act's Informed Parental Consent Provision 23

CONCLUSION 24

APPENDIX A-1

TABLE OF AUTHORITIES

Cases: PAGE

Anderson v. City of Bessemer City, 470 U.S. 564 (1985) 12

Arizona v. Rumsey, 467 U.S. 203 (1984) 4

Beal v. Doe, 432 U.S. 438 (1977) 2

Bellotti v. Baird, 428 U.S. 132 (1976) 3

Bellotti v. Baird, 443 U.S. 622 (1979) 15

Bigelow v. Virginia, 421 U.S. 809 (1975) 21

Board of Trustees v. Fox, 492 U.S. 469 (1989) 21

Bolling v. Sharpe, 347 U.S. 497 (1954) 7, 8

Brandenburg v. Ohio, 395 U.S. 444 (1969) 16

Brown v. Board of Educ., 347 U.S. 483 (1954) 8

Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) 2, 9, 10

Carrington v. Rash, 380 U.S. 89 (1965) 16

Carter v. Sedgwick County, 929 F.2d 1501 (10th Cir. 1991) 11

City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) .....*passim*

Colautti v. Franklin, 439 U.S. 379 (1979) 14

Connecticut v. Menillo, 423 U.S. 9 (1975) 3

DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989) 8

PAGE

Eisenstadt v. Baird, 405 U.S. 438 (1972) 6, 8, 10, 17

Eu v. San Francisco Democratic Comm., 489 U.S. 214 (1989) 2

Geduldig v. Aiello, 417 U.S. 484 (1974) 18

Gideon v. Wainwright, 372 U.S. 335 (1963) 8

Griswold v. Connecticut, 381 U.S. 479 (1965) 6, 8, 9

H.L. v. Matheson, 450 U.S. 398 (1981) 15

Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) 7, 8

Harris v. McRae, 448 U.S. 297 (1980).....2, 3, 8

Hernandez v. New York, 111 S. Ct. 1859 (1991)..... 12

Hilton v. South Carolina Pub. Rys. Comm'n, 112 S. Ct. 560 (1991) 4

Hodgson v. Minnesota, 110 S. Ct. 2926 (1990) .....*passim*

Hudson v. McMillian, 112 S. Ct. 995 (1992).....7-8, 9

Hunter v. Underwood, 471 U.S. 222 (1985)..... 7

International Union, U.A.W. v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991)..... 18

Jane L. v. Bangerter, No. 91-C-345-G (D. Utah filed Apr. 4, 1991) 16

Kirchberg v. Feenstra, 450 U.S. 455 (1981) 18

Lamprecht v. FCC, No. 88-1395, 1992 U.S. App. LEXIS 1997 (D.C. Cir. Feb. 19, 1992)..... 14

Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) 14

Lindsey v. Normet, 405 U.S. 56 (1972)..... 8-9

Lochner v. New York, 198 U.S. 45 (1905)..... 4, 5

PAGE

Loving v. Virginia, 388 U.S. 1 (1967) 8

Maher v. Roe, 432 U.S. 464 (1977) 2, 3, 19

Marks v. United States, 430 U.S. 188 (1977)..... 2

McCabe v. Atchison, T. & S. F. Ry., 235 U.S. 151 (1914) 16

McDaniel v. Paty, 435 U.S. 618 (1978)..... 16

McLaughlin v. Florida, 379 U.S. 184 (1964) 8

Meyer v. Nebraska, 262 U.S. 390 (1923) 16

Michael H. v. Gerald D., 491 U.S. 110 (1989)..... 6

Michael M. v. Superior Court, 450 U.S. 464 (1981) .. 8

Moore v. City of East Cleveland, 431 U.S. 494 (1977) 10

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) 15

NAACP v. Button, 371 U.S. 415 (1963).....20-21, 22

Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) 11, 18

National Railroad Passenger Corp. v. Florida, 929 F.2d 1532 (11th Cir. 1991) 11

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 21

Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983)..... 18

Ohio v. Akron Center for Reproductive Health, 110 S. Ct. 2972 (1990) 13

Olmstead v. United States, 277 U.S. 438 (1928)..... 10

Payne v. Tennessee, 111 S. Ct. 2597 (1991)..... 4

PAGE

Planned Parenthood v. Danforth, 428 U.S. 52 (1976) 3, 14, 16-17

Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983) 3, 14

Poe v. Ullman, 367 U.S. 497 (1961) 21

Regina v. Sims, 75 Eng. Rep. 1075 (Q.B. 1601)..... 6-7

Rex v. Lichefeld, K.B. 27/974, Rex. m.4 (1505)..... 6

Rhodes v. Chapman, 452 U.S. 337 (1981) 8

Riley v. National Fed'n of the Blind, Inc., 487 U.S. 781 (1988) 20, 21

Roe v. Wade, 410 U.S. 113 (1973) ..... *passim*

Sable Communications, Inc. v. FCC, 492 U.S. 115 (1989) 14

Schweiker v. Gray Panthers, 453 U.S. 34 (1981) 11

Shapiro v. Thompson, 394 U.S. 618 (1969)..... 8

Shelley v. Kraemer, 334 U.S. 1 (1948)..... 10

Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 112 S. Ct. 501 (1991) 21

Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) 8

Stanley v. Georgia, 394 U.S. 557 (1969)..... 10

Stanley v. Illinois, 405 U.S. 645 (1972)..... 8

Taylor v. Louisiana, 419 U.S. 522 (1975)..... 8

Texas v. Johnson, 491 U.S. 397 (1989)..... 16

Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) ..... *passim*

PAGE

Union Pacific Ry. Co. v. Botsford, 141 U.S. 250 (1891) 10

United States v. Salerno, 481 U.S. 739 (1987)..... 13

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976)..... 21

Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) 2, 3, 13

Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468 (1987) 4

West Virginia State Bd. of Educ. v. Barnette, 318 U.S. 624 (1943) 22

Wooley v. Maynard, 430 U.S. 705 (1977) 22

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) 21-22

Statutes and Rules:

Comstock Act, ch. 258, § 1, 17 Stat. 598 (1873) (codified as amended at 18 U.S.C. § 1461 (1988)) 6

18 Pa. Cons. Stat. Ann. § 3204(c) (Supp. 1991)..... 11

18 Pa. Cons. Stat. Ann. § 3205 (Supp. 1991) 19

18 Pa. Cons. Stat. Ann. § 3209 (Supp. 1991) ..... *passim*

Fed. R. Civ. P. 52(a) 12, 13

PAGE

Articles:

Walter Dellinger and Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from Roe v. Wade*, 138 U. Pa. L. Rev. 83 (1989) 11

James C. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* (1978) 7

J. Reed, *The Birth Control Movement and American Society: From Private Vice To Public Virtue* (1983) 6

Jeb Rubenfeld, *The Right of Privacy*, 102 Harv. L. Rev. 737 (1989) 5

Laurence H. Tribe, *American Constitutional Law* (2d ed. 1988) 5

ARGUMENT

I. THIS COURT MUST REJECT THE COMMONWEALTH AND SOLICITOR'S PLEA TO ABANDON *ROE*'S CENTRAL HOLDING.

A. *Roe* Held that the Right to Abortion Is a Fundamental Right Protected by the Strict Scrutiny Standard of Review; This Court Cannot Uphold the Pennsylvania Law Without Abandoning that Standard.

Apparently mindful of the potential negative political repercussions of a decision explicitly overruling *Roe v. Wade*, 410 U.S. 113 (1973), the Commonwealth contrives to avoid that result by arguing that the Pennsylvania law "comports with *Roe* in all respects." R.B. 35.[1] In support of this argument, the Commonwealth claims that *Roe* establishes only a "limited" right to abortion, R.B. 35-39, and that Justice O'Connor's undue burden test[2] is the standard of review mandated by *Roe*. R.B. 42-48.[3] Thus, the Commonwealth claims, this Court need not overrule *Roe* to uphold the Pennsylvania restrictions. R.B. 35.[4]

The Commonwealth's argument misstates *Roe*'s holding and, if accepted, would dismantle this Court's substantive due process jurisprudence. This Court has repeatedly found

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1 Petitioners cite the Brief for Respondents as "R.B. ___," the Brief for Petitioners as "P.B. ___," and the Brief of *Amicus* United States as "S.G. ___."

2 *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 461-64 (1983) (O'Connor, J., dissenting); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 828-29 (1986) (O'Connor, J., dissenting).

3 The Commonwealth's argument is inconsistent with that made by all of its supporting *amici*, who concede that *Roe* held that the right to choose abortion is a fundamental right protected by strict scrutiny. *E.g.*, S.G. 5; Feminists for Life Br. 3.

4 Alternatively, the Commonwealth, joined by the Solicitor, argues that this Court should explicitly overrule *Roe* and replace the strict scrutiny standard of review with the rational basis test. R.B. 105-17; S.G. 8-18.

that once a liberty interest rises to the level of a "fundamental right," restrictions on that right are subject to the strict scrutiny standard of review. *See, e.g., Eu v. San Francisco Democratic Comm.*, 489 U.S. 214, 222 (1989).[5] This Court has also repeatedly acknowledged that *Roe* established the right to choose abortion or childbirth as a fundamental right; state laws that intrude upon these reproductive decisions must therefore be examined with exacting scrutiny. 410 U.S. at 153-55.[6]

The Commonwealth's assertion that this Court can avoid overruling *Roe* by applying the "undue burden" test is disingenuous at best. As the Commonwealth concedes, that test, which presently has "the support of only a single Justice," R.B. 52,[7] provides far less protection for women seeking abortion than *Roe*'s strict scrutiny standard. *See* P.B. 35-36.[8]

5 The Commonwealth confuses fundamental rights with limited state interests. *Roe*'s accommodation of the state's interest in potential human life did not reduce the status of the abortion right to that of a so-called "limited right" and thereby sanction the imposition of a less protective standard of review. *See* R.B. 36-39. To the contrary, those concerns relate only to whether a state's interest is sufficient to override a woman's right to choose abortion. 410 U.S. at 163-64.

6 *E.g., Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977); *Thornburgh*, 476 U.S. at 772; *Akron*, 462 U.S. at 419-20 & n.1.

7 Relying on *Marks v. United States*, 430 U.S. 188 (1977), the Commonwealth insists that the undue burden test became the "governing standard" in *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989), and *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990). R.B. 53. But in *Webster*, Justice O'Connor's decisive opinion found Missouri's viability testing provision consistent with *Roe*'s strict scrutiny standard and expressly declined to reexamine *Roe*'s validity. *Webster*, 492 U.S. at 525-26 (O'Connor, J., concurring). In *Hodgson*, this Court found that the Minnesota restrictions unconstitutionally interfered with "family[ ] decisionmaking processes," 110 S. Ct. at 2950 (O'Connor, J., concurring), and failed to pass even rational basis review. *Id.* at 2945-47. Even when upholding that portion of the statute with a judicial bypass procedure, this Court carefully reconciled its ruling with past precedents. *Id.* at 2950-51 (O'Connor, J., concurring); *id.* at 2970 (Kennedy, J., concurring in part and dissenting in part) (plurality). Moreover, the Commonwealth's reliance on *Marks* is misplaced. *See* Representative Don Edwards, *et al.* Br. 8-9.

8 Respondents incorrectly cite *Harris v. McRae*, 448 U.S. 297 (1980), *Maher v. Roe*, 432 U.S. 464 (1977), and *Beal v. Doe*, 432 U.S. 438 (1977), to support their claim that the undue burden test has been regularly applied to review abortion regulations. R.B. 45. In these cases, this Court upheld funding schemes, applying rational basis review because the governments' decision to encourage childbirth over abortion "place[d] no governmental obstacle in the path of a woman who chooses to terminate her pregnancy." *Harris*, 448 U.S. at 315. But those cases acknowledged that regulations that interfere with women's rights are subject to exacting scrutiny. *See Maher*, 432 U.S. at 472-73.

Similarly, *Bellotti v. Baird*, 428 U.S. 132 (1976), is distinguishable as it involved minors' access to abortion, an area in which this Court has permitted greater state regulation. To conclude from *Bellotti*'s casual use of the phrase "undue burden" in describing the holding in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), that this Court in *Danforth* intended to replace *Roe*'s strict scrutiny standard with a less protective standard of review strains credulity.

Under the undue burden test, heightened judicial scrutiny is reserved for only those instances in which the state imposes " 'absolute obstacles or severe limitations on the abortion decision.' " *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting) (quoting *Akron*, 462 U.S. at 464 (O'Connor, J., dissenting)). By contrast, under *Roe*, any non-*de minimis* interference with the abortion right triggers strict scrutiny.[9] Absent a compelling purpose, both bans on abortion and restrictions—like those at issue here—that encumber the abortion choice with delay, administrative hurdles, or expense are invalid. *See* P.B. 17-18. In short, upholding the Pennsyl-

9 The right in *Roe*, like other fundamental rights, is not absolute. This Court has upheld numerous "regulations that have no significant impact on the woman's exercise of her right [and are] . . . justified by important state health objectives." *Akron*, 462 U.S. at 430. *See Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 486-90 (1983) (plurality opinion); *id.* at 505 (O'Connor, J., concurring in part and dissenting in part) (requirement that tissue removed following abortion be submitted to pathologist); *Danforth*, 428 U.S. at 65-67, 79-81 (woman's written consent requirement, record-keeping requirement); *Connecticut v. Menillo*, 423 U.S. 9 (1975) (requirement that only physicians perform abortions). Additionally, this Court has upheld state laws regulating the performance of abortions after viability is possible. *Webster*, 492 U.S. at 513-20 (plurality opinion); *id.* at 525-31 (O'Connor, J., concurring) (viability testing requirement); *Ashcroft*, 462 U.S. at 482-86 (plurality opinion); *id.* at 505 (O'Connor, J., concurring in part and dissenting in part) (second physician must be present during post-viability abortions).

vania law under the less protective undue burden standard plainly entails overturning *Roe* by eviscerating its core principle.

B. The Doctrine of *Stare Decisis* Requires Reaffirmation of *Roe*.

This Court has recognized time and time again that the doctrine of *stare decisis* "is of fundamental importance to the rule of law." *Hilton v. South Carolina Pub. Rys. Comm'n*, 112 S. Ct. 560, 563 (1991) (quoting *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987)). Here, where there is the potential for disrupting the lives and settled expectations of millions of American women, it is beyond dispute that *stare decisis* applies with special force. P.B. 19-22. Astonishingly, while boldly advocating *Roe*'s demise, the Commonwealth and the Solicitor make only passing reference to this doctrine.

The Solicitor virtually ignores *stare decisis*, arguing in a brief footnote that it has less potency in constitutional cases. S.G. 8-9 n.4. But "even in constitutional cases, the doctrine carries such persuasive force that . . . departure from precedent [must] be supported by some 'special justification.' " *Payne v. Tennessee*, 111 S. Ct. 2597, 2618 (1991) (Souter, J., concurring) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)). This Court has already concluded that *stare decisis* provides "especially compelling reasons" for continued adherence to *Roe*. *Akron*, 462 U.S. at 419-20 & n.1; *Thornburgh*, 476 U.S. at 759; *id.* at 780-81 (Stevens, J., concurring).

Similarly, the Commonwealth gives short shrift to *stare decisis*,[10] relying simply on this Court's overturning of *Lochner v. New York*, 198 U.S. 45 (1905), to justify overturning *Roe*. R.B. 115-16. However, *Lochner* is not remotely comparable to *Roe*. In overruling *Lochner*, this Court allowed

10 Both approaches to the resolution of this case advocated by the Commonwealth implicate *stare decisis*. As respondents concede, upholding Pennsylvania's biased counseling and 24-hour delay provisions without explicitly rejecting *Roe* would require this Court, at a minimum, to overrule *Akron* and *Thornburgh*. R.B. 40.

states to regulate the working conditions of employees. While this action upset some expectations of business owners and reduced their profits, it did not withdraw a right central to the ability of countless individuals to order and control their lives and destinies, a result that overruling *Roe* would entail. *See* Jeb Rubenfeld, *The Right of Privacy*, 102 Harv. L. Rev. 737, 806 (1989) (laws upheld following *Lochner* era "did not involve the forced, affirmative occupation and direction of individuals' lives"). Moreover, while *Lochner* frustrated states' ability to protect workers from abusive working conditions, *Roe* protects women from state intervention that endangers their lives and health.[11]

For the past nineteen years, *Roe* has secured fundamental protection for private choices affecting millions of American women. The heavy burden of convincing this Court to destroy those settled expectations falls on those who propose this radical step. Both the Commonwealth and the Solicitor have utterly failed to meet their burden.

C. The Decision To Terminate or Continue a Pregnancy Must Continue To Be Afforded Fundamental Constitutional Protection.

The Commonwealth and the Solicitor premise their argument that the right to abortion must not be accorded fundamental status primarily on two assertions: abortion is not deeply rooted in the nation's history and traditions, R.B. 109, S.G. 9-12, and abortion is different from other privacy rights previously recognized by this Court. R.B. 109-10, S.G. 13 n.10. These arguments rest on an incomplete view of history and flawed legal analysis, and fail to distinguish *Roe*'s holding from a century of this Court's privacy decisions.

11 In addition, overruling *Lochner* resulted from the changed economic conditions of the 1930s. *See* Laurence H. Tribe, *American Constitutional Law* 578 (2d ed. 1988) ("it was the economic realities of the Depression that graphically undermined *Lochner*'s premises. . . . Positive government intervention came to be more widely accepted as essential to economic survival . . ."). In contrast, no changed social conditions justify overturning *Roe*. P.B. 31-34.

The Commonwealth and the Solicitor argue that abortion is not rooted in our nation's history and tradition, S.G. 10-11, R.B. 109, because statutes limiting abortion were common when the Fourteenth Amendment was ratified. The Solicitor's narrow focus on the historical treatment of abortion in the mid-nineteenth century, rather than the general historical protection of the right of privacy, is contrary to the historical analysis traditionally used to identify fundamental rights protected by the Fourteenth Amendment. *See Michael H. v. Gerald D.*, 491 U.S. 110, 132 (1989) (O'Connor, J., concurring) ("the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be 'the most specific level' available"). *See also id.* at 139 (Brennan, J., dissenting).[12]

Furthermore, in *Roe*, this Court undertook an extensive historical analysis and concluded that there was no long-standing tradition of laws proscribing abortion. 410 U.S. at 129-41. Indeed, as the Solicitor concedes, S.G. 10, at the time of the nation's founding and at common law,[13] abortion was

12 In cases such as *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), this Court focused on the historic respect for privacy, rather than state laws prohibiting the use of contraceptives. Had this Court adopted the Solicitor's approach, the important rights recognized in these cases might not enjoy constitutional protection at all. *See Michael H.*, 491 U.S. at 139 (Brennan, J., dissenting). For although the first specifically anti-contraception statute was enacted in 1873, Comstock Act, ch. 258, § 1, 17 Stat. 598 (1873) (codified as amended at 18 U.S.C. § 1461 (1988)), anti-obscenity statutes had been used decades earlier to prosecute those who disseminated contraceptive information. J. Reed, *The Birth Control Movement and American Society: From Private Vice To Public Virtue* 9 (1983).

13 *Amicus* American Academy of Medical Ethics purports to demonstrate that abortion was criminal at common law. Their brief fails, however, to cite even one early English common law case in which either a woman or an "abortionist" was criminally prosecuted for a successful, voluntary termination of pregnancy. Rather, the cases cited involved assaults that resulted in injury or death of a pregnant woman and her fetus, *see, e.g., Rex v. Lichefeld*, K.B. 27/974, Rex. m.4 (1505) (defendant charged as accessory to suicide, a felony killing), or the killing of a child born alive, which then, as now, was considered murder. *See, e.g., Regina v. Sims*, 75 Eng. Rep. 1075 (Q.B.

permitted until the time of quickening. *Roe*, 410 U.S. at 140-41; James C. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* 3-19 (1978). The history elucidated by this Court in *Roe* has not changed since 1973.[14]

Finally, the state of the law in 1868 cannot define fundamental rights for all future generations.[15] As this Court emphasized in *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 669 (1966), "we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights." *See also Hudson v. McMillian*, 112 S. Ct. 995, 1000 (1992) ("the Eighth Amendment's prohibition of cruel and unusual pun-

1601) (man who violently beat a pregnant women indicted for death of child who was born alive and then died due to injuries from the beating).

14 Moreover, historians now condemn as obsolete or illegitimate the major reasons for the adoption of anti-abortion laws in the nineteenth century: nativist fears, the movement to consolidate control over the medical profession, and fears about the rising status of women. Mohr, *supra*, at 37, 166-70. Contrary to the Solicitor's claim, S.G. 11 n.8, the racist and sexist justifications for the criminalization of abortion in the nineteenth century are constitutionally relevant. A legislative enactment motivated by a desire to discriminate on account of race or other constitutionally illegitimate basis is unconstitutional under the Equal Protection Clause, unless the state can prove that the law would have been enacted without the illegitimate factor. *Hunter v. Underwood*, 471 U.S. 222, 228-29 (1985). This is so even where a statute is motivated by permissible as well as impermissible motives. *Id.* at 232. Although the Solicitor tries to downplay the presence of those illegitimate motives by citing the work of certain historians, S.G. 11 n.8, these works support, rather than refute, the argument made by *Amici* 250 American Historians in Support of Petitioners.

15 The Solicitor's use of 1868, rather than 1791 when the Bill of Rights was adopted, as the reference point for determining fundamental rights is not surprising since, in 1791, abortion was legal until quickening. *Roe*, 410 U.S. at 140-41. Were the requirements of due process to depend on the state of the law at the time of the framing of either the Fifth or Fourteenth Amendments, an individual might have fundamental rights guaranteed against interference by the federal government, but not against the states—an "unthinkable" result. *See Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

ishments 'draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society' ") (quoting *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981)). To choose 1868 as the touchstone by which rights are validated is to state that many of our most unassailable rights are not "fundamental" at all.[16]

The Solicitor makes a second, equally disturbing claim. While conceding that pregnancy entails "profound physical, emotional, and psychological consequences," *Michael M. v. Superior Court*, 450 U.S. 464, 471 (1981) (plurality), and that the denial of safe, legal abortion will pose significant burdens on women, the Solicitor nonetheless urges this Court to turn its back on American women, callously insisting that this Court's constitutional jurisprudence does not protect women from governmentally imposed harms. The cases relied upon to support this preposterous argument, this Court's abortion funding cases, S.G. 14, are totally inapposite. In these cases, this Court upheld the government's refusal to subsidize abortion with public resources. Nothing in those cases suggests that the Constitution would permit the government similar license when it affirmatively prohibits or, as here, places onerous restrictions on the abortion choice.[17] Indeed, just this

16 Relying exclusively on what the fifty states have legislated in determining the scope of "liberty" would imperil numerous fundamental freedoms protected by this Court's decisions: the right to be free from racial segregation, *Brown v. Board of Educ.*, 347 U.S. 483 (1954), *Bolling*, 347 U.S. 497; the right to marry a person of another race, *Loving v. Virginia*, 388 U.S. 1 (1967); the right to live with a person of another race, *McLaughlin v. Florida*, 379 U.S. 184 (1964); the right to be free from forced sterilization, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); the right of married persons to use contraceptives, *Griswold*, 381 U.S. 479; the right of unmarried persons to use contraceptives, *Eisenstadt*, 405 U.S. 438; the right to travel, *Shapiro v. Thompson*, 394 U.S. 618 (1969); the right to court-appointed counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963); the right of women to serve on juries, *Taylor v. Louisiana*, 419 U.S. 522 (1975); the right of poor people to vote, *Harper*, 383 U.S. 663; and the right to raise one's natural but illegitimate children, *Stanley v. Illinois*, 405 U.S. 645 (1972).

17 *E.g.*, *Harris v. McRae*, 448 U.S. at 317 n.19. *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989), and *Lindsey v. Normet*, 405 U.S. 56 (1972), are also cases involving failure to provide governmental assistance and are therefore also inapposite.

term, this Court recognized that governmentally imposed harms, less severe than those that forced pregnancy would entail, are unacceptable under our constitutional scheme. *Hudson*, 112 S. Ct. 995.[18]

Both the Solicitor and the Commonwealth further argue that a fundamental right to abortion does not flow logically from the long line of privacy cases relied upon by this Court in *Roe*. S.B. 13 n.10; R.B. 109-10. This argument misconstrues the nature of the privacy right in those cases, and fails miserably to distinguish them from *Roe*.

The common denominator of these and subsequent privacy cases is that personal decisions that profoundly affect bodily integrity and destiny are largely beyond the reach of government, and not, as the Solicitor suggests, "a recognition of the importance of the family." S.G. 13 n.10. Indeed, in *Carey*, Justice Brennan rejected precisely this reading of this Court's privacy decisions. Even though the Connecticut statute at issue in *Griswold* intruded into "the sacred precincts of marital bedrooms," 379 U.S. at 485, this Court held that *Griswold* was

> not dependent on that element . . . . *Griswold* may no longer be read as holding only that a State may not prohibit a married couple's use of contraceptives. Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State.

18 *Amici* attack plaintiffs for "inflating" the number of women who died from illegal abortions. *See* American Ass'n of Prolife Ob/Gyn, *et al.* Br. 22. Considering the severe criminal penalties that were attached to abortion, it is not surprising that the figures for reported illegal abortion deaths cited by *amici* are lower than the estimates of actual deaths cited by petitioners. P.B. 32. But even by *amici*'s figures, almost 2300 women died from illegal abortion during the 1960s. Surely this demonstrates the catastrophic effects of criminal abortion laws and provides a graphic illustration of the Commonwealth's appalling "rights by numbers" approach, discussed more fully in Section II.B, *infra*.

Carey, 431 U.S. at 687. Moreover, contrary to the suggestion of *amici*, *see* U.S. Catholic Conference, *et al.* Br. 11, this Court did not err in *Eisenstadt* by finding that "personal interests alone—not relational interests . . . are entitled to special protection." On the contrary, as this Court explained in *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948), "[t]he rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights."

If accepted, the Solicitor's arbitrary dividing line in this Court's privacy jurisprudence might eliminate privacy protection for millions of Americans who are unmarried, separated, or divorced, or who live in "families" that are not recognized by the state. Not just the abortion right, but all aspects of individual privacy—including the right of bodily integrity, *Union Pacific Ry. Co. v. Botsford*, 141 U.S. 250 (1891), the right to privacy in one's home, *Stanley v. Georgia*, 394 U.S. 557 (1969), the right to use contraceptives, *Eisenstadt*, 405 U.S. 438; *Carey*, 431 U.S. 678, and the right to form alternative families, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977)—might be jeopardized.

Similarly, the Solicitor's attempt to distinguish *Roe* on the ground that a "pregnant woman cannot be isolated in her privacy" misperceives this Court's privacy decisions. S.G. 13 n.10. The privacy right is not dependent on whether an individual is "isolated" in her privacy. Rather, it is a right, "as against the government . . . to be let alone" in making decisions of critical life importance. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). The presence of the fetus thus does not change or undercut the "fundamental" nature of the privacy right. *Cf.* note 5 *supra*.[19]

The weakness of the Solicitor's contention that abortion is not a fundamental right is further evidenced by his wholly unsatisfactory effort to distinguish laws that prohibit abortions from those that compel them. The Solicitor contends "a

19 This reasoning also ignores the reality that no bright line exists between contraceptives and abortion, *see* Alan Guttmacher Institute, *et al.* Br. 28-45, and might impermissibly sanction a wide variety of incursions on the liberty of pregnant women. P.B. 40.

law *mandating* abortions would pose a starkly different issue" because our nation's legal traditions permit "a competent adult . . . to refuse medical care." S.G. 13 n.10 (emphasis in original). As noted by legal scholars, the Solicitor's position not only fails to distinguish compelled abortion from abortion restrictions, but "powerfully supports" *Roe*'s basic holding:

> A competent adult's decision to have an abortion in the early weeks is clearly a decision to "refuse unwanted medical intrusion." Compelled childbirth is a major medical event and far more dangerous than aborting an early pregnancy. . . . By denying women the right to elect early, medically simple abortion, and thereby forcing pregnant women to undergo childbirth, the United States government necessarily violates the principle that it concedes . . . : "competent adult[s] may generally refuse unwanted medical intrusion."

Walter Dellinger and Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from Roe v. Wade*, 138 U. Pa. L. Rev. 83, 96-97 (1989).[20]

20 The Commonwealth disputes the propriety of remand should this Court overrule *Roe*. R.B. 53 n.21. But upon reversal, courts often remand to allow plaintiffs to pursue alternative claims not reached by the trial court, *see, e.g., Schweiker v. Gray Panthers*, 453 U.S. 34, 50 n.23 (1981), or where there has been a change in the law. *See, e.g., National Railroad Passenger Corp. v. Florida*, 929 F.2d 1532, 1537 (11th Cir. 1991). Where, as here, the trial court's decision was based on fully developed and as yet sound precedent, and "plaintiff[s] had little incentive to insist that the district court's written order also base liability on" their alternative theories, equitable principles demand a remand. *Carter v. Sedgwick County*, 929 F.2d 1501, 1505 (10th Cir. 1991) (remand to consider alternative claims was proper where decision was reversed in light of subsequent Supreme Court decision). Moreover, disputes regarding whether plaintiffs should be allowed to pursue alternative claims on remand are best resolved by the lower courts. *See Nashville Gas Co. v. Satty*, 434 U.S. 136, 146 (1977). Finally, the Solicitor's contention that petitioners opted not to challenge § 3204(c) (prohibiting abortions based on the sex of the fetus) because they believe it is constitutional, S.G. 18 n.13, is simply wrong. While petitioners believe this provision violates *Roe*, it obviously could only be challenged by a plaintiff who could satisfy Article III's standing requirement. Thus, a challenge remains a future possibility.

II. THE PENNSYLVANIA STATUTE IS UNCONSTITUTIONAL UNDER ANY STANDARD OF REVIEW.

A. The Factual Findings of the District Court Are Relevant to the Constitutional Issue Before This Court and Are Fully Supported by the Factual Record.

The Commonwealth cannot carry the extraordinary burden of proving that the district court's factual findings are "clearly erroneous" under Federal Rule of Civil Procedure 52(a). This Court has held:

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985) (citations omitted). Here, where the trial court's findings of fact are based heavily on weighing the credibility of witness testimony, "Rule 52(a) demands even greater deference to the trial court's findings . . . ." *Id.* at 575. *See also Hernandez v. New York*, 111 S. Ct. 1859, 1868-70 (1991) (plurality).[21]

The district court carefully documented the record evidence supporting each of its 387 findings of fact. The court of appeals did not reverse any of the district court's factual findings,[22] and the Commonwealth cannot justify challenging

21 The district court specifically found that the testimony of each of petitioners' nine expert and fact witnesses was "credible in all respects." 115a, 117a-124a. However, the district court made adverse credibility determinations against two of the three witnesses offered by the Commonwealth, and found that the testimony of marriage counselor Vincent Rue was simply "not credible." 127a. Certain of the Commonwealth's *amici* continue to rely on the discredited testimony of the Commonwealth's witnesses, particularly that of Vincent Rue, but the Commonwealth itself does not challenge the district court's credibility determinations in any respect.

22 Both the Commonwealth, R.B. 8 n.5, and *amici*, *see* Nat'l Legal Found. Br. 27 n.13, claim that the court of appeals overturned some of the district court's factual findings on appeal. However, reference to the cited pages of the court of appeals opinion in fact reveals no instance where the court of appeals declared any finding clearly erroneous. Typically, the cited portions of the court of appeals opinion do not even mention the district court's findings. *See, e.g.*, 38a-40a, 83a.

a single factual finding under the clearly erroneous standard.[23] Thus, for purposes of this appeal, the district court's findings must be accepted by this Court. P.B. 4 n.6.

Perhaps recognizing the futility of challenging the district court's findings, *amici* argue that facts are irrelevant in a facial constitutional challenge, because plaintiffs "must prove that the statute cannot be constitutionally applied to *anyone*." S.G. 19 (emphasis in original); *see also* Nat'l Legal Found. Br. 3-5, 27-28. *Cf.* R.B. 92. For this claim *amici* rely on *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972, 2980-81 (1990), *United States v. Salerno*, 481 U.S. 739, 745 (1987), and *Webster*, 492 U.S. at 524 (O'Connor, J., concurring). Each of these cases involved speculative challenges to the possible application of statutory provisions in the absence of factual support, and only held that facial challenges cannot succeed "based upon a worst-case analysis that may never occur." *Akron Center*, 110 S. Ct. at 2981. By contrast, far from raising remote or speculative claims based on a worst-case scenario, the record here demonstrates that, if enforced, the Act will severely harm women.

In facial challenges, this Court has always looked beyond the four corners of the statute to consider the

23 The Commonwealth insists that it "continue[s]" to challenge the district court's findings of fact, R.B. 8, but its brief reveals *no* instance where the Commonwealth even attempts to show that any particular finding was clearly erroneous. For example, the district court found that trained counselors are capable of providing to patients the information necessary for obtaining informed consent. 175a. The Commonwealth complains that this finding "simply represent[s] [the district court's] own disagreement with the considered judgment of the legislature," R.B. 66, but does not—and cannot—suggest why this finding is clearly erroneous under Rule 52(a). The Commonwealth also argues that the district court erred in failing to make certain *additional* findings. But unless the Commonwealth properly challenges the district court's findings, it is immaterial that it might have made other findings as well.

facts.[24] In *Hodgson*, for example, the Court relied extensively on the factual findings of the district court in striking down Minnesota's requirement of two-parent notification without a bypass option, a provision that had never been in effect and was challenged on its face. *See Hodgson*, 110 S. Ct. at 2938-41, 2945-46; *id.* at 2950 (O'Connor, J., concurring).

Furthermore, adoption of *amici*'s position would effectively preclude all facial challenges and prevent federal courts from scrutinizing legislative findings offered to justify an infringement of constitutional rights.[25] As Justice Thomas recently recognized:

> We know of no support . . . for the proposition that if the constitutionality of a statute depends in part on the existence of certain facts, a court may not review a legislature's judgment that the facts exist. If a legislature could make a statute constitutional simply by "finding" that black is white or freedom, slavery, judicial review would be an elaborate farce. At least since *Marbury v. Madison*, 1 Cranch 137 (1803), that has not been the law.

Lamprecht v. FCC, No. 88-1395, 1992 U.S. App. LEXIS 1997, at *30 n.2 (D.C. Cir. Feb. 19, 1992).

B. This Court Should Reject the Commonwealth's "Rights by Numbers" Approach and Find Unconstitutional the Husband Notification Provision.

The Commonwealth does not contest the conclusion reached by both lower courts that forced husband notification will impose on some women seeking abortions a wide array of "dire consequences," completely frustrating the abortion decision of some and endangering the lives and

24 *See, e.g., Ashcroft*, 462 U.S. at 483-86 (citing physician testimony); *Akron*, 462 U.S. at 434-37 (multiple references to statistical studies and medical association standards and guidelines); *Colautti v. Franklin*, 439 U.S. 379, 395-96, 398-99 (1979) (citing physician testimony); *Danforth*, 428 U.S. at 75-79 (relying on record evidence).

25 *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 129 (1989); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843-44 (1978).

health of others.[26] *See* 66a-70a & n.26; 255a-257a & n.42.[27] Nor does it seriously offer a legitimate state interest to support the statute.[28] Instead, the Commonwealth claims that only a "very small" number of women will suffer health consequences and that it is not enough in a facial challenge "to show that [a statute] may deter or inhibit *some* women from getting an abortion." R.B. 83, 85 (emphasis in original). In the Commonwealth's view, the Constitution only protects

26 Citing Justice Stevens' concurrence in *H.L. v. Matheson*, 450 U.S. 398, 423-24 (1981), the Commonwealth contends that the courts below unfairly assumed that either a marriage is so perfect that communication will routinely occur, or it is so imperfect that forced communication will always be harmful. *See* R.B. 93-96. But the lower courts, following this Court's decision in *Hodgson*, 110 S. Ct. at 2945, simply made the common sense observation that the statute serves no purpose for the vast majority of women who voluntarily discuss the abortion decision with their husbands, and therefore must be evaluated based on its impact on women who would otherwise not notify their husbands. *See* 66a, 193a, 261a. As the district court found, in this context, forced husband notification *dis*serves any legitimate state interest. *See* 201a, 262a.

27 The Commonwealth's asserted distinction between husband notice and consent statutes, R.B. 93 n.38, is conclusively refuted by the holdings of this Court and the record in this case. A notice provision can give the husband effective veto power over the woman's decision, preventing the abortion or penalizing her for exercising her choice. *See Hodgson*, 110 S. Ct. at 2939, 2945 & n.36; *Bellotti v. Baird*, 443 U.S. 622, 647 (1979). *See also* 69a; 256a. That the retaliation comes not from the state but from the husband does not exonerate the state. As Justice Harlan wrote for a unanimous Court in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 463 (1958): "The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power . . . that private action takes hold."

28 Raw paternalism informs the arguments of the *amici* who support husband notification. One brief describes a woman who obtains an abortion without first notifying her husband as one who "considers herself 'liberated,' " or who is a "highly dominant, independent wife who is not in touch with her emotions," or "who makes a hasty, impulsive decision." *See* Rutherford Inst. Br. 13. 15. The Solicitor argues that husband notification will preserve "marital integrity," albeit not "marital accord." S.G. 25. The district court's unrefuted findings that forced husband notification could destroy marriages and subject women to physical abuse, *see* 201a, 262a, make plain that the statute's only purpose is to further the husband's ability to control his wife's behavior.

American women from legislation that will result in dire consequences to their lives and health, if all, or at least the vast majority of, women are affected.

The Commonwealth's effort to defeat the constitutional rights of entire classes of women surely must fail.[29] This Court has repeatedly recognized that rights under the Fourteenth Amendment are "personal ones" that cannot "depend on the number of persons who may be discriminated against." *McCabe v. Atchison, T. & S.F. Ry.*, 235 U.S. 151, 161-62 (1914).[30] To accept the Commonwealth's view that a proportionately small class of women may be singled out might justify a wide range of prohibitive restrictions on abortion, including, for example, bans on abortion for Hispanic or Asian women, women under 16 or over 35, or an absolute ban on all second trimester saline abortions.[31] *See Danforth*,

29 The contention that the numbers of women affected is "very small" is itself highly questionable. The statute affects all married women, who comprise at least twenty percent of the approximately 50,000 women who obtain abortions in Pennsylvania each year. 149a. Even by Judge Alito's calculations, had the notification requirement been in effect in Pennsylvania during the 1980s, 8500 women could have been affected. *See* 92a & n.3; 149a. *Amicus* State of Utah claims that its husband notification requirement has had no ill effects, *see* Utah Br. 18-19, but this very provision is currently subject to litigation. *Jane L. v. Bangerter*, No. 91-C-345-G (D. Utah filed Apr. 4, 1991). The self-serving claims of the Attorney General charged with defending this statute are hardly entitled to great weight, especially where, as here, there are declarations to the contrary.

30 This Court certainly would not sanction state statutes that prohibit flag burning in protest, *Texas v. Johnson*, 491 U.S. 397 (1989), or advocating the use of violence as a means of accomplishing political reform, *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam), even though very few people engage in such activities. Nor could a state prohibit from voting any member of the Armed Forces who moves from another state for military duty, *Carrington v. Rash*, 380 U.S. 89 (1965), or disqualify ministers or priests from serving as state legislators, *see McDaniel v. Paty*, 435 U.S. 618 (1978), because only a few would feel the weight of these restrictions. Surely, this Court's holding in *Meyer v. Nebraska*, 262 U.S. 390 (1923), invalidating a state statute prohibiting the teaching of German language in private schools, would not have been different if only a small number of German immigrants lived in Nebraska.

31 Attempting to provide a limit to its argument, the Commonwealth suggests that *Hodgson* presented a case where a sufficiently large percentage

428 U.S. at 75-79. This "rights by numbers" approach is particularly inappropriate here, where the constitutional right to abortion is premised on the right of the individual to make autonomous decisions about critical life issues.[32]

Just as it tries to downplay the number of women harmed by forced husband notification, the Commonwealth attempts to shore up the obviously inadequate statutory exceptions.[33] Ignoring all of the statute's defects save one, *compare* P.B. 41-43, the Commonwealth focuses exclusively on the district court's finding that battered women will be psychologically incapable of availing themselves of the statutory exceptions to forced husband notification. *See* 201a. The Commonwealth concedes, as it must, the validity of this finding, *see* R.B. 88-90, but speculates, without evidence, that women will be too victimized to seek out abortions in the first place. *Id.* at 90. This Court must reject the Commonwealth's insulting and unacceptable view that women are either too independent

of women were affected to raise constitutional concerns. *See* R.B. 85. But the percentage of women seeking abortions under the age of 18 is only 12%, *see* 150a, far less than the proportion who are married.

32 The Commonwealth ignores altogether the provision's interference with marital integrity and a woman's autonomy. In violation of the right of marital integrity, § 3209 subjects marital discussions to state surveillance and control. P.B. 44-45. Additionally, by forcing women to obtain counsel from their husbands, the notification requirement strikes at the core of the right of privacy by denying women the ability to make critical life choices independently. As this Court recognized in *Danforth*, 428 U.S. at 69 n.11:

> the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental interference into matters so fundamentally affecting a person as the decision whether to bear or beget children.

Id. (quoting *Eisenstadt*, 405 U.S. at 453) (emphasis in original).

33 The Commonwealth tries to distinguish *Hodgson* on the basis that the exceptions there could trigger parental notification, *see* R.B. 87. However, the spousal sexual assault exception can operate in precisely the same fashion—a point the Commonwealth simply ignores. P.B. 42.

to require constitutional protection, or too oppressed to benefit from it.[34]

C. The Biased Counseling Provisions Will Harm Women and Force Physicians To Disseminate Pennsylvania's Anti-abortion Ideology.

1. The biased counseling provisions interfere with the provision of appropriate medical care.

The Commonwealth argues that the Act's biased counseling provisions must be upheld because the Constitution does not forbid state informed consent laws from requiring the provision of specific information to all patients without regard to their medical neeeds. R.B. 63. But this Court has twice rejected this view, finding that nearly identical statutory schemes failed for two independent reasons. In conflict with accepted medical practice, the schemes "intrude upon the discretion of the pregnant woman's physician," by requiring that a "specific body of information be given in all cases,

34 Citing *Geduldig v. Aiello*, 417 U.S. 484 (1974), *amici* contend that § 3209 does not deny women equal protection, because discrimination based on pregnancy is not sex-based. *See, e.g.*, S.G. 26 n.25; Life Issues Inst. Br. 6. Unlike the exclusion of pregnancy from the disability program at issue in *Geduldig*, where the "fiscal and actuarial benefits [of the exclusion] accrue[d] to both sexes," 417 U.S. at 496 n.20, the forced husband notification requirement here gives a right to a class comprised entirely of men. Marriage carries with it for men and only men the right to notification of their wives' reproductive choices. *Cf. International Union, U.A.W. v. Johnson Controls, Inc.*, 111 S. Ct. 1196, 1202 (1991) ("Fertile men, but not fertile women, are given a choice as to whether they wish to risk their reproductive health for a particular job"); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983). Here, where the Commonwealth has refused to impose spousal notification requirements on husbands who obtain surgical procedures altering their reproductive capacity, 199a, the discrimination is particularly invidious. *See Kirchberg v. Feenstra*, 450 U.S. 455, 459-61 (1981). Moreover, unlike the program in *Geduldig*, § 3209 does not merely fail to provide benefits in the event of pregnancy, but imposes new and potentially dangerous obligations on pregnant women. *Cf. Satty*, 434 U.S. at 142 (recognizing distinction between refusing to extend to women a benefit that men do not receive and imposing a burden upon women that men need not suffer).

irrespective of the particular needs of the patient." *Thornburgh*, 476 U.S. at 762, *see also Akron*, 462 U.S. at 445. They also force physicians to exploit the trust of their patients by disseminating irrelevant, inflammatory, misleading, and inaccurate information that discourages abortion. *Thornburgh*, 476 U.S. at 763. The state's real purpose is to send an ideological message to women,[35] and the Commonwealth concedes that the provisions will have their intended effect. R.B. 69-70, S.G. 21.[36] The biased counseling provisions will result in disastrous consequences for women's health, P.B. 8-9, 50-53, subjecting them to "undesirable and unnecessary anxiety, anguish and fear," 178a; *see also* J.A. 135,[37] and furthering no legitimate state interest. They are therefore invalid.

In a feeble attempt to justify these burdens, the Commonwealth claims that petitioners already provide all of the man-

35 If the state enacted a law requiring a physician to provide all women who decided to continue their pregnancies to term with a list of agencies providing abortion services; information about the availability of medical assistance for abortion; the fact that the woman's male partner may be liable to pay for the abortion; and the complete medical risks of both procedures, even when the woman has already chosen to carry the pregnancy to term, the Act's ideological bias would be obvious. The same is true with the Pennsylvania statute.

36 Although conceding that the Act "may dissuade some women" from their abortion choice, both the Commonwealth and the Solicitor claim that this is constitutionally irrelevant because the statute serves the legitimate interest in encouraging childbirth over abortion. S.G. 21; R.B. 69-70. Unlike the denial of abortion funding, which does "not add any 'restriction on access to abortion that was not already there,' " *Akron*, 462 U.S. at 444 n.33 (quoting *Maher*, 432 U.S. at 474), the State's interest in encouraging childbirth over abortion cannot justify "substituting a state decision for an individual decision that a woman has a right to make for herself. Otherwise, the interest in liberty protected by the Due Process Clause would be a nullity." *Hodgson*, 110 S. Ct. at 2937 (opinion of Stevens, J.).

37 The exemption provided in § 3205(c), where the physician can demonstrate that providing the mandated information would result in a "severely adverse effect on the physical or mental health of the patient," 291a, is wholly inadequate to protect women's health. Women who suffer damage to their health that falls short of a "severely adverse effect" are left totally unprotected.

dated information. R.B. 59, 68-69. But, as evidence amassed at trial shows, absent statutory mandate, abortion providers would not inform *all* women seeking abortions about the availability of child support payments and medical assistance benefits if a woman carries to term, nor show them pictures and a description of fetal development. J.A. 252-53, 258. Nor would petitioners provide options counseling or a complete discussion about the many medical risks of carrying a pregnancy to term to those women who have already obtained this counseling or who clearly indicate that their decision to choose abortion is firm. 138a, 142a, 146a, J.A. 140-41.[38] Although petitioners, consistent with medical standards, offer accurate and appropriate information and referral of the type mandated by the Act to some women, some of the time, J.A. 258, 266-67, this cannot be equated with § 3205's requirement that physicians offer state-prescribed information in all cases, irrespective of the needs of the patient.

2. The biased counseling required by § 3205 is not commercial speech.

The Commonwealth does not dispute that the biased patient counseling provisions compel speech, or that state compulsion of speech is "a content-based regulation of speech," and is therefore "subject to exacting First Amendment scrutiny," *Riley v. National Fed'n of the Blind, Inc.*, 487 U.S. 781, 795, 798 (1988). Nor does it dispute that the provision cannot possibly survive this test. Instead, the Commonwealth argues that the physician-patient dialogue falls outside the ambit of the First Amendment because it is "commercial" speech. *See* R.B. 70-71.

This Court, however, has long eschewed reliance on "mere labels" for determining the level of constitutional protection under the First Amendment. *NAACP v. Button*, 371 U.S.

38 Abortion providers would not refer their patients to many of the crisis pregnancy centers on the state-approved list, since these centers often provide women with inflammatory, misleading, and inaccurate information about abortion. J.A. 256. *See also* 169a.

415, 429 (1963). *See also Bigelow v. Virginia*, 421 U.S. 809, 826 (1975). In fact, this Court has consistently limited commercial speech to expression that does no more than "propose a commercial transaction." *Board of Trustees v. Fox*, 492 U.S. 469, 473 (1989) (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)). By contrast, the "right of the doctor to advise his patients according to his best lights seems so obviously within [the] First Amendment . . . as to need no extended discussion." *Poe v. Ullman*, 367 U.S. 497, 513 (1961) (Douglas, J., dissenting).[39] That the physician is paid for her advice "is as immaterial in this connection as is the fact that newspapers and books are sold." *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964). *See also Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 112 S. Ct. 501 (1991). Like the abortion advertisement in *Bigelow*, the mere "relationship of speech [between a doctor and patient] to the marketplace of products or of services does not make it valueless in the marketplace of ideas." *Bigelow*, 421 U.S. at 826.

Moreover, even if physicians' speech were commercial in part, as the Commonwealth contends, "it is inextricably intertwined with otherwise fully protected speech," namely, the informed consent dialogue that is at the heart of protected professional expression, and therefore no longer "retains its commercial character." *Riley*, 487 U.S. at 796. "[W]e cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. Therefore, we apply our test for fully protected expression." *Id.* Thus, *Riley* is controlling here.

Finally, even in cases involving "pure" commercial speech, this Court has recognized that "unjustified or unduly burden-

39 The court of appeals erred in suggesting that petitioners conceded at oral argument that the speech at issue was "commercial." The First Amendment issues were never discussed at oral argument, *see* Appendix A for the full discussion of § 3205, and petitioners' briefs took exactly the contrary position. *See* Brief of Appellees at 33-36, *Casey v. Planned Parenthood*, No. 90-1662.

some disclosure requirements" may not be used to " 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.' " *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). In *Zauderer*, the Court upheld a non-criminal reprimand for an attorney who deceived and misled potential clients by failing to disclose in a paid advertisement "purely factual and uncontroversial information about the [financial] terms under which [the] services will be available." *Zauderer*, 471 U.S. at 651-53. In this case, by comparison, the Commonwealth, on pain of criminal penalties, forces all abortion providers to disclose often inaccurate and misleading information designed, as the Commonwealth admits, to discourage abortion and encourage childbirth in all but "the most urgent circumstances." R.B. 69-70. By compelling physicians to deliver this anti-abortion message,[40] the statute forces the "individual . . . to be an instrument for fostering public adherence to an ideological point of view he [or she] finds unacceptable." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). Thus, the Act violates the First Amendment.

40 Imagine, for example, that the state enacted a criminal statute that required an attorney, before agreeing to represent a civil rights plaintiff, to advise the potential client (1) that alternatives to litigation, such as letting the matter drop, ignoring the abuse, or settling the matter for a nominal sum, may be preferable to litigation; (2) that a state-prepared list of agencies able to assist the person in avoiding litigation is available; (3) that the defendant may assume legal fees or that free legal services may be available in the event of settlement; and (4) to ensure proper consideration of the weighty effort the client is about to undertake, that the client must return to the lawyer's office on a second occasion, even if the delay will push the client past the deadline for the statute of limitations on some of his or her claims. There can be little doubt that such a poorly disguised attempt to discourage civil rights suits would interfere with the attorney-client relationship and would violate the First Amendment. *Cf. NAACP v. Button*, 371 U.S. at 429-30, 434-37.

D. The Judicial Bypass Procedure Does Not Cure the Constitutional Defects of the Act's Informed Parental Consent Provision.

The Commonwealth does not challenge the district court's finding that the Act's "informed" parental consent provision mandates face-to-face counseling for parents,[41] and thereby impermissibly burdens privacy rights, nor does it suggest that any legitimate state interest supports this requirement. *See also* P.B. 55-57. Instead, relying exclusively on *Hodgson*, the Commonwealth argues that these defects are cured by the presence of a judicial bypass procedure. *See* R.B. 80.

Reliance upon *Hodgson* is misplaced. In *Hodgson*, this Court held that Minnesota's two-parent notification statute interfered with rights of familial integrity.[42] Since only half of the minors in Minnesota reside with both biological parents, this Court recognized that the statute fails to "serve the purposes asserted by the state"—parental involvement—"in too many cases." *Hodgson*, 110 S. Ct. at 2950 (O'Connor, J., concurring).

Nevertheless, this Court held that the bypass procedure is the appropriate mechanism to cure the defect in the statute. As Justice Kennedy recognized:

> If one were to attempt to design a statute that would address the Court's concerns, one would do precisely what Minnesota has done . . . : create a judicial mechanism to identify, and exempt from the strictures of the law, those cases in which the minor is mature or in which notification of the minor's parents is not in the minor's best interests.

41 Contrary to the claims of Nat'l Legal Found. Br. 17-18, the undisputed testimony at trial showed that face-to-face counseling was indeed required. *See* 248a n.38. Petitioners' witnesses, *see* J.A. 133-34, 151, 163-64, as well as the Commonwealth's expert testified that a face-to-face meeting is necessary. *See* J.A. 354; *see also* 170a-171a.

42 As the evidence in *Hodgson* demonstrated, where the second parent has no interest in nor relationship with his daughter or where there is a history of abuse between the parents, compelling the involvement of the second parent can have disastrous effects. *Hodgson*, 110 S. Ct. at 2945.

Id. at 2970 (Kennedy, J., concurring in part and dissenting in part) (plurality opinion).

In contrast, both the purpose of the Pennsylvania law and its constitutional defect are entirely different. Pennsylvania's purpose is not solely to encourage parental involvement and approval—that purpose could be accomplished by a simple parental/judicial consent provision. Rather, Pennsylvania mandates that a parent obtain the information designed to discourage abortion in a face-to-face meeting with the physician. If a parent consents to her daughter's abortion but refuses to accompany her to the doctor's office, or if the parent cannot change work or family commitments to meet the physician in person, P.B. 11-12, 56-57, the daughter is forced to obtain judicial authorization for the abortion. But in this instance, the judicial bypass procedure is simply not designed to cure the constitutional defect. The bypass judge cannot ensure that the parent will obtain the information. In most instances, unless subpoenaed, the parent will not even attend the hearing.

Moreover, acceptance of this odious proposition may enable a state to place any restriction on a young woman's right to abortion, however irrational, so long as there was a judicial bypass that could exempt them from the mandate. For example, a state could require young women to obtain consent from complete strangers or require them to have the abortion in a hospital under general anesthesia. If a judicial bypass procedure will cure absolutely anything, then the right to abortion, whether viewed as a "fundamental" right, or as "a component of" the "liberty" guaranteed by the Constitution, *Hodgson*, 110 S. Ct. at 2951 (Marshall, J., concurring in part and dissenting in part); *id.* at 2936 (opinion of Stevens, J.); *id.* at 2949 (O'Connor, J., concurring), would be completely repudiated.

CONCLUSION

In the days before *Roe*, thousands of women lost their lives, and even more were subjected to physical and emotional scars from back-alley and self-induced abortions directly resulting from criminal prohibitions on abortion. Understanding the severe restraints on women imposed by these laws, this Court in *Roe* recognized that the right to make childbearing decisions was a protected liberty of fundamental dimension. Mindful that abandonment of these principles may again subject women to these horrors, petitioners urge this Court to reaffirm *Roe*, *Akron*, and *Thornburgh*, reverse the judgment of the court of appeals in No. 91-744 and affirm the judgment of the court of appeals in No. 91-902.

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APPENDIX

TRANSCRIPT OF ORAL ARGUMENT
BEFORE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

February 25, 1991

* * *

BY MS. KOLBERT:

* * *

[63] Let me quickly just turn to the 24-hour doctor-only requirements in 3205 and say that our argument is extremely straightforward, Akron, Thornburgh apply, the Court has not changed that standard and; therefore, this Court is bound by those precedents.

[64] The Commonwealth has tried a couple of times to distinguish this case from Thornburgh. We believe that their efforts are without merit. They argue that Thornburgh can't control because the Commonwealth didn't have a chance to put on its facts on Thornburgh, but the Supreme Court answered that argument when it rendered its decision and said that facts would make no difference to their ruling.

The second thing they said is, but the Judge didn't listen to the facts the way we wanted him to listen to it, again the clearly erroneous standard is what is applicable and the Judge's findings in our view, and I'm hoping yours, whether they were not clearly erroneous.

THE COURT: They also say this was in the era of compelling state interest. The least restrictive means, don't they?

MS. KOLBERT: That's right. But we contend that it is still that era; and therefore, this Court is bound by that precedent.

Lastly, as Judge Stapelton, as you noted, the court made pains to distinguish in the discussion in Hodgson about the 48-hour waiting period, that for the women, the Court sided with the approval and this was an opinion by Justice O'Connor and Justice Stevens, [65] they sided with the approval the majority opinion in Akron so clearly they had to have viewed

that the situation as applied to adult women was still being judged under that more stringent standard.

* * *

Nos. 91-744 and 91-902

Supreme Court, U.S.
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ORIGINAL
WITH PROOF OF SERVICE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, REPRODUCTIVE HEALTH AND COUNSELING CENTER, WOMEN'S HEALTH SERVICES, INC., WOMEN'S SUBURBAN CLINIC, ALLENTOWN WOMEN'S CENTER, and THOMAS ALLEN, M.D., on behalf of himself and all others similarly situated,

Petitioners and Cross-Respondents,

—v.—

ROBERT P. CASEY, ALLAN S. NOONAN, and ERNEST D. PREATE, JR., personally and in their official capacities,

Respondents and Cross-Petitioners.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS AND CROSS-RESPONDENTS

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IN THE
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OCTOBER TERM, 1991

NOS. 91-744 and 91-902

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, REPRODUCTIVE HEALTH AND COUNSELING CENTER, WOMEN'S HEALTH SERVICES, INC., WOMEN'S SUBURBAN CLINIC, ALLENTOWN WOMEN'S CENTER, and THOMAS ALLEN, M.D., on behalf of himself and all others similarly situated,

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Respondents and Cross-Petitioners.

SUPPLEMENTAL BRIEF FOR PETITIONERS AND CROSS-RESPONDENTS

Following the filing of the Reply Brief in this case, the United States Court of Appeals for the Ninth Circuit issued its opinion in *Guam Society of Obstetricians and Gynecologists v. Ada*, No. 90-16706 (9th Cir. Apr. 16, 1992), affirming the decision of the district court, 772 F.

Supp. 1422 (D. Guam 1990), invalidating Guam's criminal statute banning abortion. The court of appeals predicated its decision on finding that the strict scrutiny standard of *Roe v. Wade*, 410 U.S. 113 (1973), remains the appropriate standard for evaluating the constitutionality of abortion regulations. *See* 12sa ("If the core of *Roe* remains good law, then, the Act is clearly unconstitutional."). Supporting petitioners' argument that the reliance on *Roe* by a generation of Americans counsels strongly in favor of adherence to *stare decisis*, the court of appeals specifically recognized that *Roe* "has affected the lives and rights of millions of people," 16sa. The court of appeals also recognized that "[t]here clearly must be limits to the ability of a state's interest in potential life . . . to override all conflicting interests." 14sa. Otherwise, a state could forbid contraception, or "requir[e] regular sexual intercourse by all fertile persons." 15sa. *See* P.B. 29-30, 40. The opinion is attached as Appendix A.

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APPENDIX

FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GUAM SOCIETY OF OBSTETRICIANS AND GYNECOLOGISTS; GUAM NURSES ASSOCIATION; MILTON COLE; LAURIE KONWITH; EDMUND A. GRILEY, M.D.; WILLIAM S. FREEMAN, M.D.; JOHN DUNLOP, M.D.; MARIA DOE, on behalf of herself and all others similarly situated, et al, Plaintiffs-Appellees,	)	CA No. 90-16706 D.C. No. CV-90-00013-ARM OPINION
v.	)	
JOSEPH F. ADA, in his individual and official capacities, Defendant-Appellant.	)	

Appeal from the United States District Court
for the District of Guam
Alex R. Munson, Chief Justice, Presiding

Argued and Submitted November 4, 1991
Honolulu, Hawaii
Filed: April 16, 1992

BEFORE: CHOY, D.W. NELSON and CANBY, Circuit Judges

CANBY, Circuit Judge

On March 19, 1990, the Territory of Guam enacted a statute ("the Act") outlawing almost all abortions.[1] The

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[1] The final version of Guam Public Law 20-134 states:

BE IT ENACTED BY THE PEOPLE
OF THE TERRITORY OF GUAM:

Section 1. Legislative findings. The Legislature finds that for purposes of this Act life of every human being begins at conception, and that unborn children have protectible interests in life, health, and well-being. The purpose of this Act is to protect the unborn children of Guam. As used in this declaration of findings the term "unborn children" includes any and all unborn offspring of human beings from the moment of conception until birth at every state of biological development.

Section 2. § 31.20 of Title 9, Guam Code Annotated, is repealed and reenacted to read:

§31.20. Abortion: defined. "Abortion" means the purposeful termination of a human pregnancy after implantation of a fertilized ovum by any person including the pregnant woman herself with an intention other than to produce a live birth or to remove a dead unborn fetus. "Abortion" does not mean the medical intervention in (i) an ectopic pregnancy, or (ii) in a pregnancy at any time after the commencement of pregnancy if two (2) physicians who practice independently of each other reasonably determine using all available means that there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair the health of the mother, any such termination of pregnancy to be subsequently reviewed by a peer review committee designated by the

(continued...)

[1] (...continued)

Guam Medical Licensure Board, and in either case such an operation is performed by a physician licensed to practice medicine in Guam or by a physician practicing medicine in the employ of the government of the United States, in an adequately equipped medical clinic or in a hospital approved or operated by the government of the United States or of Guam.

Section 3. § 31.21 of Title 9, Guam Code Annotated, is repealed and reenacted to read:

§ 31.21. Providing or administering drug or employing means to cause an abortion. Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to cause an abortion of such woman as defined in § 31.20 of this Title is guilty of a third degree felony. In addition, if such person is a licensed physician, the Guam Medical Licensure Board shall take appropriate disciplinary action.

Section 4. § 31.22 of Title 9, Guam Code Annotated, is repealed and reenacted to read:

§ 31.22. Soliciting and taking drug or submitting to an attempt to cause an abortion. Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever with intent thereby to cause an abortion as defined in § 31.20 of this Title is guilty of a misdemeanor.

Section 5. A new § 31.23 is added to Title 9, Guam Code Annotated, to read:

§31.23. Soliciting to submit to operation, etc., to cause an abortion. Every person who solicits any woman to

(continued...)

only exceptions were abortions in cases of ectopic pregnancy, and abortions in cases where two physicians practicing independently reasonably determined that the pregnancy would endanger the life of the mother or "gravely impair" her health. All other abortions were declared to be crimes, both on the part of the women submitting to the abortions and on the part of the persons procuring or causing them.

The validity of the Act was immediately challenged in this class action brought by the Guam Society of Obstetricians & Gynecologists and others against Joseph

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[1] (...continued)

submit to any operation, or to the use of any means whatever, to cause an abortion as defined in § 31.20 of this Title is guilty of a misdemeanor.

Section 6. Subsection 14 of Section 3107, Title 10, Guam Code Annotated, is repealed.

Section 7. Abortion referendum. (a) There shall be submitted at the island-wide general election to be held on November 6, 1990, the following question for determination by the qualified voters of Guam, the question to appear on the ballot in English and Chamorro:

"Shall that public law derived from Bill 848, Twentieth Guam Legislature (P.L. 20-[134]), which outlawed abortion except in the cases of pregnancies threatening the life of the mother be repealed?[']

In the event a majority of those voting vote "Yes", such public law shall be repealed in its entirety as of December 1, 1990.

(b) There is hereby authorized to be appropriated to the Election Commission (the "Commission") sufficient funds to carry out the referendum described in this Section 7, including but not limited to the cost of printing the ballot and tabulating the results. In preparing the ballot, the Commission shall include in the question the number of the relevant public law.

F. Ada, the Governor of Guam. The district court accurately viewed the Act as a direct challenge to the regime of *Roe v. Wade*, 410 U.S. 113 (1973), in the Territory of Guam. The district court held that *Roe v. Wade* applied, and grated summary judgment for the plaintiffs, permanently enjoining enforcement of the Act.[2] We affirm.

I

The plaintiffs in this case are the Guam Society of Obstetricians & Gynecologists; the Guam Nurses Association; physicians Edmund A. Griley, William S. Freeman, and John Dunlop; the Reverend Milton H. Cole, Jr.; and Laurie Konwith. The health care providers in this group clearly have standing to bring this action. *See Planned Parenthood v. Danforth*, 428 U.S. 52, 62 (1976); *Abele v. Markle*, 452 F.2d 1121, 1125 (2d. Cir. 1971). Because some of the plaintiffs have standing, it is not necessary to determine whether the others do. *See Doe v. Bolton*, 410 U.S. 179, 188-89 (1973); *see also Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981); *Grove v. Mead School Dist. No. 354*, 753 F.2d 1528, 1532 (9th Cir.) *cert. denied*, 474 U.S. 826 (1985).

The district court held that the plaintiffs could maintain their action under 42 U.S.C. § 1983, and awarded them relief under the due process guarantees recognized in *Roe v. Wade*. The Court determined that those guarantees applied in Guam, under the provisions of the Mink Amendment to the Guam Organic Act, 48 U.S.C. § 1421b(u). The Territory of Guam in the person of Governor Ada ("Guam") challenges all of these rulings on appeal, and urges as well that the authority of *Roe v.*

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[2] The district court also held that Sections 4 and 5 of the statute, which make criminal the "soliciting" of abortions, violated the First Amendment. That ruling has not been appealed.

Wade has been undermined by later decisions of the Supreme Court. Before we address these points, however, we must deal with a threshold issue raised by the plaintiffs.

A. *Severability of the Unappealed Sections*

The district court held that Sections 4 and 5 of the Act violated the First Amendment, and Guam did not appeal from that ruling. The plaintiffs now argue that these sections are not severable from the remainder of the Act. The result, they contend, is that the entire Act has been invalidated, in effect, by the district court's unappealed ruling, leaving nothing to be decided on this appeal. We reject this contention because we conclude that Sections 4 and 5 are severable from the other parts of the Act.

> The standard for determining the severability of an unconstitutional provision is well established: "'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'"

Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987) (citations omitted). The sections of the Act that remain if Sections 4 and 5 are severed clearly are fully operative as a law. Unless there is evidence of contrary legislative intent, the remainder of the Act should therefore survive the invalidation of Sections 4 and 5.

The plaintiffs put forward two related arguments suggesting a legislative intent against severability. First, they contend that Section 7, which provides for a referendum to determine whether the entire Act should

be repealed,[3] demonstrates that the Guam Legislature intended the Act to stand or fall as a whole. Second, they argue that the Legislature's intention was to pass a comprehensive antiabortion statute, and that removal of Sections 4 and 5 creates a weaker and less comprehensive statue.

With respect to the first argument, the fact that there was to be a referendum on the entire Act reveals very little about legislative intent regarding severability. The plaintiffs place undeserved emphasis on the words "in its entirety." That part of the section provides that, if a majority of the voters vote to repeal the law, "such public law shall be repealed in its entirety." An entire repeal is the obvious and logical result of a vote to repeal in a referendum; the words in question signify no more than that.

While the plaintiffs' second argument is not wholly implausible, they present no evidence to support it. The mere suggestion that legislators wanted a comprehensive Act is not sufficient to overcome the presumption of severability that is implicit in the *Alaska Airlines* standard. We therefore reject the plaintiffs' severability arguments, and proceed to the arguments that Guam raises on appeal.

B. *Applicability of Roe v. Wade to Guam*

Guam contends that the substantive due process guarantee enforced in *Roe v. Wade* and subsequent abortion cases does not apply to Guam because nothing in Guam's Organic Act, codified at 48 U.S.C. §§ 1421-1428 (1988), so provides. The plain language of the 1968 Mink Amendment to the Organic Act, codified at 48 U.S.C. § 1421b(u) (1988), belies their claim. The Mink Amendment states that:

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[3] The provision for a referendum did not delay the effective date of the Act. There is accordingly no issue of ripeness.

> The following provisions of and amendments to the Constitution of the United States are hereby extended to Guam . . . and shall have the *same force and effect there as in the United States or in any State* of the United States:. . . the first to ninth amendments inclusive; the thirteenth amendment; the second sentence of section 1 of the fourteenth amendment; and the fifteenth and nineteenth amendments.

48 U.S.C. § 1421b(u) (emphasis added). The Mink Amendment thus expressly extends to Guam the Due Process Clause of the Fourteenth Amendment, upon which the holding of *Roe* was founded.[4] *See Roe v. Wade*, 410 U.S. at 153.

It may be true, as Guam argues, that the Supreme Court requires a clear indication of congressional intent before interpreting a congressional action as extending a right to the people of Guam. *See Guam v. Olsen*, 431 U.S. 195 (1977). We can scarcely imagine, however, any clearer indication of intent than the language of the Mink Amendment: the relevant constitutional amendments "have the same force and effect" in Guam as in a state of the United States. There is not need, therefore, to go further. *See Ngiraingas v. Sanchez*, 495 U.S. 182, 186-87 (1990) (resorting to legislative history only after determining that the statutory language was unclear). Accordingly, we hold that *Roe v. Wade* applies

[4] The Mink Amendment also extends to Guam every other conceivable constitutional source of the right of privacy. *See Roe*, 410 U.S. at 152 (sources relied on by the Court or individual Justices have included the First Amendment, the Fourth and Fifth Amendments, the penumbra of the Bill of Rights, the Ninth Amendment, and the Fourteenth Amendment).

to Guam as it applies to the states.[5]

C. *Prospective Relief Under 42 U.S.C. § 1983*

Guam next argues that the plaintiffs cannot maintain this action against Governor Ada under 42 U.S.C. § 1983 because he is not a "person" within the meaning of that statute. We hold that he is a "person" when sued in his official capacity for prospective relief.

Section 1983 creates liability for "persons" who, while acting "under color" of state or territorial law, deprive citizens or other persons of rights, privileges, or immunities secured by the Constitution or federal law. 42 U.S.C. § 1983. In *Ngiraingas v. Sanchez*, 495 U.S. 182 (1990), an action for damages, the Supreme Court held that territories are not "persons" within the meaning of § 1983. The Court also stated: "[p]etitioners concede, . . . and we agree, that if Guam is not a person, neither are its officers acting in their official capacity." *Id.* at 192. Guam seizes upon this language. It contends that, because Governor Ada is being sued to prevent him from enforcing a statute of Guam, he is necessarily being sued in his official capacity. Therefore, Guam asserts, he cannot be considered a "person" subject to suit under section 1983.

Guam's argument overlooks the distinction between suits against governmental officials for damages, such as *Ngiraingas*, and those for injunctive relief. The distinction has been spelled out in cases involving state officials. Like territories, states are not "persons" for

[5] Our disposition of this question on the basis of the Mink Amendment makes it unnecessary for us to address the further contention of the plaintiffs that the right of privacy-autonomy protected by *Roe v. Wade* qualifies as a "fundamental" constitutional right applicable to an unincorporated territory by its own force. *See, e.g., Wabol v. Villacrusis*, 908 F.2d 411, 421 (9th Cir. 1990) (only "fundamental" constitutional rights apply in unincorporated territory).

purposes of section 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 63-65 (1989). In addition, state officers, when sued for damages in their official capacities, are likewise not "persons" within the meaning of 1983. *Id.* at 71. Any other conclusion would render meaningless the ruling that states are not "persons"; a judgment against a state official in his or her official capacity runs against the state and its treasury. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985).

The rule is entirely different, however, when the suit is for injunctive relief. "Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" *Will*, 491 U.S. at 71 n.10 (quoting *Kentucky v. Graham*, 473 U.S. at 167 n.14); *see Ex parte Young*, 209 U.S. 123, 159-60 (1908). We can see no reason why the same distinction between injunctive and damages actions against officials should not apply to a territory.

Guam attempts to distinguish *Will* by arguing that Guam is a "federal instrumentality" rather than a sovereign entity like a state. Because Congress maintains control over the Territory, Guam contends that there is no need to apply § 1983 to Guam or its officials.

Guam's argument proves too much. Under its approach, section 1983 would not apply at all in any territory -- not even to municipalities or officials acting in their individual capacities. Such a result would totally nullify the provision of section 1983 imposing liability upon persons acting under color of law of "any State *or Territory*." Accordingly, we conclude that Governor Ada, when sued as he is here in his official capacity for injunctive relief, is a person within the meaning of 42 U.S.C. § 1983.

II

Having determined that the plaintiffs may maintain this action under section 1983, we turn to the substantive due process claim. Two issues arise: (1) whether Guam's Act violates the right of privacy protected by *Roe v. Wade*, and (2) whether subsequent Supreme Court decisions, particularly *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), have so eroded *Roe v. Wade* that *Roe* cannot now be applied to invalidate Guam's Act.

A. *Validity of the Act under Roe v. Wade*

The first issue is not hard to resolve. Guam's Act makes no attempt to comply with *Roe*. In *Roe*, the Supreme Court recognized that the right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy," and that for the state to deny this choice "may force upon the woman a distressful life and future," along with other harms. *Roe*, 410 U.S. at 153. The Court further recognized that limitation of the woman's fundamental right of choice could be justified only by a "compelling state interest." *Id.* at 155.

The Court in *Roe* rejected the state's argument, renewed by Guam here, that the state has a compelling interest in protecting fetal life from the moment of conception. *Id.* at 159. Thus *Roe* recognized the superior right of choice by the woman during the first trimester of pregnancy, and her right during the second trimester limited only by the state's compelling interest in protecting her health. *Id.* at 163. Only after the point of viability did the state's interest in fetal life become compelling and permit the state to proscribe abortion entirely. *Id.* at 163-64.

The Guam Act gives not a nod toward *Roe*. With two narrow exceptions, it simply negates the rights and interests of the pregnant woman and forbids her to

terminate her pregnancy from the moment of conception. It is difficult to imagine a more direct violation of *Roe*. Even the exceptions for abortion to save the mother's life or to prevent grave impairment to her health are hedged with crippling restrictions. The pivotal determination must be made by two physicians "who practice independently of each other"; they must make their determination "using all available means," and subject to subsequent review by a peer review committee. Act, 9 Guam Code Ann. § 31.20. Less cumbersome two-physician and peer review requirements were struck down by the Supreme Court in *Doe v. Bolton*, 410 U.S. 179, 199-200 (1973), decided with *Roe*, and in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 768-71 (1986).

If the core of *Roe* remains good law, then, the Act is clearly unconstitutional. Guam contends, however, that subsequent decisions have so eroded the analysis of *Roe* that Guam's Act should be held to be constitutional under the current state of the law. We now address that contention.

B. *The Status and Applicability of Roe Today*

Guam contends that *Roe* has no force after *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). Putting *Webster* together with non-majority opinions in other cases, Guam contends that the classification of competing interests has changed. Guam relies particularly upon Justice O'Connor's dissents in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. at 814, and *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 452 (1983). According to Guam, five Justices of the Supreme Court now recognize the state's compelling interest in potential human life throughout pregnancy, and no longer adhere to the *Roe* analysis. In *Webster*, a three-Justice plurality stated that it did "not see why the State's interest in

protecting potential human life should come into existence only at the point of viability." *Webster*, 492 U.S. at 519. It also characterized the woman's interest as a "liberty interest," as distinguished from a "fundamental right." *Id.* at 520. Guam would put these statements together with Justice Scalia's view that *Roe* should be overruled. *Id.* at 532. It would then add Justice O'Connor's view that regulations that do not impose an "undue burden" on a woman's right to seek an abortion are sustainable if rationally related to a legitimate state purpose. *Id.* at 529-30; *Thornburgh*, 476 U.S. at 828.[6] Finally, it would include Justice O'Connor's position elsewhere expressed that the state's compelling interest exists throughout pregnancy. *See Akron*, 462 U.S. at 459; *Thornburgh*, 476 U.S. at 828. From this mix, Guam derives the conclusion that its interest in fetal life can overcome the woman's right to choose whether to have an abortion, and that Guam's Act is therefore not unconstitutional on its face.

We reject Guam's construct. The bits and pieces assembled by Guam fall short of compelling us to do that which the Supreme Court itself has declined to do -- overrule *Roe v. Wade*. In *Webster*, the Court modified *Roe* only to the extent necessary to uphold Missouri's requirement of testing for viability. *Webster*, 492 U.S. at 521. The plurality opinion stated that the case afforded no occasion to revisit *Roe*, "and we leave it undisturbed."

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[6] Guam also contends that *Roe*'s requirement of a "compelling interest" on the part of the state was reduced to that of a "rational basis" in *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990) (*Akron II*), and *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990). *Akron II* and *Hodgson* dealt with minor woman, however, and the Court has recognized that "the State has somewhat broader authority to regulate the activities of children than of adults." *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976).

Id. Justice O'Connor found no conflict between Missouri's statute and *Roe*, and similarly concluded that there was no need to reexamine *Roe*. *Id.* at 525-26. Three dissenters opined that *Roe* survived *Webster*, although it was not secure. *Id.* at 537 (dissenting opinion of Justice Blackmun, joined by Justices Brennan and Marshall). Justice Scalia in his concurrence chastised the Court for failing to overrule *Roe*. *Id.* at 532. In the face of these pronouncements, it would be both wrong and presumptuous of us now to declare that *Roe v. Wade* is dead.[7]

We also have severe difficulty accepting the conclusions that Guam draws from the existing mosaic of decisions. In the first place, it is hard to see how Justice O'Connor's view helps Guam: surely an outright criminalization of abortion places an "undue burden" on the exercise of the woman's right.[8] Second, a view of the state's interest in potential life as "compelling" throughout pregnancy does not necessarily mean that it sweeps all other interests out of the way.[9] There is a

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[7] In its most recent abortion-related case, *Rust v. Sullivan*, 111 S. Ct. 1759 (1991), the Supreme Court upheld certain federal regulations against a challenge that they violated a woman's due process right to choose whether to terminate her pregnancy. The Court held that the regulations dealing with activities of federally-funded programs did not violate *Roe v. Wade*. *Id.* at 1777. It did not suggest that *Roe v. Wade* was no longer the law.

[8] Because Justice O'Connor's "undue burden" test is of no assistance to Guam, we need not decide what authoritative effect, if any, it must be given. *See Planned Parenthood v. Casey*, 947 F.2d 682, 687-98 (3d Cir. 1991) (Justice O'Connor's standard is now the law of the land, *cert. granted*, 112 S. Ct. 931 (1992)).

[9] There clearly must be limits to the ability of a state's interest in potential life, whether or not characterized as compelling, to override (continued...)

countervailing right in issue here, although we find little reflection of it in Guam's briefs. No matter how it is characterized, the right of a woman not to be forced to endure a pregnancy and birth is an extremely important one. Pregnancy entails "profound physical, emotional, and psychological consequences." *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 471 (1981). "Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision -- with the guidance of her physician and within the limits specified in *Roe* -- whether to end her pregnancy." *Thornburgh*, 476 U.S. at 772. The individual's interest in exercising control over intimate personal decisions has been recognized in decades of Court precedent. *See id.*; *Akron*, 462 U.S. at 419; *Roe*, 410 U.S. at 167-70 (Stewart, J., concurring); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). We would not lightly conclude that it could be overcome wholesale at any stage of pregnancy by Guam's interest in potential life.

The balancing of these vital individual interests against the state's interest in potential life is not an exercise in mathematics. These forces present a constitutional clash of the first order. Its outcome cannot be predetermined by adopting in the abstract various assembled characterizations of the interests at stake or formulae for weighing them. A more

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[9] (...continued)
all conflicting interests. Potential human life exists in the ovum and sperm. *See Webster*, 492 U.S. at 565-66 (Stevens, J., concurring in part and dissenting in part). A state could maximize that potential by forbidding contraception, or even by requiring regular sexual intercourse by all fertile persons. The prospect is absurd, of course, because there are highly important constitutional rights that would be interfered with by such a measure.

fundamental process is at work. *Roe* worked through that process and came to a result that has affected the lives and rights of millions of people. It is not for this court to discard that precedent.[10]

III

The judgment of the district court permanently enjoining the enforcement of Guam's Public Law 20-134 is AFFIRMED.[11]

Counsel

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[10] We find it unnecessary to address the plaintiffs' arguments that Guam's Act is void for vagueness and overbreadth. We also decline to address the plaintiffs' arguments based on the Establishment Clause, the Equal Protection and Due Process Clauses, the Eighth and Thirteenth Amendments, and comparable provisions of the Guam Bill of Rights, 48 U.S.C. § 1421b.

[11] The plaintiffs have requested attorneys' fees in connection with this appeal. They will be entitled to them if they ultimately prevail in this proceeding. 42 U.S.C. § 1988; *see Hutto v. Finney*, 437 U.S. 678, 692 (1978). If the plaintiffs apply for fees in this court, we will transfer their application to the district court for a determination of the recoverable amount. In those proceedings, Guam will have the opportunity to contest the standing of the plaintiffs who are not health care providers, to the extent that the issue has any effect on recoverable fees.

Fees at the trial level were granted in a separate proceeding, separately appealable.

(22) (21)

Nos. 91-744 and 91-902

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OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, ET AL., PETITIONERS

v.

ROBERT P. CASEY, ET AL.

ROBERT P. CASEY, ET AL., PETITIONERS

v.

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

1. Did the court of appeals err in upholding the constitutionality of the following provisions of the Pennsylvania Abortion Control Act: (a) 18 Pa. Cons. Stat. Ann. § 3203 (Purdon 1983 & Supp. 1991) (definition of medical emergency); (b) 18 Pa. Cons. Stat. Ann. § 3205 (Purdon 1983 & Supp. 1991) (informed consent); (c) 18 Pa. Cons. Stat. Ann. § 3206 (Purdon 1983 & Supp. 1991) (parental consent); (d) 18 Pa. Cons. Stat. Ann. §§ 3207 and 3214 (Purdon 1983 & Supp. 1991) reporting requirements)?

2. Did the court of appeals err in holding 18 Pa. Cons. Stat. Ann. § 3209 (Purdon Supp. 1991) (spousal notice) unconstitutional?

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	4
Argument:	
The Pennsylvania Abortion Control Act does not violate the Constitution	5
I. Abortion regulations should be upheld if they are reasonably designed to serve a legitimate state interest	6
A. Abortion regulations should be subject to heightened scrutiny only if they implicate a fundamental right	6
B. The Pennsylvania Abortion Control Act does not implicate a fundamental right under the Due Process Clause	8
1. The Nation's history and traditions do not establish a fundamental right to abortion	9
2. The State has a compelling interest in protecting the fetus throughout pregnancy	15
II. The Pennsylvania Abortion Control Act is reasonably designed to advance legitimate state interests	19
Conclusion	29

TABLE OF AUTHORITIES

Cases:

Akron v. *Akron Center for Reproductive Health*, 462 U.S. 416 (1983)	3, 5, 17, 20, 25
Bolger v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983)	11
Bowen v. *Kendrick*, 487 U.S. 589 (1988)	18
Bowers v. *Hardwick*, 478 U.S. 186 (1986)	7, 8, 9

Cases—Continued: Page

Burnett v. *Coronado Oil & Gas Co.*, 285 U.S. 393 (1932) 9
Burnham v. *Superior Court*, 495 U.S. 604 (1990) .. 8
Califano v. *Aznavorian*, 439 U.S. 170 (1978) 7
Carey v. *Population Servs. Int'l*, 431 U.S. 678 (1977) 15
Coker v. *Georgia*, 433 U.S. 584 (1977) 14
Cox v. *Wood*, 247 U.S. 3 (1918) 14
Cruzan v. *Director*, 110 S. Ct. 2841 (1990) 8, 20
DeShaney v. *Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989) 14
Doe v. *Doe*, 365 Mass. 556, 314 N.E.2d 128 (1974) 23
Employment Division, Dep't of Human Resources v. *Smith*, 494 U.S. 872 (1990) 18
Ferguson v. *Skrupa*, 372 U.S. 726 (1963) 7
Geduldig v. *Aiello*, 417 U.S. 484 (1974) 26
Griffin v. *United States*, 112 S. Ct. 466 (1991) 8
Griswold v. *Connecticut*, 381 U.S. 479 (1965) 6-7, 8
Haig v. *Agee*, 453 U.S. 280 (1981) 15
Harris v. *McRae*, 448 U.S. 297 (1980) 13, 18, 20, 22, 26
Hodgson v. *Minnesota*, 110 S. Ct. 2926 (1990) 1, 5, 22, 23, 25
Illinois v. *Gates*, 462 U.S. 213 (1983) 16
Jacobson v. *Massachusetts*, 197 U.S. 11 (1905) 14, 27
Jehovah's Witnesses v. *King County Hosp.*, 390 U.S. 598 (1968), aff'g 278 F. Supp. 488 (W.D. Wash. 1967) 18
Judgment of Feb. 25, 1975, 39 BVerfGE 1, *reprinted in* 9 J. Marshall J. Prac. & Proc. 605 (1975) 12
Kirchberg v. *Feenstra*, 450 U.S. 455 (1981) 26
Labine v. *Vincent*, 401 U.S. 532 (1971) 24, 25
Lee v. *Washington*, 390 U.S. 333 (1968) 15
Lehr v. *Robertson*, 463 U.S. 248 (1983) 24
Lindsey v. *Normet*, 405 U.S. 56 (1972) 14
Maher v. *Roe*, 432 U.S. 464 (1977) 21, 26
Marks v. *United States*, 430 U.S. 188 (1977) 3
McKeiver v. *Pennsylvania*, 403 U.S. 528 (1971) 8
Metro Broadcasting, Inc. v. *FCC*, 110 S. Ct. 2997 (1990) 5

Cases—Continued: Page

Metropolitan Life Ins. Co. v. *Ward*, 470 U.S. 869 (1985) 15
Michael H. v. *Gerald D.*, 491 U.S. 110 (1989) 7-8, 9, 12, 13, 24
Michael M. v. *Superior Court*, 450 U.S. 464 (1981) 14
Minnesota v. *Probate Court*, 309 U.S. 270 (1940) .. 27
Miranda v. *Arizona*, 384 U.S. 436 (1966) 16
Moore v. *East Cleveland*, 431 U.S. 494 (1977) 6, 7, 8
Morgentaler v. *Regina*, 1 S.C.R. 30, 44 D.L.R. 4th 385 (1988) 12
Near v. *Minnesota*, 283 U.S. 697 (1931) 15-16
Ohio v. *Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990) 19, 24
Palko v. *Connecticut*, 302 U.S. 319 (1937) 7
Patterson v. *New York*, 432 U.S. 197 (1977) 8
Pierce v. *Society of Sisters*, 268 U.S. 510 (1925) .. 6
Planned Parenthood v. *Danforth*, 428 U.S. 52 (1976) 20, 24, 28
Planned Parenthood Ass'n v. *Ashcroft*, 462 U.S. 476 (1983) 28
Poe v. *Gerstein*, 517 F.2d 787 (5th Cir. 1975), aff'd, 428 U.S. 901 (1976) 23
Poe v. *Ullman*, 367 U.S. 497 (1961) 16
Prince v. *Massachusetts*, 321 U.S. 158 (1944) 18
Reynolds v. *United States*, 98 U.S. 145 (1879) 18
Riley v. *National Fed'n of the Blind*, 487 U.S. 781 (1988) 21
Roe v. *Wade*, 410 U.S. 113 (1973) .....*passim*
Rust v. *Sullivan*, 111 S. Ct. 1759 (1991) 8
Schad v. *Arizona*, 111 S. Ct. 2491 (1991) 8
Scheinberg v. *Smith*, 659 F.2d 476 (5th Cir. 1981) 25
Schloendorff v. *Society of the New York Hosp.*, 211 N.Y. 125, 105 N.E. 92 (1914) 13
Schmerber v. *California*, 384 U.S. 757 (1966) 13-14
Selective Draft Law Cases, 245 U.S. 366 (1918) 14
Skinner v. *Oklahoma*, 316 U.S. 535 (1942) 24
Slater v. *Baker*, 2 Wils. 359, 95 Eng. 860 (K.B. 1767) 20
Snyder v. *Massachusetts*, 291 U.S. 97 (1934) 8

Cases—Continued: Page

Sosna v. *Iowa*, 419 U.S. 393 (1975) 25
Stanford v. *Kentucky*, 492 U.S. 361 (1989) 8, 11, 12
Thornburgh v. *American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) 3, 5, 13, 17, 18, 20, 21, 27, 28
United States v. *Kozminski*, 487 U.S. 931 (1988).. 19
United States v. *O'Brien*, 391 U.S. 367 (1968)..... 11
United States v. *Salerno*, 481 U.S. 739 (1987) 19
United States Dep't of Agric. v. *Moreno*, 413 U.S. 528 (1973) 15
Vance v. *Bradley*, 440 U.S. 93 (1979) 21
Virginia v. *American Booksellers Ass'n*, 484 U.S. 383 (1988) 27
Vitek v. *Jones*, 445 U.S. 480 (1980) 13
Washington v. *Harper*, 494 U.S. 210 (1990) 13
Webster v. *Reproductive Health Care Servs.*, 492 U.S. 490 (1989) 1, 5, 6, 9, 14, 15, 17, 19, 26
Williamson v. *Lee Optical Co.*, 348 U.S. 483 (1955) 7
Winston v. *Lee*, 470 U.S. 753 (1985) 14
Wyman v. *James*, 400 U.S. 309 (1971) 28
Zauderer v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985) 21
Zobel v. *Williams*, 457 U.S. 55 (1982) 15

Constitution and statutes:

U.S. Const.:
Amend. I 21
Establishment Clause 18
Free Exercise Clause 18, 19
Amend. IV 14
Amend. V (Due Process Clause) 5, 6, 8, 14-15
Amend. VIII 8
Amend. X 6
Amend. XIII 19
Amend. XIV 4, 10
Equal Protection Clause 26
Act of Sept. 30, 1976, Pub. L. No. 94-439, § 209, 90 Stat. 1434 (Hyde Amendment) 2, 18

Statutes—Continued: Page

Public Health Service Act (Adolescent Family Life Act of 1981), 42 U.S.C. 300z *et seq.* 2, 18
Abortion Control Act, 18 Pa. Cons. Stat. Ann. (Purdon):
§§ 3201-3220 (1983 & Supp. 1991) 2
§ 3202(a) (1983) 11
§ 3202(b) (1983) 2
§ 3202(b)(4) (1983) 11
§ 3203 (Supp. 1991) 26
§ 3203(a) (1983) 2
§ 3204(c) (Supp. 1991) 2, 18
§ 3205(a)(1) (Supp. 1991) 20
§ 3205(a)(2) (1983 & Supp. 1991) 20
§ 3206(a) (1983 & Supp. 1991) 22
§ 3206(b) (1983) 22
§ 3206(c) (1983) 22
§ 3206(d) (1983) 22
§ 3206(e)-(h) (1983 & Supp. 1991) 22
§ 3207 (1983 & Supp. 1991) 27
§ 3209(a) (Supp. 1991) 23, 25
§ 3209(b) (Supp. 1991) 23
§ 3211(a) (1983 & Supp. 1991) 2
§ 3214 (Supp. 1991) 27-28
§ 3214(a) (Supp. 1991) 27, 28
Colo. Rev. Stat. Ann. § 18-6-101(1) (West 1986) 23
Lord Ellenborough's Act, 1803, 43 Geo. 3, ch. 58 10

Miscellaneous:

A. Bickel, *The Morality of Consent* (1975) 9
Bopp, *Will There Be a Constitutional Right to Abortion After the Reconsideration of* Roe *v.* Wade?, 15 J. Contemp. L. 131 (1989) 19
Burt, *The Constitution of the Family*, 1979 Sup. Ct. Rev. 329 9
A. Cox, *The Court and the Constitution* (1987)..... 9
J. Ely, *Democracy and Distrust—A Theory of Judicial Review* (1980) 9
Ely, *The Wages of Crying Wolf: A Comment on* Roe *v.* Wade, 82 Yale L.J. 920 (1973) 16-17
Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159 ..... 9, 11

Miscellaneous—Continued: Page

M. Glendon, *Abortion and Divorce in Western Law* (1987) 12
Gunther, *Some Reflections on the Judicial Role: Distinctions, Roots, and Prospects*, 1979 Wash. U.L.Q. 817 9
3 F. Harper, F. James, Jr. & O. Gray, *The Law of Torts* (2d ed. 1986) 13, 20
J. Mohr, *Abortion in America* (1978) 10, 11, 17
Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261 (1992) 10, 11
L. Tribe, *American Constitutional Law* (2d ed. 1988) 17
Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L.J. 221 (1973) 9

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-744

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, ET AL., PETITIONERS,

v.

ROBERT P. CASEY, ET AL.

No. 91-902

ROBERT P. CASEY, ET AL., PETITIONERS

v.

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This Court granted review in order to resolve several issues regarding the constitutionality of the 1988 and 1989 amendments to the Pennsylvania Abortion Control Act. In *Webster* v. *Reproductive Health Care Servs.*, 492 U.S. 490 (1989), and *Hodgson* v. *Minnesota*, 110 S. Ct. 2926 (1990), the United States filed briefs as an amicus

curiae in which we argued that *Roe* v. *Wade*, 410 U.S. 113 (1973), was wrongly decided and should be overruled. Moreover, Congress has enacted laws affecting abortion.[1] The United States therefore has a substantial interest in the outcome of this case.

STATEMENT

1. In 1988 and 1989, Pennsylvania amended its Abortion Control Act, 18 Pa. Cons. Stat. Ann. §§ 3201-3220 (Purdon 1983 & Supp. 1991). The purpose of the Act is to "protect hereby the life and health of the woman subject to abortion" and "the child subject to abortion," to "foster the development of standards of professional conduct in a critical area of medical practice," to "provide for development of statistical data," and to "protect the right of the minor woman voluntarily to decide to submit to abortion or to carry her child to term." *Id.* § 3203(a) (Purdon 1983); see also *id.* § 3202(b) (Purdon 1983) (legislative findings). The Act outlaws post-viability abortions and pre-viability abortions based on the fetus's sex. *Id.* § 3204(c) (Purdon Supp. 1991), § 3211(a) (Purdon 1983 & Supp. 1991). Otherwise, the Act regulates but does not ban abortion. Five such regulations are at issue here: the informed consent, informed parental consent, and spousal notification requirements; the definition of a medical emergency, which is an exception to the first three provisions; and certain reporting requirements.

2. Petitioners, five abortion clinics and one physician, brought this action three days before the 1988 amendments would have taken effect, seeking to have those amendments (and later the 1989 amendments) declared unconstitutional. The district court entered preliminary injunctions against the 1988 and 1989 amendments. After

[1] *E.g.*, Act of Sept. 30, 1976, Pub. L. No. 94-439, § 209, 90 Stat. 1434 (the Hyde Amendment); Public Health Service Act (the Adolescent Family Life Act of 1981), 42 U.S.C. 300z *et seq.*

a bench trial, relying on *Roe* v. *Wade*, *Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (*Akron I*), and *Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), the court held unconstitutional the five provisions noted above and permanently enjoined their enforcement. 91-744 Pet. App. (Pet. App.) 104a-287a.

3. The court of appeals, by a divided vote, affirmed in part and reversed in part. Pet. App. 1a-103a. At the outset, the court addressed the correct standard of review for abortion regulations. Relying on *Marks* v. *United States*, 430 U.S. 188 (1977), the court concluded that when this Court issues a judgment without a majority opinion, "the holding of the Court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds." Pet. App. 20a, 15a-24a. Applying that approach to this Court's decisions, the court held that the strict scrutiny standard of *Roe*, *Akron I*, and *Thornburgh* was no longer applicable after *Webster* and *Hodgson*. Instead, the court determined, the undue burden standard adopted by Justice O'Connor now constituted the governing rule. Pet. App. 24a-30a.

The Third Circuit then applied the undue burden standard to the Pennsylvania Act. The court unanimously held that the definition of medical emergency included conditions posing a significant risk of death or serious injury to a woman, and that the informed consent, informed parental consent, and reporting requirements did not unduly burden a woman's right to an abortion. Pet. App. 33a-60a, 75a-85a. By contrast, a majority of the court held that the spousal notification provision was unduly burdensome and that the State lacked a compelling interest in ensuring such notification. Pet. App. 60a-74a. Judge Alito dissented from that portion of the majority's decision. Pet. App. 86a-103a.

SUMMARY OF ARGUMENT

I. Under this Court's decisions, a liberty interest is "fundamental" and thus deserves heightened protection only if our Nation's history and traditions have protected that interest from state restriction. Those sources do not establish a fundamental right to abortion. Abortion after quickening was a crime at common law; the first English abortion statute outlawed abortions throughout pregnancy; state laws condemning or restricting abortion were common when the Fourteenth Amendment was ratified; and 21 of those laws were still in existence in 1973. Thus, strict scrutiny is inappropriate. The correct standard of review is the one endorsed by the *Webster* plurality. In any event, a State has a compelling interest in protecting fetal life throughout pregnancy.

II. The challenged provisions of the Pennsylvania Act are reasonably designed to advance legitimate state interests. The informed consent and waiting period requirements ensure that a woman knows the relevant facts and can reflect on them before making a final decision. The informed parental consent requirement enables parents to make important decisions affecting their child. The spousal notification requirement can help protect the life of a fetus, the integrity of the family unit, and the husband's interests in procreation within marriage and the potential life of his unborn child. The definition of medical emergency includes those conditions that put a woman's life or health at significant risk. The reporting rules help in enforcing the ban on abortion of viable fetuses (except to protect a mother's life or health), in advancing medical knowledge, and in informing the public about the use of state tax dollars.

ARGUMENT

THE PENNSYLVANIA ABORTION CONTROL ACT DOES NOT VIOLATE THE CONSTITUTION

In *Roe* v. *Wade*, a divided Court held that a woman has a fundamental right to an abortion; the Court also adopted a complex trimester framework to determine whether and how a State may regulate abortion. Since then, a majority of the Members of this Court has expressed the view that *Roe* and succeeding cases should be limited or overruled. See *Webster*, 492 U.S. at 517-521 (plurality opinion of Rehnquist, C.J., joined by White & Kennedy, JJ.); *id.* at 532 (opinion of Scalia, J.); *Hodgson*, 110 S. Ct. at 2984 (Scalia, J., concurring); *Thornburgh*, 476 U.S. at 786-797 (White, J., dissenting, joined by Rehnquist, J.); *Akron I*, 462 U.S. at 453-459 (O'Connor, J., dissenting, joined by White & Rehnquist, JJ.). At the same time, none of the opinions in recent abortion cases commanded a majority. The result is that considerable uncertainty now prevails with respect to the proper standard of review applicable when legislation affecting abortion is challenged under the Due Process Clause. The Third Circuit's opinion in this case illustrates this uncertainty.

Ascertaining the correct standard of review is not only the threshold issue, but also a critical one. Here, as elsewhere, the question of the correct standard that the courts should employ is not merely "a lawyer's quibble over words," but "establishes whether and when the Court and Constitution allow the Government to" regulate a woman's abortion decision. *Metro Broadcasting, Inc.* v. *FCC*, 110 S. Ct. 2997, 3033 (1990) (O'Connor, J., dissenting). This issue is one in need of clarification if the legislatures, lower courts, and litigants are to have guidance in this difficult area. We believe that the correct standard was the one articulated by the *Webster* plurality: Is a regulation reasonably designed to serve a legitimate state inter-

est? That standard should be applied to the questions in this case and to abortion regulations generally.[2]

I. ABORTION REGULATIONS SHOULD BE UPHELD IF THEY ARE REASONABLY DESIGNED TO SERVE A LEGITIMATE STATE INTEREST

A. Abortion Regulations Should Be Subject To Heightened Scrutiny Only If They Implicate A Fundamental Right

The ultimate source for constitutional rights is the text of the Constitution. That text, of course, is silent with respect to abortion; the Constitution leaves this matter to the States, since only the States possess a general, regulatory police power. See *Roe*, 410 U.S. at 177 (Rehnquist, J., dissenting) ("the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter"); U.S. Const. Amend. X. The "right to an abortion" was judicially recognized in *Roe* as "derived from the Due Process Clause," *Webster*, 492 U.S. at 521 (plurality opinion); *Roe*, 410 U.S. at 153. By its terms, however, the Due Process Clause seeks to ensure that the government affords a person the process she is due before it attempts to deprive her of life, liberty, or property. The text of the Clause therefore focuses on procedure, not substance.

This Court's decisions nevertheless hold that the Clause provides a measure of substantive protection to certain liberty interests. See, *e.g.*, *Moore* v. *East Cleveland*, 431 U.S. 494 (1977); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Griswold* v. *Connecticut*, 381 U.S. 479, 501

[2] Petitioners note, Pet. Br. 36-37, that we urged this Court to adopt an "undue burden" analysis in *Akron I*, but criticized and abandoned that standard in *Webster* and *Hodgson*. We adhere to our views as expressed in the latter two cases. In our view, the undue burden standard begs the question at issue (namely, whether there is a fundamental right to abortion) and does not provide a meaningful guide for assessing the weight of the competing interests.

(1965) (Harlan, J., concurring in the judgment). At the same time, the Court has been cautious in identifying such rights, recognizing that once the courts venture beyond the "core textual meaning" of "liberty" as freedom from bodily restraint, the imputation of substance to that concept is a "treacherous" undertaking. *Michael H.* v. *Gerald D.*, 491 U.S. 110, 121 (1989) (plurality opinion) (citation omitted). Accordingly, the Court has recognized that it "is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." *Bowers* v. *Hardwick*, 478 U.S. 186, 194 (1986).

The general standard of review in assessing a substantive due process claim is highly deferential to legislative judgments. As a rule, a state or federal law that trenches on an individual's liberty interest will be upheld as long as it is rationally related to a legitimate governmental interest. See, *e.g.*, *Califano* v. *Aznavorian*, 439 U.S. 170, 176-178 (1978); *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955). In some sensitive areas, however, the Court has gone further and held that certain liberty interests rise to the level of "fundamental rights" and are subject to more exacting scrutiny. *Michael H.*, 491 U.S. at 122 (plurality opinion). Where that is the case, the State may restrict such a liberty interest only through means that are narrowly tailored to serve a compelling state interest. *Roe* v. *Wade*, 410 U.S. at 155-156 (collecting cases). Accordingly, the applicable standard of review in substantive due process cases is principally a function of the methodology used for identifying what rights are "fundamental."

This Court has held that a liberty interest will be deemed fundamental if it is "implicit in the concept of ordered liberty," *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937), is "deeply rooted in this Nation's history and tradition," *Moore*, 431 U.S. at 503 (plurality opinion), or is "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Michael H.*, 491

U.S. at 122 (plurality opinion) (quoting *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934)). See *Bowers*, 478 U.S. at 192-194. The precise formulation may vary, but the governing methodology rests on the Nation's history and traditions. *E.g.*, *Burnham* v. *Superior Court*, 495 U.S. 604, 608-619 (1990) (plurality opinion); *Michael H.*, 491 U.S. at 122-130 (plurality opinion); *Bowers*, 478 U.S. at 192-194; *Moore*, 431 U.S. at 504 n.12 (plurality opinion); *Griswold*, 381 U.S. at 501 (Harlan, J., concurring in the judgment). See *Cruzan* v. *Director*, 110 S. Ct. 2841, 2846-2851 & n.7 (1990).[3] By so limiting fundamental rights, the Court has sought, in the words of the *Michael H.* plurality, to "prevent future generations from lightly casting aside important traditional values," while assuring that the Due Process Clause does not become a license "to invent new ones." 491 U.S. at 122 n.2. See *Moore*, 431 U.S. at 504 n.12 (plurality opinion).

B. The Pennsylvania Abortion Control Act Does Not Implicate A Fundamental Right Under The Due Process Clause

Petitioners' principal submission is that the Court should reaffirm the fundamental right to abortion identified in *Roe*. As we explained in our briefs in *Akron I*, *Thornburgh*, *Webster*, *Hodgson*, and *Rust* v. *Sullivan*, 111 S. Ct. 1759 (1991), *Roe* v. *Wade* was wrongly decided and should be overruled. We strongly adhere to that position in this case.[4] But regardless of whether this

[3] That approach is consistent with this Court's procedural due process and Eighth Amendment decisions. In those areas, too, this Court has insisted that, at a minimum, history and tradition must inform the otherwise broad and general constitutional text. See, *e.g.*, *Griffin* v. *United States*, 112 S. Ct. 466, 469-470 (1991); *Schad* v. *Arizona*, 111 S. Ct. 2491, 2500-2503 (1991) (plurality opinion); *id.* at 2505-2507 (opinion of Scalia, J.); *Stanford* v. *Kentucky*, 492 U.S. 361, 368-370 (1989); *Patterson* v. *New York*, 432 U.S. 197, 202 (1977); *McKeiver* v. *Pennsylvania*, 403 U.S. 528, 548 (1971) (plurality opinion).

[4] As we explained in our *Webster* brief (at 9-10), stare decisis considerations do not preclude reconsidering and overruling *Roe*.

case requires reconsideration of *Roe*'s actual holding, see *Webster*, 492 U.S. at 521 (plurality opinion), the Court should clarify the standard of review of abortion regulation and, in so doing, make clear that the liberty interest recognized in *Webster* does not rise to the exceptional level of a fundamental right.

1. *The Nation's history and traditions do not establish a fundamental right to abortion*

In *Webster*, a plurality of the Court determined that a woman's interest in having an abortion is a form of liberty protected by due process against arbitrary deprivation by the State. 492 U.S. at 520. Under the traditional means used by this Court to identify fundamental rights, however, no credible foundation exists for the claim that a woman enjoys a fundamental right to abortion.[5] That conclusion follows whether the inquiry is framed broadly, in terms of privacy or reproductive choice, or narrowly, in terms of abortion. Compare *Michael H.*, 491 U.S. at 127-128 n.6 (opinion of Scalia, J.), with *id.* at 132 (O'Connor, J., concurring in part).

If "[n]either the length of time a majority has held its convictions [n]or the passions with which it defends them can withdraw legislation from this Court's scrutiny," *Bowers*, 478 U.S. at 210 (Blackmun, J., dissenting), neither factor should immunize one of this Court's constitutional rulings from re-examination, because in such cases "correction through legislative action is practically impossible." *Burnett* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting).

[5] That judgment is shared by a broad spectrum of constitutional scholars. See, *e.g.*, A. Bickel, *The Morality of Consent* 27-29 (1975); Burt, *The Constitution of the Family*, 1979 Sup. Ct. Rev. 329, 371-373; A. Cox, *The Court and the Constitution* 322-338 (1987); J. Ely, *Democracy and Distrust—A Theory of Judicial Review* 2-3, 247-248 n.52 (1980); Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159; Gunther, *Some Reflections on the Judicial Role: Distinctions, Roots, and Prospects*, 1979 Wash. U.L.Q. 817, 819; Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L.J. 221, 297-311 (1973).

To examine this proposition, we turn to explore the legal history and traditions of the American people to discern the basis and nature of any such right.

a. It is beyond dispute that abortion after "quickening" was an offense at common law.[6] The first English abortion law, Lord Ellenborough's Act, 1803, 43 Geo. 3, ch. 58, outlawed abortion throughout pregnancy; it distinguished pre- from post-quickening abortions only to fix the severity of punishment. Early in our history, this Nation embraced the common law. In 1821, however, States began to enact laws condemning or restricting abortion. By the time the Fourteenth Amendment was ratified, such legislation was commonplace; in 1868, at least 28 of the then-37 States and 8 Territories had statutes banning or limiting abortion. The Reconstruction Era witnessed "the most important burst of anti-abortion legislation in the nation's history." J. Mohr, *Abortion in America* 200 (1978).[7] By the turn of the century, after "the passage of unambiguous anti-abortion laws in most of the states that had not already acted during the previous twenty years," the country had completed the transition from a Nation that followed the common law rule

[6] The historical materials are discussed in *Roe*, 410 U.S. at 132-141; *id.* at 174-177 & nn.1-2 (Rehnquist, J., dissenting); J. Mohr, *Abortion in America* (1978); Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261, 281-282 (1992); Amicus Br. of the American Academy of Medical Ethics; Amicus Br. of Certain American State Legislators.

[7] "At least 40 anti-abortion statutes of various kinds were placed on the state and territorial lawbooks during that period [between 1860 and 1880]; over 30 in the years from 1866 through 1877 alone. Some 13 jurisdictions formally outlawed abortion for the first time, and at least 21 states revised their already existing statutes on the subject. More significantly, most of the legislation passed between 1860 and 1880 explicitly accepted the regulars' [*i.e.*, regular physicians'] assertions that the interruption of gestation at any point in a pregnancy should be a crime and that the state itself should try actively to restrict the practice of abortion." J. Mohr, *supra*, at 200.

outlawing post-quickening abortion to "a nation where abortion was legally and officially proscribed." *Id.* at 226. "Every state in the Union had an anti-abortion law of some kind on its books by 1900 except Kentucky, where the state courts outlawed the practice anyway." *Id.* at 229-230. With minor refinements and adjustments, those statutes, which reflected "a basic legislative consensus," remained unchanged until the 1960's. *Id.* at 229. And 21 of those laws were in effect in 1973 when *Roe* was decided, even after a decade of efforts at liberalization.[8]

In view of this historical record, it cannot persuasively be argued that the interest in having an abortion is so deeply rooted in our history as to be deemed "fundamental." The record in favor of the right to an abortion is no stronger than the record in *Michael H.*, where the court found no fundamental right to visitation privileges by adulterous fathers, or in *Bowers*, where the Court found no fundamental right to engage in homosexual sodomy. Cf. *Stanford* v. *Kentucky*, 492 U.S. 361, 370-373 (1989) (no consensus against execution of 16-year-olds when a majority of the States with capital punishment

[8] Amici 250 Historians contend that laws banning abortion were originally adopted for various ignoble reasons, not to protect life in the womb. 250 Historians Br. 15-26. That claim is overstated, J. Mohr, *supra*, 35-36, 165, 200; Siegel, 44 Stan. L. Rev. at 282, but it is irrelevant in any event. "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive," *United States* v. *O'Brien*, 391 U.S. 367, 383 (1968), and that "the insufficiency of the original motivation does not diminish other interests that the restriction may now serve," *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 71 (1983); Epstein, 1973 Sup. Ct. Rev. at 168 n.34. Pennsylvania "places a supreme value upon protecting human life," including prenatal life, 18 Pa. Cons. Stat. Ann. § 3202(b)(4) (Purdon 1983), and the purpose of this Act is to "protect hereby the life and health of the woman subject to abortion" and "the child subject to abortion," *id.* § 3202(a) (Purdon 1983). Just as the widespread use of controlled substances does not render the drug laws unconstitutional, so, too, the prevalance of illegal abortions does not undermine laws outlawing or restricting abortion.

allows them to be executed). In short, this Nation's history rebuts any claim that the right to obtain an abortion is fundamental, since that history does not "exclude * * * a societal tradition of enacting laws *denying* that interest." *Michael H.*, 491 U.S. at 122 n.2 (opinion of Scalia, J., joined by Rehnquist, C.J., O'Connor & Kennedy, JJ.).[9]

[9] The prevalence of bans or restrictions on abortion prior to *Roe* was "not merely an historical accident." *Stanford*, 492 U.S. at 369 n.1 (citation omitted). After studying the abortion laws of 20 Western countries, a leading comparative law scholar reported that "we have less regulation of abortion in the interest of the fetus than any other Western nation," and "to a greater extent than in any other country, our courts have shut down the legislative process of bargaining, education, and persuasion on the abortion issue." M. Glendon, *Abortion and Divorce in Western Law* 2 (1987). Two of those nations (Belgium and Ireland) have blanket prohibitions against abortion in their criminal law, subject only to the defense of necessity. Four countries (Canada, Portugal, Spain, and Switzerland) allow abortion only early in pregnancy and only in restricted instances, such as if there is a serious danger to the pregnant woman's health, a likelihood of serious disease or defect in the fetus, or the pregnancy resulted from rape or incest. Eight countries (Great Britain, Finland, France, West Germany, Iceland, Italy, Luxembourg, and the Netherlands) permit abortion in early pregnancy in a wider variety of circumstances that pose a particular hardship for a pregnant woman. Five nations (Austria, Denmark, Greece, Norway, and Sweden) allow elective abortions early in pregnancy, and strictly limit abortions thereafter. Only the United States permits elective abortion until viability. *Id.* at 13-15 & Table 1, 145-154. Indeed, Eastern European nations and the former Soviet Union had greater restrictions on abortion than this country does. *Id.* at 23-24. Thus, the fact that the regime created by *Roe* is so out of step with these judgments suggests that it is *Roe*, not the pre-*Roe* state of our law, that is "an historical accident."

After the publication of Professor Glendon's book, the Canadian Supreme Court struck down its abortion law on grounds similar to those stated in *Roe*. *Morgentaler* v. *Regina*, 1 S.C.R. 30, 44 D.L.R.4th 385 (1988). The West German constitutional court, by contrast, had earlier struck down a law liberalizing access to abortion on the grounds that " 'life developing within the womb' is constitutionally protected." *Judgment of Feb. 25, 1975*, 39 BVerfGE 1 (quoted in M. Glendon, *supra*, at 26). See 9 J. Marshall J. Prac. & Proc. 605 (1975) (reprinting decision).

b. Petitioners argue that "compelled continuation of a pregnancy infringes on a woman's right to bodily integrity by imposing substantial physical intrusions and significant risks of physical harm" and that abortion restrictions deny women "the right to make autonomous decisions about reproduction and family planning." Pet. Br. 24, 26. *Roe* made a similar point. 410 U.S. at 153.[10]

[10] *Roe* did not seek to ground a right to abortion in the text of the Constitution or this Nation's history and tradition. Instead, *Roe* fashioned the "fundamental right" to abortion by reference to several decisions of this Court. *Roe* described those decisions as recognizing a "guarantee of personal privacy," which "has some extension to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education." 410 U.S. at 152-153 (citations omitted). "This right to privacy," *Roe* declared, "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153.

That line of reasoning, with all respect, is deeply flawed. Even if this Court's pre-*Roe* decisions have a common denominator, it is not a highly abstract right to "privacy," but a recognition of the importance of the family. Cf. *Michael H.*, 491 U.S. at 123 (plurality opinion). Even if those cases have "some extension" to "activities relating to" the family, abortion is "inherently different" from activities such as the use of contraceptives. Abortion, after all, "involves the purposeful termination of potential life." *Harris* v. *McRae*, 448 U.S. 297, 325 (1980); see generally *Thornburgh*, 476 U.S. at 792 n.2 (White, J., dissenting). For that reason, *Roe* itself realized that a "pregnant woman cannot be isolated in her privacy." 410 U.S. at 159. In sum, *Roe* derived a right to abortion from pre-*Roe* cases only by creating an artificial common denominator while denying what makes abortion unique.

By contrast, a law *mandating* abortions would pose a starkly different issue. At common law, a competent adult had a right to refuse medical care, and involuntary treatment was a battery absent consent or an emergency. *Schloendorff* v. *Society of the New York Hosp.*, 211 N.Y. 125, 129-130, 105 N.E. 92, 93 (1914) (Cardozo, J.); 3 F. Harper, F. James, Jr. & O. Gray, *The Law of Torts* § 17.1 (2d ed. 1986). Relying on that tradition, the Court has held that a competent adult has a liberty interest protected by due process in refusing unwanted, state-administered medical care. *Washington* v. *Harper*, 494 U.S. 210, 229 (1990); *Vitek* v. *Jones*, 445 U.S. 480, 494 (1980). Moreover, a compelled intrusion into a person's body is a "search" under the Fourth Amendment, *Schmer-*

We readily agree that pregnancy (like abortion) entails "profound physical, emotional, and psychological consequences." *Michael M.* v. *Superior Court*, 450 U.S. 464, 471 (1981) (plurality opinion). But those burdens, albeit substantial, do not themselves give rise to a fundamental right. As this Court has recognized, governmental refusal to fund abortions can be quite burdensome, yet the Constitution does not guarantee a woman the right to such funds. And that is so even if the State funds childbirth expenses. *Webster*, 492 U.S. at 507-511. The refusal to supply other forms of government assistance can prove harmful, yet the Constitution does not require a State to intervene to prevent harm from befalling a person. *DeShaney* v. *Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989) (police protection); *Lindsey* v. *Normet*, 405 U.S. 56 (1972) (shelter). If risk of physical or psychological harm were sufficient to create a constitutional right, a person would arguably have a right to avoid vaccinations or military service. But there is no such right. *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1905); *Selective Draft Law Cases*, 245 U.S. 366 (1918); *Cox* v. *Wood*, 247 U.S. 3 (1918). In sum, risk of harm, standing alone, does not give rise to a constitutional right.

Nor is this conclusion altered by the fact that abortion is a controversy "of a 'sensitive and emotional nature,' generating heated public debate and controversy, 'with vigorous opposing views' and 'deeply and seemingly absolute convictions.'" New York *et al.* Br. 11 (quoting *Roe*, 410 U.S. at 116). Other subjects, such as capital punishment, likewise evoke strong emotions and inspire heated debate. Yet the Constitution leaves such questions in the main to the political process to decide.[11] In short, the Due

ber v. *California*, 384 U.S. 757, 767-768 (1966), and the Fourth Amendment prohibits as unreasonable certain forcible intrusions into a person's body, *Winston* v. *Lee*, 470 U.S. 753 (1985).

[11] The Court has, of course, established limits in that regard. See, *e.g.*, *Coker* v. *Georgia*, 433 U.S. 584 (1977). But within those limits, the policy question of using capital punishment is one entrusted to the political processes in a democratic society.

Process Clause does not remove issues from the political process and put them before the judiciary for resolution because they are difficult and divisive.

We believe that the proper inquiry in reviewing an abortion regulation is whether the regulation is reasonably designed to advance a legitimate state interest, as a plurality of this Court articulated in *Webster*. 492 U.S. at 520. That standard of review is deferential, but not toothless. Indeed, this Court has held laws invalid under such a standard. Compare, *e.g.*, *Metropolitan Life Ins. Co.* v. *Ward*, 470 U.S. 869 (1985); *Zobel* v. *Williams*, 457 U.S. 55 (1982); *United States Dep't of Agric.* v. *Moreno*, 413 U.S. 528 (1973). No reason exists to assume that courts will abdicate their responsibility to ensure that abortion regulations pass muster under that standard. Legislatures under that constitutional regime will not be able arbitrarily or unreasonably to constrain a woman's liberty interest.

2. *The State has a compelling interest in protecting the fetus throughout pregnancy*

Even if the Court's pre-*Roe* decisions could be said to create a right of "privacy" or to "accomplish or prevent conception," *Carey* v. *Population Servs. Int'l*, 431 U.S. 678, 685 (1977), that conclusion would not end the inquiry. The Court's decisions make clear that a State can limit or even forbid conduct that is otherwise entitled to constitutional protection if the State acts precisely to vindicate a compelling interest. See, *e.g.*, *Haig* v. *Agee*, 453 U.S. 280, 308-309 (1981) (the government may revoke the passport of a person who wishes to travel in order to disclose intelligence operations and the names of intelligence personnel); *Lee* v. *Washington*, 390 U.S. 333, 334 (1968) (Black, J., concurring) (the government may take threats and tensions from prison racial strife into account for the purpose of maintaining security and order in prison); *Near* v. *Minnesota*, 283

U.S. 697, 716 (1931) (dictum that military needs justify a prior restraint on the disclosure of the sailing date of troop ships). That principle is as applicable in this context as in any other, because, as Justice Harlan once noted, "[t]he right of privacy most manifestly is not an absolute." *Poe* v. *Ullman*, 367 U.S. 497, 552 (1961) (Harlan, J., dissenting). The protection of innocent human life—in or out of the womb—is certainly the most compelling interest that a State can advance. See *Illinois* v. *Gates*, 462 U.S. 213, 237 (1983) ("[t]he most basic function of any government" is "to provide for the security of the individual and of his property") (quoting *Miranda* v. *Arizona*, 384 U.S. 436, 539 (1966) (White, J., dissenting)). In our view, a State's interest in protecting fetal life throughout pregnancy, as a general matter, outweighs a woman's liberty interest in an abortion. The State's interest in prenatal life is a wholly legitimate and entirely adequate basis for restricting the right to abortion derived in *Roe*.

Central to *Roe* was the conclusion that the State lacks a compelling interest in preserving fetal life throughout pregnancy. *Roe* noted that a woman's right to terminate a fetus "is not unqualified and must be considered against important state interests" in "safeguarding health, in maintaining medical standards, and in protecting potential life." 410 U.S. at 154. But *Roe* stated that the weight of those interests is not uniform from conception to birth; instead, they "grow[] in substantiality as the woman approaches term." *Id.* at 162-163. Particularly critical in this regard was *Roe*'s conclusion that a State's "important and legitimate interest in potential life" is not "compelling," *i.e.*, sufficiently weighty to overcome the fundamental right to abortion, until the fetus has reached viability, since only then is the fetus capable of "meaningful life outside the mother's womb." *Id.* at 163.

The proposition that a State's interest in protecting life in the womb is compelling only at viability "seems to mistake a definition for a syllogism." Ely, *The Wages*

of Crying Wolf: A Comment on Roe *v.* Wade, 82 Yale L.J. 920, 924 (1973).[12] "The choice of viability as the point at which the state interest in *potential* life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward." *Akron I*, 462 U.S. at 461 (O'Connor, J., dissenting). Even if the importance of a State's interest in protecting the fetus parallels the fetus's development, it does not follow that the State's interest in this regard is not *compelling* throughout a pregnancy. An interest may be sufficiently weighty to be "compelling" in the constitutional sense even if it later assumes still greater urgency. Accordingly, since "*potential* life is no less potential in the first weeks of pregnancy than it is at viability or afterward," *Akron I*, 462 U.S. at 461 (O'Connor, J., dissenting), the State's interest in protecting prenatal life "if compelling after viability, is equally compelling before viability," *Webster*, 492 U.S. at 519 (plurality opinion); *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting).

Roe itself recognized that laws infringing on a fundamental right are not automatically invalid; they survive strict scrutiny if they are "narrowly drawn to express only the legitimate state interests at stake." 410 U.S. at 155. Accordingly, because the State's interest in protecting prenatal life is compelling throughout pregnancy,

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[12] See J. Mohr, *supra*, at 165 ("Most [19th century] physicians considered abortion a crime because of the inherent difficulties of determining any point at which a steadily developing embryo became somehow more alive than it had been the moment before. Furthermore, they objected strongly to snuffing out life in the making."); see also *id.* at 35-36, 200; L. Tribe, *American Constitutional Law* 1349 (2d ed. 1988) ("nothing in [*Roe*] provides a satisfactory explanation of why the fetal interest should not be deemed overriding prior to viability, particularly when a legislative majority chooses to regard the fetus as a human being from the moment of conception and perhaps even when it does not") (footnotes omitted).

we believe that regulations furthering that interest are lawful throughout pregnancy.[13]

[13] Petitioners may even agree with us to some extent. The Act prohibits pre-viability abortions based on the sex of the fetus. 18 Pa. Cons. Stat. Ann. § 3204(c) (Purdon Supp. 1991). While petitioners ask the Court to reaffirm *Roe*, which bars a State from outlawing previability abortions, petitioners did not contend in the courts below, and they do not argue in this Court, that this provision is unconstitutional. It is not difficult to understand why. The prospect that a woman would terminate life in the womb merely because it is a boy or a girl surely should be so utterly odious to every member of "a free, egalitarian, and democratic society" like ours, *Thornburgh*, 476 U.S. at 793 (White, J., dissenting), that any such abortion would be properly subject to universal condemnation. At the very least, no one could seriously claim that the Constitution offers the remotest protection for such a macabre act. Yet, if a State has a compelling interest in forbidding gender-selection abortions, the *Roe* trimester framework cannot survive intact. And if the State has a compelling interest in prohibiting abortions for that reason, it may fairly be asked why the State lacks a similar compelling interest in outlawing abortions for other reasons. A State which believes that a child in the womb should not be destroyed simply because it is a boy or a girl should also be free to protect that life if it is the second (or third, etc.) child to be born, or if the pregnancy occurred despite the use of contraceptives.

Petitioners contend that "the right to abortion may be grounded" in constitutional rights other than due process. Pet. Br. 19 n.27. In our view, those claims are meritless. Indeed, the ceaseless quest for a textual basis for the constitutional right to abortion only underscores the lack of any such support. See, *e.g.*, *Harris* v. *McRae*, 448 U.S. at 319-320 (rejecting Establishment Clause challenge to Hyde Amendment); *Bowen* v. *Kendrick*, 487 U.S. 589 (1988) (same, Public Health Service Act (the Adolescent Family Life Act of 1981), 42 U.S.C. 300z *et seq.*); *Employment Division, Dep't of Human Resources* v. *Smith*, 494 U.S. 872, 879-890 (1990) (Free Exercise Clause does not invalidate neutral laws directed at secular subjects; rejecting Free Exercise challenge to statute banning drug use); *Reynolds* v. *United States*, 98 U.S. 145 (1879) (same, laws banning polygamy); *Prince* v. *Massachusetts*, 321 U.S. 158 (1944) (same, law banning child labor, as applied to distribution of religious pamphlets); *Jehovah's Witnesses* v. *King County Hosp.*, 390 U.S. 598 (1968), aff'g 278 F. Supp. 488 (W.D. Wash. 1967) (upholding life-saving transfusion for a minor child over parents'

II. THE PENNSYLVANIA ABORTION CONTROL ACT IS REASONABLY DESIGNED TO ADVANCE LEGITIMATE STATE INTERESTS

Petitioners claim that the Act is unconstitutional under any standard of review. Pet. Br. 40-61. In so arguing, petitioners and amici (*e.g.*, ACOG Br. 17-20; American Psychological Ass'n Br.; City of New York *et al.* Br.; NAACP Legal Defense and Educ. Fund *et al.* Br.; Pennsylvania Coalition Against Domestic Violence *et al.* Br.) rely heavily on the burden that could befall some women from provisions such as the spousal notification requirement. Yet, as the court of appeals noted, petitioners brought a facial constitutional challenge to the statute, not an as-applied challenge. Pet. App. 5a, 41a. Thus, the governing legal standard is exacting: Petitioners must prove that the statute cannot be constitutionally applied to *anyone*. See, *e.g.*, *Ohio* v. *Akron Center for Reproductive Health*, 110 S. Ct. 2972, 2980-2981 (1990) (*Akron II*); *United States* v. *Salerno*, 481 U.S. 739, 745 (1987); *Webster*, 492 U.S. at 524 (O'Connor, J., concurring). This they cannot do.[14]

Informed consent. Under the Pennsylvania statute, a woman must be given medical and other information by a physician or his agent, and she must wait 24 hours before consenting to an abortion.[15] Those provisions are valid.

Free Exercise claim; relying on *Prince*); *United States* v. *Kozminski*, 487 U.S. 931, 944 (1988) (Thirteenth Amendment does not apply to established common law cases, such as parents' right to custody of their children); U.S. Brief in *Bray* v. *Alexandria Women's Health Clinic*, No. 90-985 (opposition to abortion is not gender discrimination) (a copy has been supplied to the parties' counsel); see generally Bopp, *Will There Be a Constitutional Right to Abortion After the Reconsideration of* Roe v. Wade?, 15 J. Contemp. L. 131 (1989).

[14] The majority in *Akron I* and *Thornburgh* struck down statutory requirements similar to those here. The *Webster* plurality, however, explained that many of the rules adopted in *Roe* and later cases would not be of "constitutional import" once *Roe*'s trimester framework is abandoned. 492 U.S. at 518 n.15.

[15] A referring or performing physician must inform a woman about (i) the nature of the procedure and risks and alternatives

The State has a legitimate interest in ensuring that a woman's decision to have an abortion is an informed one. *Thornburgh*, 476 U.S. at 760; *Akron I*, 462 U.S. at 443; *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 67 (1976).[16] Accurate information about the abortion procedure and its risks and alternatives is related to maternal health and a State's legitimate purpose in requiring informed consent. *Akron I*, 462 U.S. at 446. An accurate description of the gestational age of the fetus and the risks involved in carrying a child to term furthers those interests and the State's concern for potential life. See *Thornburgh*, 476 U.S. at 798-804 (White, J., dissenting); *id.* at 830-831 (O'Connor, J., dissenting).[17] Likewise, the State's interest in preserving potential life is rationally served by informing women that medical assistance benefits and paternal child support may be obtainable, and by making available accurate information about the

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that a reasonable patient would find material; (ii) the fetus's probable gestational age; and (iii) the medical risks involved in carrying a pregnancy to term. 18 Pa. Cons. Stat. Ann. § 3205(a)(1) (Purdon Supp. 1991). A physician or a qualified agent also must tell a woman that (i) medical assistance benefits may be available for prenatal, childbirth, and neonatal care; (ii) the child's father is liable for child support; and (iii) the state health department publishes free materials describing the fetus at different stages and listing abortion alternatives. *Id.* § 3205(a)(2) (Purdon 1983 & Supp. 1991). A 24-hour waiting period follows.

[16] At common law and today, a physician must obtain patients' consent to the contemplated scope of an operation without misleading them about its nature or probable consequences, and must inform patients about the risks posed by available alternative treatments. See, *e.g.*, *Cruzan*, 110 S. Ct. at 2846-2847; *Slater* v. *Baker*, 2 Wils. 359, 95 Eng. Rep. 860 (K.B. 1767); 3 F. Harper, F. James, Jr. & O. Gray, *supra*, § 17.1.

[17] Petitioners' claim that non-physician counselors can provide the same information is beside the point. As the court of appeals observed, it was reasonable for the State to conclude that disclosure by physicians will be more effective than delegation of that task to others. Pet. App. 47a-48a.

process of fetal growth and alternatives to abortion. *Id.* at 831 (O'Connor, J., dissenting).

The fact that some information may be of little or no use to some recipients, Pet. App. 177a-180a, does not cast doubt on the validity of the Act. Where, as here, no fundamental right is at stake, government may regulate conduct in an overinclusive manner, as long as it does so rationally. *Vance* v. *Bradley*, 440 U.S. 93, 108 (1979). A State's belief that its interests are better served with an informed consent provision than without one is, in our view, entirely rational.

It is no argument that the disclosure of accurate information might persuade some women not to have an abortion. Encouraging childbirth is a legitimate governmental objective. *Harris* v. *McRae*, 448 U.S. 297, 322-323 (1980); *Maher* v. *Roe*, 432 U.S. 464, 478-479 (1977). *Roe* did not purport to impress on the Constitution the proposition that abortion is a public good. *Thornburgh*, 476 U.S. at 797 (White, J., dissenting). Instead, *Roe* professed agnosticism on the question when life begins and declined to debate the morality of abortion. 410 U.S. at 116-117, 159-162. Thus, the fact that the informed consent provision may dissuade some women from having an abortion does not undermine its validity.[18]

Lastly, the Act's 24-hour waiting period readily passes muster. A waiting period provides time for reflection and reconsideration, furthering a State's interests in informed consent and protecting fetal life. A mandatory

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[18] Nor do the informed consent provisions violate the First Amendment rights of physicians or counselors. States are free to require professionals to include accurate and reasonably material information in their commercial speech directed toward prospective clients. *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 650-651 (1985). Truthful and relevant information about risks, alternatives, and medical and financial facts is not the kind of "prescribe[d] * * * orthodox[y] in politics, nationalism, religion, or other matters of opinion" that violates the First Amendment's protection of commercial speech. *Id.* at 651; cf. *Riley* v. *National Fed'n of the Blind*, 487 U.S. 781, 796 n.9 (1988).

waiting period burdens women seeking abortions, but the State is constitutionally at liberty to weigh the competing concerns and to strike what it sees as an appropriate balance. The abortion decision, once implemented, is an irrevocable one, and the unique psychological consequences of that singular act will remain with a woman (and her spouse or partner) throughout their lives. Whatever the wisdom of the State's decision, it is clearly a rational one. See *Harris* v. *McRae*, 448 U.S. at 326.

Informed parental consent. An unemancipated or incompetent minor must give her informed consent and obtain that of a parent or guardian before she can obtain an abortion. 18 Pa. Cons. Stat. Ann. § 3206(a) (Purdon 1983 & Supp. 1991).[19] Alternatively, a minor can obtain an abortion if a state court finds that she is mature, is capable of giving informed consent, and gives such consent, or that an abortion is in her best interests. *Id.* § 3206(c) and (d) (Purdon 1983); see *id.* § 3206(e)-(h) (Purdon 1983 & Supp. 1991) (bypass procedures). Those provisions are valid, too.

In our view, a minor has no fundamental right to an abortion without parental consent.[20] In addition, a State has a strong and legitimate interest in involving parents in matters affecting their children's well-being, including abortion. See, *e.g.*, *Hodgson*, 110 S. Ct. at 2948 (opinion of Stevens, J.); *id.* at 2950-2951 (opinion of

[19] Consent of the child's guardian(s) is sufficient if both parents are dead or otherwise unavailable to the physician in a reasonable time and manner. Consent of a custodial parent is sufficient if the child's parents are divorced. Consent of an adult standing in loco parentis is sufficient if neither a parent nor a guardian is available to the physician in a reasonable time and manner. 18 Pa. Cons. Stat. Ann. § 3206(b) (Purdon 1983). In the case of pregnancy due to incest by the child's father, the minor need obtain consent only from her mother. 18 Pa. Cons. Stat. Ann. § 3206(a) (Purdon 1983 & Supp. 1991).

[20] Our position in this regard is set forth in our amicus brief in *Hodgson* v. *Minnesota*, Nos. 88-1125 & 88-1309, a copy of which has been provided to the parties' counsel.

O'Connor, J.); *id.* at 2970 (opinion of Kennedy, J.). Parental consent laws reasonably advance that interest. Furthermore, if the informed consent provision is valid, the informed parental consent provision is valid, too. A State has a keener interest in protecting minors than adults against their improvement choices.

Spousal notification. The Act adopts a spousal notification requirement in order "to further the Commonwealth's interest in promoting the integrity of the marital relationship," in "protect[ing] a spouse's interests in having children within marriage," and in "protecting the prenatal life of that spouse's child," 18 Pa. Cons. Stat. Ann. § 3209(a) (Purdon Supp. 1991). With certain exceptions, a woman must give the physician a signed statement, under penalty for making a false statement, that she has notified her spouse that she will undergo an abortion. *Ibid.*[21] This notification requirement readily survives facial challenge, because it is reasonably designed to further a number of legitimate state interests.[22]

First, spousal notification is reasonably designed to advance a State's legitimate interest in protecting the fetus.

[21] A woman need not provide the statement if her spouse is not the child's father; if he could not be located after a diligent search; if the pregnancy is the result of a spousal sexual assault that has been reported to the authorities; or if she has reason to believe that notifying her spouse will lead her to suffer bodily injury by him or someone else. *Id.* § 3209(b) (Purdon Supp. 1991).

[22] Pennsylvania is not alone in recognizing and protecting the husband's interest in the life of his unborn child. Before and during the 19th century, when abortion was strictly regulated and generally prohibited by state law, there was no need for special protection of the father's interests. See *Poe* v. *Gerstein*, 517 F.2d 787, 795 (5th Cir. 1975), aff'd, 428 U.S. 901 (1976). By the time of *Roe*, some States had liberalized their abortion laws, and many of the new laws acknowledged and protected the father's role in the abortion decision. *Doe* v. *Doe*, 365 Mass. 556, 561 & nn.3-5, 314 N.E.2d 128, 131 & nn.3-5 (1974) (citing statutes of 15 States requiring husband's consent for abortions under some or all circumstances). A number of spousal consent and notification laws are currently on the books. See, *e.g.*, Colo. Rev. Stat. Ann. § 18-6-101(1) (West 1986) (spousal consent).

The husband sometimes will oppose a proposed abortion. After being notified, he may persuade his spouse to reconsider her decision, thus achieving the State's interest. Cf. Pet. App. 255a-256a.

Second, a husband's interests in procreation within marriage and in the potential life of his unborn child are unquestionably legitimate and substantial ones.[23] It can hardly be gainsaid that the State acts legitimately in seeking to protect such parental and familial interests. See *Michael H.*, 491 U.S. at 128-129 (opinion of Scalia, J.) (husband's opportunity "to develop a relationship with" the offspring of the marital community may be protected by the State) (quoting *Lehr* v. *Robertson*, 463 U.S. 248, 262 (1983)); *Labine* v. *Vincent*, 401 U.S. 532, 538 (1971). The spousal notification requirement is certainly a reasonable means of advancing that state interest. By providing that, absent unusual circumstances, a husband will know of his spouse's intent to have an abortion, the notification requirement ensures at least the possibility that the husband will participate in deciding the fate of his unborn child, a possibility that might otherwise have been denied him. The husband's participation, in turn, may lead his spouse to reconsider her options or to rethink a hasty decision.[24] As Judge Alito noted in dissent

[23] See *Danforth*, 428 U.S. at 69; *id.* at 93 (White, J., dissenting in part); *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942). *Danforth* held that a State could not condition a woman's access to an abortion on the consent of her spouse, but that conclusion rested on the flawed premise that "the State cannot regulate or proscribe abortion during the first stage" of pregnancy. 428 U.S. at 69. A spousal notification requirement also impinges far less severely on a woman's ability to have an abortion than does a spousal consent requirement. See *Akron II*, 110 S. Ct. at 2979.

[24] No doubt most wives would consult with their husbands even absent a statutory notice requirement. Pet. App. 193a. Nonetheless, the Act will likely increase the number of such consultations. Many women who otherwise might choose not to tell their spouses of their decision, for reasons of convenience, haste, or concern about disagreement, will be inclined to comply because of the legislative mandate.

below, the state legislature "could have rationally believed that some married women are initially inclined to obtain an abortion without their husbands' knowledge because of perceived problems—such as economic constraints, future plans, or the husbands' previously expressed opposition—that may be obviated by discussion prior to the abortion." Pet. App. 102a.

Finally, and for essentially the same reasons, the State's interest in "promoting the integrity of the marital relationship," 18 Pa. Cons. Stat. Ann. § 3209(a) (Purdon Supp. 1991), is reasonably furthered by the spousal notice requirement. That interest is legitimate, *Akron I*, 462 U.S. at 443 n.32, and is properly encompassed by the State's traditional power to regulate marriage and strengthen family life, see *Sosna* v. *Iowa*, 419 U.S. 393, 404 (1975); *Labine*, 401 U.S. at 538. Petitioners' claim, Pet. Br. 43-44, and the district court's ruling, Pet. App. 261a-262a, that the notification requirement does not further the State's interest misses the point. The interest that Pennsylvania has chosen to foster is marital *integrity*, not "[m]arital accord," Pet. App. 262a. A State may legitimately elect to ensure truthful marital communication concerning a crucial issue such as abortion, despite the possibility that marital discord may result in some instances. See *Scheinberg* v. *Smith*, 659 F.2d 476, 484-486 & n.4 (5th Cir. 1981).

Petitioners make much of the possibility that some women may be deterred from obtaining an abortion if they must notify their spouses. Pet. Br. 41-43. But the State could reasonably have concluded that the statutory exceptions for women who reasonably fear bodily injury and for pregnancies resulting from spousal assault would eliminate the principal bases for that concern. The possibility that some women may not take advantage of the exceptions, or may fear other consequences of notification, does not affect the facial validity of the statute. See *Hodgson*, 110 S. Ct. at 2968 (opinion of Kennedy, J.) ("Laws are not declared unconstitutional because of some general reluctance to follow a statutory scheme the legis-

lature finds necessary to accomplish a legitimate state objective."). The State weighed the complex social and moral considerations involved and found such concerns insufficient to overcome the countervailing factors. The wisdom of such a clearly rational decision is not for the courts to judge. See *Harris* v. *McRae*, 448 U.S. at 326.[25]

Medical emergency. A "medical emergency" is an exception to the above requirements of the Act.[26] Petitioners argued below that the statutory definition of medical emergency was inadequate since it did not include three serious conditions that pregnant women can suffer (preclampsia, inevitable abortion, and prematurely ruptured membrane). The district court ruled that the definition did not include those conditions, Pet. App. 237a, but the court of appeals disagreed, Pet. App. 41a, relying on the "well-accepted canon[] of statutory interpretation used in the [state] courts," *Webster*, 492 U.S. at 515 (plural-

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[25] Petitioners argue that the spousal notification requirement violates the Equal Protection Clause and impermissibly intrudes on "the protected marital relationship." Pet. Br. 44-48. In our view, neither claim has merit. Women who want an abortion are not a "suspect" or "quasi-suspect" class deserving of heightened scrutiny under the Equal Protection Clause. See *Harris* v. *McRae*, 448 U.S. at 323; *Maher v. Roe*, 432 U.S. at 470-471; cf. *Geduldig* v. *Aiello*, 417 U.S. 484, 496-497 n.20 (1974). Likewise no generalized right of marital privacy is infringed by the spousal notification requirement. If the State may—indeed must, see *Kirchberg* v. *Feenstra*, 450 U.S. 455 (1981)—require the participation of both spouses in the disposition of marital property, surely it may require that they both be aware of the far more important decision to terminate a pregnancy.

[26] A "medical emergency" is defined as "[t]hat condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function." 18 Pa. Cons. Stat. Ann. § 3203 (Purdon Supp. 1991).

ity opinion), that a statute should be read to preserve its constitutionality and on the fact that petitioners challenged the Act on its face. Pet. App. 37a, 41a.[27]

Petitioners do not argue that the Act cannot be read that way. Instead, they criticize the Third Circuit for reading the Act too narrowly, as protecting women only from "significant" health risks. Pet. Br. 60-61. Due process, however, does not require the State to avoid placing insignificant health risks on individuals for the public benefit. This Court in *Jacobson* v. *Massachusetts* upheld a compulsory smallpox vaccination even though the vaccine had a statistical possibility of causing serious illness or death. In this case, the State has a compelling interest in protecting the fetus, which "justif[ies] substantial and ordinarily impermissible impositions on the individual," including "the infliction of some degree of risk of physical harm." *Thornburgh*, 476 U.S. at 808-809 (White, J., dissenting).

Reporting requirements. Facilities performing abortions have various reporting obligations.[28] The require-

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[27] The State also reads the definition to include all three conditions. See Appellants C.A. Br. 5-7, 23-25. A state attorney general's interpretation of a state law is not binding on the state courts, *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383, 397 (1988), but may be useful in construing state law, cf. *Minnesota* v. *Probate Court*, 309 U.S. 270, 273-274 (1940) (relying on the state attorney general's reading of the state supreme court's opinion).

[28] Each facility must file a report with its name and address and that of any affiliated enterprise. Such information is public if a facility received state funds during the past calendar year; otherwise, the information is available only to state law enforcement officials or state medical boards. 18 Pa. Cons. Stat. Ann. § 3207 (Purdon 1983 & Supp. 1991). To "promot[e] * * * maternal health and life by adding to the sum of medical and public health knowledge through the compilation of relevant data, and to promote the Commonwealth's interest in protection of the unborn child," *id.* § 3214(a) (Purdon Supp. 1991), each facility must file a report on each abortion. The reports do not identify patients by name, but they do include other types of information. *Id.* § 3214

ment that facilities provide confidential reports concerning the identities and medical judgments of physicians involved in abortions is valid given the State's legitimate interests in maternal health and enforcement of the Act. See *Thornburgh*, 476 U.S. at 804 (White, J., dissenting). The other information can be required under *Danforth*, 428 U.S. at 79-81, and furthers the same interests. See *Planned Parenthood Ass'n* v. *Ashcroft*, 462 U.S. 476, 486-490 (1983) (opinion of Powell, J.); *id.* at 505 (opinion of O'Connor, J.) (upholding compulsory pathology reports). Public disclosure of the number of abortions performed by facilities receiving public funds directly furthers the valid goal of increasing the public's knowledge as to how, and by whom, public money is spent. See *Wyman* v. *James*, 400 U.S. 309, 319 (1971); Pet. App. 83a.[29]

(Purdon Supp. 1991). A facility also must file a quarterly report stating the number of abortions performed for each trimester of pregnancy. Here, too, the reports are public only if the facility received state funds during the year prior to the filing of the report. *Id.* § 3214(a) (Purdon Supp. 1991).

[29] Petitioners' speculative concerns that these requirements may deter some facilities and physicians from performing abortions and may lead to harassment of abortion clinics, Pet. Br. 58, do not undermine the facial validity of the Act. The State's decision to require the reports was a rational one; the Constitution requires no more.

CONCLUSION

The judgment of the court of appeals in No. 91-744 should be affirmed and in No. 91-902 should be reversed.

Respectfully submitted.

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October Term, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *et al.*,

Petitioners,

v.

ROBERT P. CASEY, *et al.*,

Respondents.

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Petitioners,

v.

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF 250 AMERICAN HISTORIANS AS AMICI CURIAE IN SUPPORT OF PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI..... 1

SUMMARY OF ARGUMENT 1

ARGUMENT..... 2

I. OUR TRADITIONS AND HISTORY HELP DEFINE THE CONTOURS OF FUNDAMENTAL CONSTITUTIONAL RIGHTS, INCLUDING THE RIGHT TO PRIVACY 2

II. AT THE TIME THE FEDERAL CONSTITUTION WAS ADOPTED, ABORTION WAS KNOWN AND NOT ILLEGAL..... 5

III. THROUGH THE NINETEENTH CENTURY, ABORTION BECAME EVEN MORE WIDELY ACCEPTED AND HIGHLY VISIBLE..... 8

IV. NINETEENTH-CENTURY ABORTION RESTRICTIONS SOUGHT TO PROMOTE OBJECTIVES THAT ARE TODAY EITHER PLAINLY INAPPLICABLE OR CONSTITUTIONALLY IMPERMISSIBLE 11

A. From 1820-1860, Abortion Regulation In The States Rejected Broader English Restrictions And Sought To Protect Women From Particularly Dangerous Forms of Abortion 11

B. A Central Purpose Of Abortion Regulation In The Nineteenth Century Was To Define Who Should Be Allowed To Control Medical Practice..... 13

TABLE OF CONTENTS – Continued

Page

C. Enforcement Of Sharply Differentiated Concepts Of The Roles And Choices Of Men And Women Underlay Regulation Of Abortion And Contraception In The Nineteenth Century 15

D. Nineteenth-Century Contraception And Abortion Regulation Also Reflected Ethnocentric Fears About The Relative Birthrates Of Immigrants And White Protestants 20

V. ENFORCEMENT OF ABORTION RESTRICTIONS IN THE FIRST HALF OF THE TWENTIETH CENTURY FOLLOWED ENTRENCHED ETHNIC AND CLASS DIFFERENTIATIONS, AFFIRMED TRADITIONAL CONCERNS ABOUT ENFORCING GENDER ROLES, AND IMPOSED ENORMOUS COSTS UPON WOMEN 22

VI. EMPHASIS ON THE FETUS BECAME CENTRAL TO CULTURAL AND LEGAL DEBATE OVER ABORTION ONLY IN THE LATE TWENTIETH CENTURY, WHEN TRADITIONAL JUSTIFICATIONS FOR RESTRICTING ACCESS TO ABORTION BECAME CULTURALLY ANACHRONISTIC OR CONSTITUTIONALLY IMPERMISSIBLE 26

VII. A PRESUMED INTEREST IN PROTECTING FETAL LIFE DOES NOT JUSTIFY DENYING WOMEN THEIR HISTORIC LIBERTY TO CHOOSE ABORTION..... 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES:

Abrams v. Foshee, 3 Iowa 274, 66 Am. Dec. 77 (1856) 5

Barnes v. Allen, 1 Keyes 390 (N.Y. 1864) 18

Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873)..... 17

Commonwealth v. Follansbee, 155 Mass. 274, 29 N.E. 471 (1892)..... 5

Commonwealth v. Parker, 50 Mass. (9 Met.) 263, 43 Am. Dec. 396 (1845) 5

Cooper v. State, 22 N.J.L. (2 Zab.) 52 (1849)..... 27

Eisenstadt v. Baird, 405 U.S. 438 (1972) 29

Frontiero v. Richardson, 411 U.S. 677 (1973)..... 17

Griswold v. Connecticut, 381 U.S. 479 (1965).....4, 29

Hatfield v. Gano, 15 Iowa 177 (1863)..... 5

Martin v. Struthers, 319 U.S. 141 (1943) 2

McCollum v. Board of Education, 333 U.S. 203 (1948) 2

McRae v. Califano, 491 F. Supp. 630 (E.D.N.Y. 1980) 25

Mississippi University for Women v. Hogan, 458 U.S. 718 (1982)..... 29

Moore v. East Cleveland, 431 U.S. 494 (1977)..... 2

Munn v. Illinois, 94 U.S. 113 (1877)..... 2

Olmstead v. U.S., 277 U.S. 438 (1928) 4

Orr v. Orr, 440 U.S. 268 (1979)..... 29

People v. Stanko, 402 Ill. 558 (1949) 23

TABLE OF AUTHORITIES – Continued

Page

People v. Stanko, 407 Ill. 624 (1951) 23

Planned Parenthood of Southeastern Pennsylvania v. Casey, 947 F.2d 683 (3d Cir. 1991) 29

Planned Parenthood of Southeastern Pennsylvania v. Casey, 744 F. Supp. 1323 (E.D. Pa. 1990) 30

Plessy v. Ferguson, 163 U.S. 537 (1896) 2

Poe v. Ullman, 367 U.S. 497 (1961) 4

Roe v. Wade, 410 U.S. 113 (1973) ..... *passim*

Scott v. Sandford, 19 How. 1 (1857) 2

Stanton v. Stanton, 421 U.S. 7 (1975) 29

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) 3

United Automobile Workers v. Johnson Controls, 111 S.Ct. 1196 (1991) 17

United States v. Foote, 25 Fed. Cas. 1140 (S.D.N.Y. 1876) 20

Webster v. Reproductive Health Services, 492 U.S. 490 (1989) 29

CONSTITUTION, STATUTES, AND REGULATIONS:

Comstock Act, Ch. 258, § 1, 17 Stat. 598 (1873), currently codified at 18 U.S.C. § 1461 (1988) 19

Conn. Stat. Tit. 22, § 14 at 152 (1821) 12

Pub. L. 91-662, 84 Stat. 1973 (1971) 19

TABLE OF AUTHORITIES – Continued

Page

The Public Statute Laws of the State of Connecticut 152-153 (1821) 12

N.Y. Rev. Stat., pt. IV, ch. I, tit. VI, § 21 (1828 to 1835) 12

MISCELLANEOUS:

M. Abramowitz, *Regulating the Lives of Women: Social Welfare Policy from Colonial Times to the Present* (1988) 17

AMA Editorial, *Abortion or Removal of Pregnant Uterus*, 96 J. Am. Med. Ass'n 1169, April 14, 1931 24

P. Aries, *Centuries of Childhood: A Social History of Family Life* (R. Baldick trans. 1962) 7

Atlee & O'Donnell, *Report of the Committee on Criminal Abortion*, XXII Transactions of the American Medical Association 241 (1871) 16

R. Baxandall, L. Gordon & S. Reverby, eds., *America's Working Women: A Documentary History – 1600 to the Present* (1976) 25

1 W. Blackstone, Commentaries *442 17

J. Brodie, *Family Limitation in American Culture*, Ph.D. Dissertation, University of Chicago, 1982 6

Chicago Tribune, Nov. 21, 1912, p. 1 21

Chused, *Married Women's Property Law: 1800-1850*, 71 Geo. L. J. 1359 (1983) 17

N. Culpeper, *The English Physician* (1799) 6

Cott, *Eighteenth-Century Family and Social Life Revealed in Massachusetts Divorce Records*, 10 J. of Soc. Hist. 20 (1976) 7

D. Davis, *From Homicide to Slavery: Studies in American Culture* (1986) 20

TABLE OF AUTHORITIES – Continued

Page

Dayton, *Taking the Trade: Abortion and Gender Relations in an Eighteenth-Century New England Village*, 48 Wm. & Mary Q. 19 (1991) 6

J. D'Emilio & E. Freedman, *Intimate Matters: A History of Sexuality in America* (1988) 7

C. Degler, *At Odds: Women and the Family in America from the Revolution to the Present* (1980) 8, 9, 10, 13, 21

Demos, "Images of The American Family, Then and Now," in *Changing Images of the Family* (V. Tufte & B. Myerhoff eds. 1979) 9

Diary of Martha Moore Ballard, Maine State Manuscript Library, Sept. 27, 1789 6

Dubois, *Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution, 1820-1878*, 74 J. Am. Hist. 836 (1987) 16

Dudziak, *Just Say No: Birth Control in the Connecticut Supreme Court Before Griswold v. Connecticut*, 75 Ia. L. Rev. 915 (1990) 25

B. Ehrenreich & D. English, *For Her Own Good: 150 Years of the Experts' Advice to Women* (1979) 14

Faragher, *History from the Inside-Out: Writing the History of Women in Rural America*, 33 Am. Q. 536 (1981) 9

D. Flaherty, *Privacy in Colonial New England* (1972) 7

E. Flexner, *Century of Struggle: The Woman's Right's Movement in the United States* (rev. ed. 1975) 16

TABLE OF AUTHORITIES – Continued

Page

E. Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War* (1970) 20

G. Frederickson, *The Inner Civil War: Northern Intellectuals and the Crisis of the Union* (1965) 20

G. Geison, ed., *Professions and Professional Ideologies in America* (1983) 14

L. Gordon, *Woman's Body, Woman's Right: Birth Control in America* (rev.ed. 1990) 10, 11, 18, 19, 20, 21

Gordon, "Why Nineteenth Century Feminists Did Not Support 'Birth Control' and Twentieth Century Feminists Do," in *Rethinking the Family: Feminism, Reproduction, and the Family* (B. Thorne & M. Yalom, eds. 1982) 19

M. Gordon, *The American Family: Past, Present and Future* (1978) 8

M. Grossberg, *Governing the Hearth: Law and Family in Nineteenth-Century America* (1985) 7, 12, 19, 20, 27, 28

Haggard, *Abortion: Accidental, Essential, Criminal, Address Before the Nashville Academy of Medicine*, Aug. 4, 1898 8

N. Hawthorne, *The Scarlet Letter* (1850) 7

J. Higham, *Strangers in the Land: Patterns of American Nativism, 1860-1925* (1963) 20

Hoff-Wilson, "The Illusion of Change: Women and the American Revolution," in *The American Revolution: Explorations in the History of American Radicalism* (A. Young ed. 1976) 8

TABLE OF AUTHORITIES – Continued

Page

R. Hofstadter, *Social Darwinism in American Thought* (1955) 20

D. Kennedy, *Birth Control in America: The Career of Margaret Sanger* (1971) 21

D. Kevles, *In the Name of Eugenics: Genetics and the Uses of Human Heredity* (1985) 21

L. Koehler, *A Search for Power: The "Weaker Sex" in Seventeenth-Century New England* (1980) 6

L. Lader, *Abortion* (1966) 25

P. Laslett, *The World We Have Lost* (1972) 7

LaSorte, *Nineteenth Century Family Planning Practices*, 14 J. of Psychohistory 163 (1976) 10

J. Leavitt, *Brought to Bed: Child-Bearing in America, 1750-1950* (1986) 14

Leavitt, *The Growth of Medical Authority: Technology and Morals in Turn-of-the-Century Obstetrics*, 1 Med. Anthropology Q. 230 (1987) 28

S. Lipset & E. Raab, *The Politics of Unreason: Right-Wing Extremism in America*, 1790-1970 (1970) 20

K. Luker, *Abortion and the Politics of Motherhood* (1984) 22, 24, 25

A. McLaren, *Reproductive Rituals: The Perception of Fertility in England from the Sixteenth Century to the Nineteenth Century* (1984) 6

TABLE OF AUTHORITIES – Continued

Page

Means, *The Phoenix of Abortional Freedom*, 17 N.Y. L. Forum 335 ..... 6, 12

J. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* (1978) ..... *passim*

New York Times, Aug. 23, 1871 10

M. Norton, *Liberty's Daughters: The Revolutionary Experience of American Women, 1750-1800* (1980) 8

Note, *To Have and To Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 Harv. L. Rev. 1255 (1986) 17

R. Petchesky, *Abortion and Woman's Choice: The State, Sexuality & Reproductive Freedom* (rev. ed. 1990) 9, 11, 27

E. Pleck, *Domestic Tyranny: The Making of Social Policy Against Family Violence from Colonial Times to the Present* (1987) 17

W. Prosser, *Law of Torts* (3d ed. 1971) 18

Quay, *Justifiable Abortion – Medical and Legal Foundations*, 49 Geo. L. Rev. 173 (1960-61) 12

Reagan, *"About to Meet Her Maker": Women, Doctors, Dying Declarations, and the State's Investigation of Abortion, Chicago, 1867-1940*, 77 J. Am. Hist. 1240 (1991) 22

L. Reagan, *When Abortion Was a Crime: The Legal and Medical Regulation of Abortion, Chicago, 1880-1973*, Ph.D. Dissertation, University of Wisconsin-Madison, 1991 ..... 22, 23, 24

TABLE OF AUTHORITIES – Continued

Page

J. Reed, *From Private Vice to Public Virtue: The Birth Control Movement and American Society Since 1830* (1978) 21

Rodrique, "The Black Community and the Birth Control Movement," in *Passion and Power: Sexuality and History* (K. Peiss & C. Simmons eds. 1989)..... 9

W. Rothstein, *American Physicians in the Nineteenth Century: From Sects to Science (1972)*..... 14

M. Ryan, *Cradle of the Middle Class: The Family in Oneida County, New York, 1790-1865* (1981) 16

M. Ryan, ed., *Womanhood in America: From Colonial Times to the Present* (1975) 25

Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261 (forthcoming 1992) 13, 19

Smith, "Family Limitation, Sexual Control, and Domestic Feminism in Victorian America," in *A Heritage of Her Own* (N. Cott. & E. Pleck eds. 1979)..... 9

Smith & Hindus, *Premarital Pregnancy in America, 1640-1971: An Overview and Interpretation*, 5 J. Interdisciplinary Hist. 537 (1975) 8

C. Smith-Rosenberg, *Disorderly Conduct: Visions of Gender in Victorian America* (1985)..... *passim*

J. Spruill, *Women's Life and Work in the Southern Colonies* (1972, orig. pub. 1938)..... 6

TABLE OF AUTHORITIES – Continued

Page

P. Starr, *The Social Transformation of American Medicine: The Rise of a Sovereign Profession and the Making of a Vast Industry* (1982)..... 14

Stix, *A Study of Pregnancy Wastage*, 13 Milbank Memorial Fund Q. 347 (1935)..... 22

Stix & Wiehl, *Abortion and Public Health*, 28 Am. J. Pub. Health 622 (1938) 22

H. Storer, *Why Not? A Book for Every Woman* (1866) 21

F. Taussig, *Abortion, Spontaneous and Induced: Medical and Social Aspects* (1936) 22

R. Thompson, *Sex in Middlesex: Popular Mores in a Massachusetts County, 1649-1699* (1986) 6

L. Ulrich, *A Midwife's Tale: The Life of Martha Ballard, Based on Her Diary, 1785-1812* (1990) 7

Weisbrod, *Birth Control and the Black American: A Matter of Genocide?*, 10 Demography 571 (1973) 21

Wells, *Family Size and Fertility Control in Eighteenth Century America: A Study of Quaker Families*, 25 Population Stud. 73 (1971)..... 8

R. Wertz & D. Wertz, *Lying-In: A History of Childbirth in America* (1977)..... 14

A. Wilder, *History of Medicine* (1901)..... 13

BRIEF OF 250 AMERICAN HISTORIANS AS AMICI CURIAE IN SUPPORT OF PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA

INTEREST OF AMICI

Amici are 250 professional American historians who, with the permission of the parties, here seek to provide the Court a rich and accurate description of our national history and tradition in relation to women's liberty to choose whether to terminate a pregnancy. Amici represent a diverse array of historical specialties and approaches. They are united, however, in their conviction that this Court's decision in *Roe v. Wade* is supported by American history and the lessons that history imparts.

SUMMARY OF ARGUMENT

This Court has long consulted our nation's history and traditions to determine the contours of fundamental constitutional rights. This brief will demonstrate that for much of our nation's history, abortion was tolerated and not illegal; that for much of the nineteenth century, abortion remained legal prior to quickening; and that when states did enact laws regulating abortion, these statutes did not punish women. A variety of complex factors, and not simply moral or theological impulses, underlay the nineteenth-century laws restricting abortion: concern for women's health, the medical profession's desire to control the practice of medicine, openly discriminatory ideas of the appropriate role for women, opposition to non-procreative sexual activity and to the dissemination of information concerning birth control, and even concern for racial and ethnic purity. This brief discusses the prevalence and visibility of abortion as a common social practice in the nineteenth century. Above all, this historical account refutes the erroneous assumption that abortion restrictions enjoyed broad social support in past eras.

Moreover, this nation's history confirms that abortion restrictions have imposed profound burdens on the liberty and equality of women. The Court should therefore reaffirm its commitment to providing strong constitutional protection to

women's fundamental liberty interest in reproductive choice and control of their own bodies.

ARGUMENT

I. OUR TRADITIONS AND HISTORY HELP DEFINE THE CONTOURS OF FUNDAMENTAL CONSTITUTIONAL RIGHTS, INCLUDING THE RIGHT TO PRIVACY.

Since the beginning of the Republic, no Justice of the Supreme Court has seriously disputed that the meaning of our Constitution is to be determined by interpreting its words in light of our nation's history and traditions. "[A]n approach grounded in history imposes limits on the judiciary that are more meaningful than any based on [an] abstract formula." *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977). Even when this Court has not specifically identified "history" as a source of authority, it has frequently taken "judicial notice" of this country's history and traditions in resolving difficult constitutional issues.[1] Because an understanding of our nation's history rightly influences this Court's fundamental constitutional understandings, it is essential to capture that history deeply and accurately. It is no accident that *Scott v. Sandford*, 19 How. 1, 19-20 (1857), and *Plessy v. Ferguson*, 163 U.S. 537, 544, 550-51 (1896) – two of this Court's most discredited decisions – rested largely on disputed and insupportable readings of history.

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[1] *See, e.g., Munn v. Illinois*, 94 U.S. 113, 125 (1877) ("[I]t has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold"); *Martin v. Struthers*, 319 U.S. 141, 145 (1943) (door-to-door distribution of literature protected by First Amendment because "in accordance with the best tradition of free discussion"); *McCollum v. Board of Education*, 333 U.S. 203, 213 (1948) (Frankfurter, J., concurring) ("released-time" provision unconstitutional in light of the "relevant history of religious education in America" and "the place of 'released-time' in that history").

The relevance of history to this Court's task often goes beyond exploration of "framers' intent"; not every facet of the Constitution's meaning can be determined by reference to its words or to the apparent intent of its drafters. Justice White has said:

> [T]his Court does not subscribe to the simplistic view that constitutional interpretation can possibly be limited to the "plain meaning" of the Constitution's text or to the subjective intention of the Framers. The Constitution is not a deed setting forth the precise metes and bounds of its subject matter; rather it is a document announcing fundamental principles in value-laden terms that leave ample scope for the exercise of normative judgment by those charged with interpreting and applying it.

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 789 (1986) (White, J., dissenting). But if history cannot always pinpoint the views of the framers, the historical perspective *can* suggest fundamental principles by which to measure the scope of valued constitutional rights. In particular, history and tradition help give content to the open-textured provisions of our Constitution: the prohibition in the Fifth and Fourteenth Amendments of state action that deprives citizens of life, liberty or property without due process of law; the Fourteenth Amendment's guarantee of equal treatment under the law; and the Ninth Amendment's command that the "enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

In 1961, Justice Harlan wrote of the importance of history and tradition in explicating the scope of the due process clause respecting bodily privacy:

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the individual, has struck between

> that liberty and the demands of organized society. . . . The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.

Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). *See also Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring). Justice Harlan's words express the Constitution's general protection of the right to privacy, *see Griswold*, 381 U.S. at 483-86, and *Olmstead v. United States*, 277 U.S. 438, 474-75 (1928) (Brandeis, J., dissenting), and explain the role of history in illuminating how the autonomy to make fundamental personal decisions is basic to individual liberty. These words are especially relevant to this case. The history of abortion in this country illustrates that this Court was correct in *Roe v. Wade* in holding that the right to choose an abortion is fundamental to women's liberty.

This Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), accurately recounted the history of abortion in the United States and at British common law. Since 1973 and *Roe*, ongoing historical research and scholarship have expanded and deepened historians' understanding of abortion in America. In addition to the important legal-historical sources relied on in *Roe* (past statutes, legislative debates, and the decisions of common-law courts), historians in recent decades have begun to document people's actual beliefs and practices throughout history, offering an even deeper and richer understanding of baseline American values and traditions. As scholars familiar with these varied methods of historical inquiry, amici believe the Court must consult evidence of daily life as well as official and governmental action to uncover the beliefs and practices of the broad range of American society. It is this inclusive perspective on the past that should inform the Court's investigation of our nation's history and traditions. Such an inquiry does not mean that what has prevailed in the past must govern the present, for

that would deny any role for human progress. Rather, consideration of past practices and beliefs offers real lessons about the centrality of those practices and the meaning of attempts to regulate them.

II. AT THE TIME THE FEDERAL CONSTITUTION WAS ADOPTED, ABORTION WAS KNOWN AND NOT ILLEGAL.

As this Court demonstrated in *Roe v. Wade*, abortion was not illegal at common law.[2] Through the nineteenth century, American common law decisions uniformly reaffirmed that women committed no offense in seeking abortions.[3] Both common law and popular American understanding drew distinctions depending upon whether the fetus was "quick," *i.e.* whether the woman perceived signs of independent life.[4] There was some dispute whether a common law misdemeanor occurred when a third party destroyed a fetus, after quickening, without the woman's consent. But early common law recognition of this crime against a pregnant woman did not

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[2] *Roe v. Wade*, 410 U.S. 113, 132-36 & n.21 (1973). *See also* J. Mohr, *Abortion in America: The Origins and Evolution of National Policy* 3-19 (1978).

[3] For example, in 1845, Chief Judge Shaw of Massachusetts held that abortion, with the woman's consent, was not punishable at common law unless the fetus was quick. *Commonwealth v. Parker*, 50 Mass. (9 Met.) 263, 43 Am. Dec. 396 (1845). In 1892, the Massachusetts Supreme Judicial Court held that, despite statutory enactments regulating abortion, the woman having an abortion was not a principal or an accomplice. *Commonwealth v. Follansbee*, 155 Mass. 274, 29 N.E. 471 (1892). In *Abrams v. Foshee*, 3 Iowa 274, 278, 66 Am. Dec. 77, 80 (1856), the Iowa Supreme Court held that abortion prior to quickening was no crime. *Hatfield v. Gano*, 15 Iowa 177 (1863), held that Iowa's statutory enactment did not apply to abortion produced by a woman herself. *See* C. Smith-Rosenberg, *Disorderly Conduct* 219-20 (1985).

[4] *See Roe v. Wade*, 410 U.S. at 134-36; J. Mohr, *supra* note 2, at 24-26. In the ordinary language of the eighteenth century and much of the nineteenth century, the term "abortion" meant the termination of pregnancy after the point of quickening. *Id.* at 3-5.

diminish the woman's liberty to end a pregnancy herself in its early stages.[5]

Abortion was not a pressing social issue in colonial America, but as a social practice, it was far from unknown.[6] Herbal abortifacients were widely known,[7] and cookbooks and women's diaries of the era contained recipes for such medicines.[8] Recent studies of the work of midwives in the 1700s report cases in which the midwives appeared to have provided women abortifacient compounds. Such treatments do not appear to have been regarded as extraordinary or illicit by those administering them.[9]

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[5] *See Roe v. Wade*, 410 U.S. at 134-36; J. Mohr, *supra* note 2, at 24-26. Means, *The Phoenix of Abortional Freedom*, 17 N.Y.L. Forum 335, 336-53 (1971) demonstrates that commentators who assert that a misdemeanor could be charged against a third party who destroyed a fetus by assaulting a woman late in pregnancy misread the common law precedents upon which they purport to rely. Even in cases involving brutal beatings of women in the late stages of pregnancy, common-law courts refused to recognize abortion as a crime, independent of assault upon the woman. *See* A. McLaren, *Reproductive Rituals* 119-121 (1984).

[6] Observers in the seventeenth and eighteenth centuries made repeated references to employment of herbal abortifacients by both single and married women, either self-administered or procured by husbands, male partners or family members. Specific instances are documented in R. Thompson, *Sex in Middlesex: Popular Mores in a Massachusetts County, 1649-1699* 11, 25-26, 42, 47, 51, 78, 107-08, 182-83 (1986); J. Spruill, *Women's Life and Work in the Southern Colonies* 325-326 (1972, orig. pub. 1938); L. Koehler, *A Search for Power: The "Weaker Sex" in Seventeenth-Century New England* 204-205 (1980). *See also* Dayton, *Taking the Trade: Abortion and Gender Relations in an Eighteenth-Century New England Village*, 48 Wm. & Mary Q. 19 (1991) (reporting instance of abortion by use of instrument). *Compare* A. McLaren, *supra* note 5, at 114 and generally at 113-44, reporting widespread evidence of abortifacient use in England during the same era.

[7] The classic work was N. Culpeper, *The English Physician* (1799). *See* J. Brodie, *Family Limitation in American Culture*, Ph.D. Dissertation, University of Chicago, 1982, at 224-30.

[8] C. Smith-Rosenberg, *supra* note 3, at 228.

[9] One midwife reported, "She is suffering from obstructions and I prescribed the use of particular herbs." Diary of Martha Moore Ballard, Sept.

(Continued on following page)

The absence of legal condemnation of abortion in colonial America is all the more significant because both families and society valued children and population growth in a rural economy, with vast unsettled lands, where diseases of infancy claimed many lives. For these reasons, single women more often sought abortions in the Colonial era than did married women.[10] The absence of legal condemnation is particularly striking in the New England culture of tightly-knit, religiously homogeneous communities in which neighbor observed the private behavior of neighbor and did not hesitate to chastise those who violated pervasive moral norms of the community.[11] Further, in an era filled with extensive oral and written moral prescripts from community and religious leaders, it is notable that birth control and abortion were rarely the subject for moralizing. Where abortion is noted, it is not the practice itself that is subject of comment, but rather the violation of other social/sexual norms that led to the pregnancy.[12]

(Continued from previous page)

27, 1789, Maine State Manuscript Library. For a discussion of the possibility that this may refer to an administered abortifacient, see L. Ulrich, *A Midwife's Tale: The Life of Martha Ballard, Based on Her Diary, 1785-1812* 56 (1990).

[10] M. Grossberg, *Governing the Hearth* 159 (1985). *Accord* J. D'Emilio & E. Freedman, *Intimate Matters* 26 (1988) ("Cases of attempted abortion usually involved illicit lovers, not married couples").

[11] Adultery, incest, insubordination by children, and even "living alone not subject to the governance of family life," were condemned by the colonial America criminal law – but abortion was not. *See* Cott, *Eighteenth-Century Family and Social Life Revealed in Massachusetts Divorce Records*, 10 J. of Soc. Hist. 20, 22-24, 33 (1976); P. Laslett, *The World We Have Lost* 37-38 (1973); D. Flaherty, *Privacy in Colonial New England* 42-43, 76 (1972); P. Aries, *Centuries of Childhood* 405-07 (R. Baldick trans. 1962). For a more popular, fictional treatment, see N. Hawthorne, *The Scarlet Letter* (1850).

[12] J. D'Emilio & E. Freedman, *supra* note 10, at 12, report the following case from the 1600s: "Captain William Mitchell, an influential Marylander who served on the governor's council, not only impregnated Mrs. Susan Warren and gave her a 'physic' to abort the child, but he also 'lived in fornication' with his pretended wife, Joan Toaste. Even so, the first charge filed against Mitchell by the Maryland attorney was that he professed himself to be an Atheist and openly mocked all Religion."

In the late eighteenth century, strictures on sexual behavior loosened considerably. The incidence of premarital pregnancy rose sharply; by the late eighteenth century, one third of all New England brides were pregnant when they married, compared to less than ten percent in the seventeenth century.[13] Falling birth rates in the 1780s suggest that, at the time of the drafting of the Constitution, the use of birth control and abortion was increasing.[14]

III. THROUGH THE NINETEENTH CENTURY, ABORTION BECAME EVEN MORE WIDELY ACCEPTED AND HIGHLY VISIBLE.

Through the nineteenth century and well into the twentieth, abortion remained a widely accepted practice, despite growing efforts after 1860 to prohibit it.[15] Changing patterns of abortion practice and attitudes towards it can only be understood against the background of dramatic change in American economic and family life during this period.

During the period between ratification of the Constitution and adoption of the Civil War Amendments, Americans

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[13] M. Gordon, *The American Family* 173 (1978). For comprehensive discussions see Smith & Hindus, *Premarital Pregnancy in America, 1640-1971*, 5 J. Interdisciplinary Hist. 537, 553-57 (1975); Hoff-Wilson, "The Illusion of Change: Women and the American Revolution," in *The American Revolution* 404 (A. Young ed. 1976).

[14] Wells, *Family Size and Fertility Control in Eighteenth Century America: A Study of Quaker Families*, 25 Population Stud. 73 (1971); M. Norton, *Liberty's Daughters: The Revolutionary Experience of American Women, 1750-1800* 232 (1980).

[15] C. Degler, *At Odds* 243-46 (1980). Several studies by physicians in various parts of the U.S. suggest that in the mid-nineteenth century one abortion was performed for every four live births. *See* J. Mohr, *supra* note 2, at 76-80. Reports from the late 1870s estimated even greater numbers. *Id.* at 81-82. The Michigan Board of Health estimated in 1898 that one-third of all pregnancies in that state ended in abortion. Haggard, *Abortion: Accidental, Essential, Criminal, Address Before the Nashville Academy of Medicine*, Aug. 4, 1898, at 10, discussed in C. Smith-Rosenberg, *supra* note 3, at 221.

moved to cities and increasingly worked for wages.[16] In 1787, the average white American woman bore seven children; by the late 1870s, the average was down to fewer than five; by 1900 it was 3.56.[17] Carl Degler calls this decline in fertility "the single most important fact about women and the family in American history."[18]

Urban couples limited family size for economic reasons: working-class married women, faced with the material difficulty of managing a family budget on a single male wage, resorted to abortion as the most effective available means of "conscious fertility control."[19] Other economic factors were at work in restricting fertility.[20] Middle-class Americans were influenced by changing definitions of the family and of motherhood. As men's work patterns deviated further from those of women, "wife" and "home" became powerful symbols of men's economic security and social standing.[21] Even as women were regarded as agents of reproduction, the expectation that they turn outward into the larger society served as an incentive to limit the number of children they bore. Nineteenth-century women thus faced sharply conflicting

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[16] *See* C. Degler, *supra* note 15.

[17] Smith, "Family Limitation, Sexual Control, and Domestic Feminism in Victorian America," in *A Heritage of Her Own* 226 (N. Cott & E. Pleck eds. 1979). For discussion of continual decline in family size in the eighteenth and nineteenth centuries, see R. Petchesky, *Abortion and Woman's Choice* 73-78 (rev. ed. 1990).

[18] C. Degler, *supra* note 15, at 191.

[19] *See* R. Petchesky, *supra* note 17, at 53; Rodrique, "The Black Community and the Birth Control Movement," in *Passion and Power* 141-42 (K. Peiss & C. Simmons eds. 1989).

[20] The size of rural families also declined sharply during the nineteenth century. Faragher, *History From the Inside-Out: Writing the History of Women in Rural America*, 33 Am. Q. 536, 549 (1981); R. Petchesky, *supra* note 17, at 74. James Mohr observes that by the 1860s abortion "seemed to thrive as well on the prairies as in large urban centers." J. Mohr, *supra* note 2, at 100.

[21] Demos, "Images of The American Family, Then and Now," in *Changing Images of the Family* 51, 52 (V. Tufte and B. Myerhoff eds. 1979).

demands: "The True Woman was domestic, docile, and reproductive. The good bourgeois wife was to limit her fertility, symbolize her husband's affluence, and do good within the world."[22]

To limit the number of children they bore, women of all classes adopted a range of strategies, including abortion. Through the 1870s abortion was "common," a "matter of fact" and often "safe and successful."[23] The most common methods of abortion in the nineteenth century involved self-administered herbs and devices available from pharmacists.[24] Nonetheless, women also relied on professional abortionists: in 1871, New York City, with a population of less than one million, supported two hundred full-time abortionists, not including doctors who also sometimes performed abortions.[25]

For most of the nineteenth century, abortion was a visible as well as common practice. "Beginning in the early 1840s abortion became, for all intents and purposes, a business, a service openly traded in the free market. . . . [Pervasive advertising told Americans] not only that many practitioners would provide abortion services, but that some practitioners had made the abortion business their chief livelihood. Indeed, abortions became one of the first specialties in American medical history."[26]

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[22] C. Smith-Rosenberg, *supra* note 3, at 225.

[23] L. Gordon, *Woman's Body, Woman's Right* 51-52 (rev. ed. 1990).

[24] *See* LaSorte, *Nineteenth Century Family Planning Practices*, 41 J. of Psychohistory 163, 166-70 (1976).

[25] *New York Times*, Aug. 23, 1871, at 6.

[26] J. Mohr, *supra* note 2, at 47. In the 1860s and 1870s both the popular press and medical journals were full of advice about abortion services. *Id.* at 67-68. *See also* C. Degler, *supra* note 15, at 230.

IV. NINETEENTH-CENTURY ABORTION RESTRICTIONS SOUGHT TO PROMOTE OBJECTIVES THAT ARE TODAY EITHER PLAINLY INAPPLICABLE OR CONSTITUTIONALLY IMPERMISSIBLE.

Nineteenth-century allopathic physicians enlisted state power to limit access to abortion for reasons that are, in retrospect, parochial, and have long since been rejected by organized medicine. Indeed, between 1850 and 1880, the newly formed American Medical Association, through some of its active members, became the "single most important factor in altering the legal policies toward abortion in this country."[27]

The doctors found an audience for their effort to restrict abortion because they appealed to specific social concerns and anxieties: maternal health, consumer protection, discriminatory ideas about the properly subordinate status of women, and racist/nativist fears generated by the fact that elite Protestant women often sought abortions. Some of those doctors also sought to attribute moral status to the fetus.

A. From 1820-1860, Abortion Regulation In The States Rejected Broader English Restrictions And Sought To Protect Women From Particularly Dangerous Forms Of Abortion.

In 1803, English law made all forms of abortion criminal.[28] Despite this model, for two decades, no American state restricted access to abortion. In 1821, when one state, Connecticut, acted, it prohibited only the administration of a "deadly poison, or other noxious and destructive substance"

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[27] J. Mohr, *supra* note 2, at 157. *See also* R. Petchesky, *supra* note 17, at 79; L. Gordon, *supra* note 23, at 59.

[28] The law was passed as part of a comprehensive revision of the criminal code, urged by Lord Ellenborough, broadening the sweep of the criminal law and increasing penalties. J. Mohr, *supra* note 2, at 23; *Roe v. Wade*, 410 U.S. at 136-38.

as a means of bringing about an abortion.[29] Moreover, the act applied only after quickening, and punished only the person who administered the poison, not the woman who consumed it. In the late 1820s, three other states followed the Connecticut model, prohibiting the use of dangerous poisons *after* quickening.[30] Most American states did not see abortion as a problem demanding legislative attention.

In 1830, Connecticut became the first state to punish abortion after quickening.[31] In the same year, New York, also animated by a concern for patient safety, considered a law to prohibit *any* surgery, unless two physicians approved it as essential. Before scientific understanding of germ theory and antisepsis, any surgical intervention was likely to be fatal. The New York act finally adopted applied only to surgical abortion and included the first "therapeutic" exception, approving abortion where two physicians agreed that it was "necessary."[32] As the Court recognized in *Roe v. Wade*, until the twentieth century, abortion, particularly when done through surgical intervention, remained significantly more dangerous to the woman than childbirth.[33] Because these early abortion laws were drafted and justified to protect women, they did not punish women as parties to an abortion.[34]

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[29] The *Public Statute Laws of the State of Connecticut* 152-53 (1821). *See* J. Mohr, *supra* note 2, at 22. *See also* Quay, *Justifiable Abortion – Medical and Legal Foundations*, 49 Geo. L. J. 395 (1960-61).

[30] Missouri adopted such a statute in 1825, Illinois in 1827, and New York in 1828. *See* J. Mohr, *supra* note 2, at 25-27.

[31] Conn. Stat. Tit. 22, § 14 at 152 (1821), reported by Quay, *supra* note 29, at 453.

[32] *See* N.Y. Rev. Stat., pt. IV, Ch. I, tit. VI, § 21, at 578 (1828-1835), reported by Quay, *supra* note 29, at 499.

[33] *See Roe v. Wade*, 410 U.S. at 148-50; Means, *supra* note 5, at 353-54, 358-59, 382-96.

[34] *Roe v. Wade*, 410 U.S. at 151-52; M. Grossberg, *supra* note 10, at 163-64.

None of these early laws, restricting forms of abortion thought to be particularly unsafe, were enforced.[35] That absence itself speaks powerfully, particularly because abortion was a prevalent practice in this era. Despite legislative action and medical opposition, the common and openly tolerated practice suggests that many Americans did not perceive abortion as morally wrong.[36]

B. A Central Purpose Of Abortion Regulation In The Nineteenth Century Was To Define Who Should Be Allowed To Control Medical Practice.

Physicians were the principal nineteenth-century proponents of laws to restrict abortion. A core purpose of the nineteenth-century laws, and of doctors in supporting them, was to control medical practice in the interest of public safety.[37] This is not to deny that some doctors had moral objections to abortion, although their arguments tended to be framed "from the perspective of medical science."[38] But the most significant explanation for the drive by medical doctors to enact statutes regulating abortion is the fact that these doctors were undergoing the historical process of professionalization – the effort to attain control over a specialized body of knowledge.

Medicine was not then the organized, highly regulated profession we know today. It was an occupation in which

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[35] J. Mohr, *supra* note 2, at 39, *citing* A. Wilder, *History of Medicine* 499-511 (1901).

[36] C. Degler, *supra* note 15, cites physicians who observe that women who are "otherwise quite intelligent and refined, with a keen sense of their moral and religious obligations to themselves and to others, deem it nothing amiss to destroy the embryo during the first few months of its growth." *Id.* at 233-34.

[37] J. Mohr, *supra* note 2, at 43.

[38] Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261, 287 (forthcoming 1992).

conventional and scientifically authoritative modes of practice (allopathic medicine) still contended for stature and authority with other modes, such as botanic medicine, homeopathy, herbalists, midwives and abortionists. Allopathic physicians sought to establish and consolidate professional sovereignty.[39] It was only by mid-century, with the founding of the American Medical Association, that professional sovereignty was tentatively established for "scientific" medicine.[40]

The nineteenth century movement to regulate abortions was one chapter in a campaign by doctors that reflected a professional conflict between "regulars" (those who ultimately became the practitioners and proponents of scientific medicine) and "irregulars."[41] As James Mohr explains:

> If a regular doctor refused to perform an abortion he knew the woman could go to one of several types of irregulars and probably receive one. . . . As more and more irregulars began to advertise abortion services openly, especially after 1840, regular physicians grew more and more nervous about losing their practices to healers who would provide a service that more and more American women after 1840 began to want. Yet, if a regular gave in to the temptation to perform an occasional discreet abortion, and physicians testified repeatedly that this frequently happened among the regulars, he would

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[39] *See* P. Starr, *The Social Transformation of American Medicine* (1982).

[40] *See id.*; W. Rothstein, *American Physicians in the Nineteenth Century* (1972). On professionalization, see, for example, G. Geison, ed., *Professions and Professional Ideologies in America* (1983).

[41] Another illustrative chapter is the "medicalization" of childbirth, transforming what had been an affair of family, friends, and midwives into a procedure associated with doctors, hospitals, and sophisticated medical interventions. *See* J. Leavitt, *Brought to Bed: Child-Bearing in America, 1750-1950* (1986); R. Wertz & D. Wertz, *Lying-In: A History of Childbirth in America* (1977); B. Ehrenreich & D. English, *For Her Own Good: 150 Years of the Experts' Advice to Women* (1979); C. Smith-Rosenberg, *supra* note 3, at 231.

> be compromising his own commitment to an American medical practice that would conform to Hippocratic standards of behavior. *The best way out of these dilemmas was to persuade state legislators to make abortion a criminal offense. Anti-abortion laws would weaken the appeal of the competition and take the pressure off the more marginal members of the regulars' own sect.*[42]

To be sure, some "regulars" were morally troubled by abortion, and not all "irregulars" performed them. But issues of medical authority and professional sovereignty explain why "regular" physicians became interested in abortion policy from an early date and "repeatedly dragged it into their prolonged struggle to control the practice of medicine in the United States."[43]

C. Enforcement Of Sharply Differentiated Concepts Of The Roles And Choices Of Men And Women Underlay Regulation Of Abortion And Contraception In The Nineteenth Century.

The American Medical Association's campaign in the nineteenth century to restrict access to abortion succeeded for many reasons. Concerns over the dangers of surgical abortion to women were well founded. In addition, physicians persuaded political leaders (who were, of course, uniformly male) that "abortion constituted a threat to social order and to male authority."[44] Since the 1840s, a growing movement for women's suffrage and equality had generated popular fears

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[42] J. Mohr, *supra* note 2, at 37 (citation omitted, emphasis added).

[43] *Id.*

[44] C. Smith-Rosenberg, *supra* note 3, at 235.

that women were departing from a purely maternal role[45] – fears fueled by the decline in family size during the nineteenth century. A central rhetorical focus of the woman's movement was framed by a new perception of women as the rightful possessors of their own bodies.[46]

In 1871, the American Medical Association's Committee on Criminal Abortion described the woman who sought an abortion:

> She becomes unmindful of the course marked out for her by Providence, she overlooks the duties imposed on her by the marriage contract. She yields to the pleasures – but shrinks from the pains and responsibilities of maternity; and, destitute of all delicacy and refinements, resigns herself, body and soul, into the hands of unscrupulous and wicked men. Let not the husband of such a wife flatter himself that he possesses her affection. Nor can she in turn ever merit even the respect of a virtuous husband. She sinks into old age like a withered tree, stripped of its foliage; with the stain of blood upon her soul, she dies without the hand of affection to smooth her pillow.[47]

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[45] From the 1840s on, the moral fervor of the abolitionist cause drew Northern women more deeply into public life than ever before in the nation's history. Some of the women who were active in the anti-slavery movement perceived parallels between the subjugation and disenfranchisement of black people and the oppression of women. *See* E. Flexner, *Century of Struggle* ch. 13 (rev. ed. 1975).

[46] M. Ryan, *Cradle of the Middle Class* 155-57 (1983); Dubois, *Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution, 1820-1878*, 74 J. Am. Hist. 836 (1987).

[47] Atlee & O'Donnell, *Report of the Committee on Criminal Abortion*, 22 Transactions of the American Medical Association 241 (1871), *quoted in* C. Smith-Rosenberg, *supra* note 3, at 236-37. Smith-Rosenberg observes that, although middle-class husbands were undoubtedly active participants in their wives' decisions about abortion, the nineteenth-century AMA "linked doctor and husband as the equally wronged and innocent parties. The aborting wife, in contrast, was unnaturally selfish and ruthless." *Id.* at 236.

The nineteenth-century American Medical Association's view of women is strikingly similar to that adopted by Justice Bradley in 1873, when women were denied the right to practice law because "divine ordinance," and "the nature of things," prescribed a "family institution [that] is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband."[48] This Court has now come to see this view as part of our "long and unfortunate history of sex discrimination," and as constitutionally illegitimate.[49]

This vision of woman-as-reproductive-vessel was expressed in a range of legal restrictions that enforced a married woman's dependence on her husband. Under the common law, indeed well into this century, a married woman's body and reproductive capacity were subjected to her husband's control.[50] Common law provided the husband a remedy for interference with his right to sole possession of his wife's body and services. The early writ of "ravishment" listed the wife with the husband's chattels. Until recent years, the action for criminal conversation allowed the husband to maintain an action for trespass, not only when his wife was raped, but even when the wife had consented to extramarital sexual relations, "since it was considered that she was not more capable of giving a consent which would prejudice the

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[48] *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring).

[49] *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973). In *United Automobile Workers v. Johnson Controls*, 111 S.Ct. 1196 (1991), this Court struck down a sex-specific fetal-protection policy, noting that "[c]oncern for a woman's existing or potential offspring historically has been the excuse for denying women equal economic opportunities." *Id.* at 1210.

[50] For the classic statement of the theory of "coverture" followed in the United States, see 1 W. Blackstone, Commentaries *442. On the legal disabilities associated with coverture, see M. Abramowitz, *Regulating the Lives of Women* 54 (1988); Chused, *Married Women's Property Law: 1800-1850*, 71 Geo. L. J. 1359, 1366 (1983); E. Pleck, *Domestic Tyranny* 88 (1987); Note, *To Have and To Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 Harv. L. Rev. 1255, 1256 (1986).

husband's interests than was his horse."[51] At common law a husband could sue a third party for rendering aid to his wife without his permission – a privilege that strikingly resembles the cause of action conferred upon unconsulted husbands against doctors by the Pennsylvania law at issue in this case.

By the middle of the nineteenth century, such privileges were widely regarded as corrupt and illegitimate impositions of domestic slavery – and not just by women's rights activists. In 1864, for example, the New York Court of Appeals overturned a common law rule allowing a husband to sue for "enticement" any person who helped his wife to leave him, stating: "[A married woman may] invoke and receive aid, shelter and protection from others, even strangers, against the oppression and cruelty of her husband," even if the wife was acting directly contrary to her husband's wishes. "[A stranger] may in such a case treat the wife as a person, an individual entitled to credit, and invested with the rights and claims of, and upon, our common humanity."[52]

Against what they saw as an inequitable vision of gender relations, the women's movement of the nineteenth century affirmed that women – even married women – should have basic rights of self-governance, including the right to decide whether to bear a child. Early feminists sought to enhance women's control of reproduction through a campaign for "voluntary motherhood," ideally to be achieved through periodic abstinence from sexual relations.[53] They attempted, with

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[51] W. Prosser, *Law of Torts* 877 (3d ed. 1971).

[52] *Barnes* v. *Allen*, 1 Keyes 390, 392 (N.Y. 1864) (neighbor who provided wagon ride to wife from her husband's house to her father's house not liable to husband).

[53] *See* L. Gordon, *supra* note 23, at 93-113. During this period, much scientific and folk wisdom held a flatly inaccurate view of the cycle of female fertility, which made periodic abstinence an unreliable form of contraception. *Id.* at 99. This inaccurate belief, when viewed in light of hard data on declining birthrates, *see* text at notes 17-19 *supra*, underscore how common abortion must have been.

limited success, to analogize women's control over reproduction to the structure of rights that had overturned chattel slavery. Indeed, it was precisely women's outrage at their sexual subordination that led some feminists to oppose abortion – not on moral grounds, but as an object example of women's victimization at the hands of men.[54] The recently adopted Reconstruction Amendments were a central text in the opposition of women's rights advocates to the social and legal covenants binding women to the marital relation.

Opposition to abortion and contraception were closely linked,[55] and can only be understood as a reaction to the uncertainties generated by changes in family function and anxieties created by women's challenges to their historic roles of silence and subservience. These challenges were critical factors motivating the all-male state legislatures that adopted restraints on women, including restrictions on abortion.[56] In opposition to the feminist demand for control of reproduction, the federal government in 1873 took the lead in banning access to information about both contraception and abortion. The Comstock law[57] restricted not only medical information on abortion and contraception, such as a medical text on

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[54] L. Gordon, *supra* note 23, at 108; Siegel, *supra* note 38, at 304-308; Gordon, "Why Nineteenth Century Feminists Did Not Support 'Birth Control' and Twentieth Century Feminists Do," in *Rethinking the Family* 40, 43 (B. Thorne & M. Yalom eds. 1982).

[55] "Anthony Comstock had labeled as abortionists everyone who advocated or dealt in family-limitation materials and services." M. Grossberg, *supra* note 10, at 193.

[56] C. Smith-Rosenberg, *supra* note 3, at 218.

[57] The act prohibits mailing, transporting or importing "obscene, lewd or lascivious" items, specifically including all devices and information pertaining to "preventing conception and producing abortion." *See* Comstock Act, Ch. 258, § 1, 17 Stat. 598 (1873). It was not until 1971 that an amendment was passed deleting the prohibition as to contraception. Pub. L. 91-662, 84 Stat. 1973 (1971). The ban as to information about abortion remains. *See* 18 U.S.C. § 1461 (1988).

physiology written by an eminent Harvard scientist, but also literary depictions, such as Leo Tolstoy's disapproving tale of infidelity, *The Kreutzer Sonata*, and moral literature, including a pamphlet urging total sexual chastity.[58]

D. Nineteenth-Century Contraception And Abortion Regulation Also Reflected Ethnocentric Fears About The Relative Birthrates Of Immigrants And White Protestants.

Nativism, notably anti-Catholicism, had been part of American politics and culture as early as the Jacksonian period. The Civil War and Reconstruction Era dramatically raised social fears about national identity and citizenship. Social conservatives in the 1850s articulated an "organicist" ideal in which social unity should predominate over diversity. By the 1870s social thought was turning the insights of Charles Darwin toward racist ends. The political ideology of "free labor," forged in the nascent Republican Party in the years preceding the Civil War,[59] was severely challenged by an influx of foreign labor in the latter part of the nineteenth century.[60] The discriminatory immigration policies and nativist fears of the late nineteenth and early twentieth centuries fanned movements against women's reproductive freedom.

Beginning in the 1890s, and continuing through the first decades of the twentieth century, these nativist fears coalesced into a drive against what was then called "race

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[58] *See* M. Grossberg, *supra* note 10, at 190; *United States v. Foote*, 25 Fed. Cas. 1140, 1141 (S.D.N.Y. 1876) (rejecting claim that physicians should have right to distribute information concerning contraceptives); L. Gordon, *supra* note 23, at 164-66.

[59] E. Foner, *Free Soil, Free Labor, Free Men* (1970).

[60] D. Davis, *From Homicide to Slavery* 137-54 (1986). *See also* S. Lipset & E. Raab, *The Politics of Unreason* (1970); G. Frederickson, *The Inner Civil War* (1965); R. Hofstadter, *Social Darwinism in American Thought* (1955); J. Higham, *Strangers in the Land* (1963).

suicide."[61] The "race suicide" alarmists worried that women of "good stock" – prosperous, white, and Protestant – were not having enough children to maintain the political and social supremacy of their group.[62] Anxiety over the falling birth rates of Protestant whites in comparison with other groups helped shape policy governing both birth control and abortion.[63] As James Mohr points out, "The doctors both used and were influenced by blatant nativism . . . There can be little doubt that Protestants' fears about not keeping up with the reproductive rates of Catholic immigrants played a greater role in the drive for anti-abortion laws in nineteenth-century America than Catholic opposition to abortion did."[64]

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[61] *See* L. Gordon, *supra* note 23, at 133-55. On November 20, 1912, 390 federal postal inspectors arrested 173 people for using the mails to disseminate information about abortion and contraception in violation of the Comstock Act. The campaign was called the "federal war on race suicide." "Take Chicagoans in Federal War on Race Suicide," *Chicago Tribune*, Nov. 21, 1912, p. 1.

[62] *See* C. Degler, *supra* note 15, at 229-30, on the concern of physicians that women of "good stock" were particularly likely to obtain abortions. In Buffalo in 1855, the fertility ratio of Irish women of ages 20-34 was over twice that of native white women, *id.* at 134, raising concerns about disparities in relative population growth. *See also* Weisbrod, *Birth Control and the Black American: A Matter of Genocide?*, 10 Demography 571 (1973).

[63] J. Reed, *From Private Vice to Public Virtue* (1978); D. Kevles, *In the Name of Eugenics* (1985); D. Kennedy, *Birth Control in America* (1971).

[64] *See* J. Mohr, *supra* note 2, at 167. Horatio Robinson Storer, who spearheaded the American Medical Association's mid-nineteenth century anti-abortion campaign, frequently referred to racial themes. *Id.* at 180-90; H. Storer, *Why Not? A Book for Every Woman* 85 (1866) ("[S]hall the great territories of the Far West be filled by our children or by those of aliens?"). Carl Degler also documents that physicians of the 1850s and 1860s expressed particular concern that abortion was increasingly sought by married women of "high repute." C. Degler, *supra* note 15, at 229.

V. ENFORCEMENT OF ABORTION RESTRICTIONS IN THE FIRST HALF OF THE TWENTIETH CENTURY FOLLOWED ENTRENCHED ETHNIC AND CLASS DIFFERENTIATIONS, AFFIRMED TRADITIONAL CONCERNS ABOUT ENFORCING GENDER ROLES, AND IMPOSED ENORMOUS COSTS UPON WOMEN.

The statutory restrictions on abortion remained virtually unchanged from the early twentieth century until the 1960s. Physicians were allowed to perform abortions only "to preserve the mother's life." Nonetheless, the incidence of abortion remained high, ranging from one pregnancy in seven at the turn of the century, to one in three in 1936.[65] Most abortions were performed illegally.[66] Legal restrictions did not stop abortion, but made it humiliating and dangerous.

The dangers of illegal abortion were exacerbated by law enforcement abuse. Leslie Reagan's study of the regime of criminalized abortion in Chicago in the late nineteenth and early twentieth centuries chronicles the inevitable abuses of police and prosecutorial power that attended efforts to enforce restrictive abortion laws. As Reagan notes, "Popular tolerance of abortion tempered enforcement of the criminal abortion laws. Prosecutors discovered early the difficulty of winning convictions in criminal abortion cases. Juries nullified the law and regularly acquitted abortionists."[67] Faced with these

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[65] *See* F. Taussig, *Abortion, Spontaneous and Induced* 338, and Appendix A, 453-75 (1936). *See also* Stix, *A Study of Pregnancy Wastage*, 13 Milbank Memorial Fund Q. 347 (1935); Stix & Wiehl, *Abortion and Public Health*, 28 Am. J. Pub. Health 622, Table I (1938).

[66] *See* K. Luker, *Abortion and the Politics of Motherhood* 38-54 (1984).

[67] Reagan, *"About to Meet Her Maker": Women, Doctors, Dying Declarations, and the State's Investigation of Abortion, Chicago, 1867-1940*, 77 J. Am. Hist. 1240, 1247 (1991). *See generally* L. Reagan, *When Abortion Was a Crime*, Ph.D. dissertation, University of Wisconsin-Madison, 1991.

obstacles, prosecutors routinely resorted to enforcement tactics that were at best questionable and at worst grotesque: They extracted "dying declarations" in hospitals from women dying from poorly administered abortions in order to secure evidence needed to prosecute abortionists.

This practice not only subjected dying women to cruel and humiliating interrogations; it also drew reluctant doctors into the web of criminal investigation and encouraged doctors to violate patient confidences in exchange for their own exculpation. A doctor who tried to save the life of a woman dying from an abortion could himself be subjected to harassment or even criminal prosecution as an accessory. But if he managed to secure a "dying declaration" from the woman that named the abortionist, the doctor might hope to perform his medical duties without fear of prosecution. Some doctors, of course, rebelled against a regime that required them to harass sick and dying women. "The business of the doctor is to relieve pain, cure disease and save life, not to act as a bloodhound [for] the state," one Illinois doctor protested in 1933.[68] But such practices seemed inevitable if the laws against abortion were to be enforced in a climate of tolerance for routine violation of those laws.

When advances in medical science in the 1930s and 1940s reduced the number of deaths due to improperly administered abortions, Chicago authorities shifted their enforcement strategy from securing "dying declarations" to more direct but equally coercive means of securing convictions. The 1947 investigation and prosecution of Chicago midwife Helen Stanko, for instance, was replete with instances of forced gynecological examinations and humiliating interrogations of Stanko's patients.[69] The aggressive efforts of Chicago police in the 1940s to enforce criminal statutes that reached

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[68] L. Reagan, *When Abortion Was A Crime*, *supra* note 67, at 180-81.

[69] *Id.* at 277-83. *See People v. Stanko*, 402 Ill. 558 (1949); *People v. Stanko*, 407 Ill. 624 (1951).

into the heart of women's intimate lives and medical relationships led inexorably to law enforcement practices that in retrospect seem medieval.

In the first half of the twentieth century, a two-tiered abortion system emerged in which quality of medical care depended on the class, race, age and residence of the woman. Poor and rural women obtained illegal abortions performed by people (including some physicians) willing to defy the law out of sympathy for the woman or for the fee. More privileged women pressed private physicians for legal abortions and many obtained them. Some doctors could be persuaded that a delivery would endanger a woman's health. The dilation and curettage procedure effective for abortion was indicated for numerous other gynecological health problems, allowing the word "abortion" to remain unspoken between patient and doctor – even as the procedure went forward.[70]

Shifts in the definition of "therapeutic" abortion responded to larger social forces.[71] Early in the century, "race suicide" fears fueled efforts to suppress both abortion and birth control. During the Depression, abortions increased as the medical profession recognized impoverishment as an indication for therapeutic abortion.[72] In the 1940s and 1950s the definition of therapeutic abortion expanded to include psychiatric indications.[73] Physicians were caught in a double bind: abortion was criminal, but the reasons women sought the

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[70] *See generally* K. Luker, *supra* note 66.

[71] L. Reagan, *When Abortion Was a Crime*, *supra* note 67, at 284-312.

[72] In 1931 an American Medical Association editorial noted that "poverty . . . does not constitute an indication for abortion, [but] there is no doubt that in the United States many abortions are performed for borderline cases in which there is a strong ethical indication plus a more or less minor medical ailment." *Abortion or Removal of Pregnant Uterus*, 95 J. Am. Med. Ass'n 1169 (1931).

[73] K. Luker, *supra* note 66, at 45-47, 54-57.

procedure were so multiple and compelling that doctors found requests for abortion difficult to resist.[74]

In the 1950s, more restrictive attitudes toward both legal and illegal abortions[75] were part of a conservative response to growing female labor-force participation and independence.[76] The movement to legalize abortion in the 1960s arose in response to this rather brief wave of anti-abortion enforcement. Physicians, particularly those who worked in public hospitals and clinics, saw women who needlessly suffered and died as a consequence of illegal abortions.[77] Others were disturbed that most of those women were poor and Black. Many were distressed by the class bias inherent in the psychiatric indications for therapeutic abortions.[78] In the late 1960s, concerned physicians were joined by women who had come to understand that control of reproductive capacity is at the heart of women's self-governance and moral personhood.[79]

As a number of states acted to legalize abortion in the late 1960s and early 1970s, there was pressure for recognition of constitutional protection for the basic right of abortion choice. Class and regional differentiations were accentuated as it became possible for women with resources to travel to

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[74] For example, Luker, *id.*, discusses the early 1960s scare over the fertility drug Thalidomide, which caused crippling fetal deformities. The scare underlined the inadequacy of a narrow definition of therapeutic indications for abortion: American women carrying severely deformed fetuses were forced either to carry to term or to travel overseas to find abortion access. *Id.* at 62-65 (case of Sherri Finkbine).

[75] L. Lader, *Abortion* 42-51 (1966).

[76] M. Ryan, ed., *Womanhood in America* 198-215 (1975); R. Baxandall, L. Gordon & S. Reverby, eds., *America's Working Women* 299-308 (1976).

[77] *See, e.g.*, Dudziak, *Just Say No: Birth Control in the Connecticut Supreme Court Before Griswold v. Connecticut*, 75 Ia. L. Rev. 915, 924-927 (1990) (impetus for Connecticut doctors' campaign in 1940s-1960s to legalize birth control in the state was threat to life and health of married women from medically-dangerous pregnancies).

[78] *See McRae v. Califano*, 491 F. Supp. 630, 668-76 (E.D.N.Y. 1980).

[79] K. Luker, *supra* note 66, at 92-125.

states where abortion had been made legal. In its 1973 decision in *Roe v. Wade*, this Court responded to these forces in holding that constitutional rights of liberty and privacy protect the right of the woman and her physician to choose abortion.

VI. EMPHASIS ON THE FETUS BECAME CENTRAL TO CULTURAL AND LEGAL DEBATE OVER ABORTION ONLY IN THE LATE TWENTIETH CENTURY, WHEN TRADITIONAL JUSTIFICATIONS FOR RESTRICTING ACCESS TO ABORTION BECAME CULTURALLY ANACHRONISTIC OR CONSTITUTIONALLY IMPERMISSIBLE.

Some of those seeking to enlist the power of the state to deny women's liberty to choose abortion have long articulated a concern for the fetus.[80] Yet until the late twentieth century, this concern was always subsidiary to more mundane social visions and anxieties. The mid-nineteenth century physicians' campaign against abortion was directed at botanic medicine and homeopathy, as well as at abortion. Similarly, those who opposed abortion and birth control as a means of preventing "race suicide" sought to protect the privilege of elite white Protestants, not to protect the racially mixed universe of fetuses.

It is significant that there was virtually no religious support for the nineteenth-century physicians' campaign to bar abortion.[81] Physicians tried hard to enlist moral authority

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[80] *See* J. Mohr, *supra* note 2, at 165-66.

[81] The extensive religious press of the United States, both Catholic and Protestant, "maintained a total blackout on the issue of abortion from the beginning of the nineteenth century through the end of the Civil War." *Id.* at 183. It was not until 1869 that a papal declaration condemned abortion as a violation of the fetus prior to "ensoulment," held to be 40 days gestational age for a male fetus and 80 days for a female. Before that time, Catholic theology condemned early abortion on precisely the same terms as it had condemned masturbation and contraception, *i.e.* a distrust of sexuality and of interference

(Continued on following page)

and organized religion in their campaign to restrict abortion, and "were openly disgusted when the established voices of moral authority refused to speak on their behalf. . . . Medical journals accused the religious journals of valuing abortifacient advertising revenue too highly to risk criticizing the practice."[82]

Further, the limited support offered physicians from Protestant religious leaders appeared to reflect "worr[y] about falling birth-rates among their adherents [more] than . . . the morality of abortion itself."[83] Compared to extensive religious involvement in other nineteenth-century movements for changing social morality, such as temperance, the conspicuous absence of religious support for the physicians' anti-abortion crusade is particularly striking.[84]

Nineteenth-century laws restricting access to abortion did not define the fetus as a human being, nor did courts treat fetuses as legal rights-bearers. To the contrary, New Jersey Chief Justice Green expressed the prevailing judicial opinion in 1849 when he asserted that although it was "true, for certain purposes, [that] the law regards an infant as *in being* from the time of conception, yet it seems nowhere to regard it as *in life*, or to have respect to its preservation as a living being."[85] Michael Grossberg summarizes the nineteenth-century cases, saying, "[A] fetus enjoyed rights only in property

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with natural processes. In Catholic doctrine late abortions were always held to be a form of homicide. No American diocesan newspaper reported the Pope's 1869 statement. *Id.* at 187. In that same year, the Bishop of Baltimore issued the only formal nineteenth-century Catholic condemnation of abortion in America, *id.* at 186, and the Old School Presbyterians became the only major Protestant denomination to condemn abortion. *Id.* at 192. No other religious denominations or leaders followed.

[82] *Id.* at 184.

[83] *Id.* at 195.

[84] *Id.* at 182-96; R. Petchesky, *supra* note 17, at 80.

[85] *Cooper v. State*, 22 N.J.L. (2 Zab.) 52, 56-57 (1849) (emphasis in the original), discussed in M. Grossberg, *supra* note 10, at 165.

law and then only if successfully born. It had no standing in criminal law until quickening, and none at all in tort. The law highly prized children, not fetuses."[86] An important illustration lies in Judith Walzer Leavitt's analysis of turn-of-the-century medical decisions about the procedure of craniotomy (a surgical mutilation of the live fetal head to permit vaginal extraction). Leavitt's research shows that the majority of physicians, confronted with a woman whose pelvis was too small to permit delivery, thought craniotomy (which killed the fully-formed fetus) more appropriate than a Caesarean section (with its high risk to the woman) – a revealing comment on the prevailing hierarchy of values.[87]

As this Court observed in *Roe v. Wade*, the pattern of American abortion laws does not support the view that such laws incorporate a view of the fetus as a person. Both the lesser punishment for abortion than for homicide, and the various exceptions allowing the physician to determine when and if abortion is justified, rebut the assumption that laws against abortion reflect simply a belief in fetal personhood.

VII. A PRESUMED INTEREST IN PROTECTING FETAL LIFE DOES NOT JUSTIFY DENYING WOMEN THEIR HISTORIC LIBERTY TO CHOOSE ABORTION.

A culture can, of course, allow growing humanistic impulses to attach greater moral value to fetuses or to potential human life. But this Court should reject state efforts to invoke the protection of fetal life to justify restrictions upon women's access to abortion.

As this brief has demonstrated, the complex historic grounds originally asserted for restricting access to abortion are now either socially irrelevant or recognized as constitutionally illegitimate. Both culturally and legally, it is today

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[86] M. Grossberg, *supra* note 10, at 165.

[87] *See* Leavitt, *The Growth of Medical Authority: Technology and Morals in Turn-of-the-Century Obstetrics*, 1 Med. Anthropology Q. 230, 233-35 (1987).

impossible to defend abortion restrictions as a means of enforcing an absolutist religious belief that intimate relations must always remain open to the possibility of procreation.[88] Similarly, abortion restrictions cannot be justified by the desire to keep women in traditional roles.[89] Likewise, our social consensus, embodied in principles of legal equality, would not permit the Court to defend restrictions on abortion as a means of encouraging the propagation of white Protestant stock or of diminishing the population of racial or religious minorities. History should make us skeptical, however, of the notion that basic conflicts underlying these earlier social purposes have disappeared as motive forces for the regulation of abortion, to be entirely displaced by moral concern for the protection of unborn life. Sufficient refutation of this notion lies in the "spousal notification" provision of the Pennsylvania law at issue in this case.[90] In historical terms, the spousal notification requirement rests upon and reanimates the traditional notion that married women's bodies, lives and will are submerged in their husband's.[91] That "long and unfortunate history" of the subordination of women has now been firmly – and properly – rejected by this Court.[92]

The extensive factual record developed at trial amply demonstrates that the restrictions of the Pennsylvania law

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[88] *See Griswold v. Connecticut*, *supra*; *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

[89] Gender-based classifications must be "free of fixed notions concerning the roles and abilities of males and females." *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724-25 (1982). *Accord Orr v. Orr*, 440 U.S. 268 (1979); *Stanton v. Stanton*, 421 U.S. 7 (1975).

[90] The Circuit Court of Appeals, while concluding that this Court's decision in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), compelled it to approve most of the restrictions of the Pennsylvania law, held that the spousal notification requirement constitutes an undue burden on women's ability to choose abortion, not narrowly tailored to serve a compelling state interest. *Planned Parenthood v. Casey*, 947 F.2d 683, 711-715 (3d.Cir. 1991).

[91] *Supra* note 50.

[92] *Supra* note 49.

impose heavy burdens and costs on women's ability to choose whether to bear a child, and that these burdens fall most heavily on the most vulnerable women. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 744 F.Supp. 1323, 1329-72 (E.D.Pa. 1990). Similarly, history vividly establishes that the single most obvious and inevitable result of such onerous restrictions is their devastating consequences for the health and autonomy of women.

CONCLUSION

The judgment of the Court of Appeals regarding the spousal notification requirement should be affirmed and the judgment regarding the other provisions of the Pennsylvania act should be reversed. The Court should reaffirm that the Constitution prohibits the state from unduly burdening women's powerful liberty and equality interests in controlling their own bodies and lives.

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APPENDIX

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IN THE

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OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *et al.*,

Petitioners,

v.

ROBERT P. CASEY, *et al.*,

Respondents.

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v.

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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Brief Of *Amici Curiae* of the NAACP Legal Defense and Educational Fund, Inc., and Other Organizations,* in Support of Planned Parenthood of Southeastern Pennsylvania

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QUESTION PRESENTED

Whether provisions of the Pennsylvania Abortion Control Act that impose a 24-hour waiting period before the performance of an abortion (18 Pa. Cons. Stat. Ann. § 3205(a) (informed consent)), mandate parental consent (18 Pa. Cons. Stat. Ann. § 3206), and require spousal notification (18 Pa. Cons. Stat. Ann. § 3209) unduly burden women's right to privacy.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 5

ARGUMENT 6

INTRODUCTION 6

A. LAWS THAT OPERATE TO INTERFERE WITH OR IMPAIR ACCESS TO ABORTIONS BURDEN THE PRIVACY RIGHTS OF POOR WOMEN 16

B. PENNSYLVANIA'S ABORTION CONTROL ACT WOULD IMPEDE THE DECISION-MAKING PROCESS AND THE EXERCISE OF THE RIGHT TO REPRODUCTIVE CHOICE FOR POOR WOMEN AND THUS CONSTITUTES A BURDEN ON THE RIGHT TO PRIVACY 19

1. Section 3205(a) of the Act, which requires a 24-hour delay between the time that a woman's consent for an abortion is obtained and the actual time when the procedure is performed, burdens the right to abortion 19

2. Section 3206 of the Act, which requires parental consent before an abortion can be obtained, burdens the rights of low-income young women, creating a virtual bar to abortion 25

3. Section 3209 of the Act, which requires spousal notification before an abortion can be obtained, burdens the right to abortion 30

CONCLUSION 34

TABLE OF AUTHORITIES

Cases: *Pages:*

Akron v. Akron Ctr. for Reproductive Health, 462 U.S. 416 (1983) 8, 11-14, 32

Beal v. Doe, 432 U.S. 438 (1977) 10, 32

Bellotti v. Baird, 443 U.S. 622 (1979) 25

Doe v. Bolton, 410 U.S. 179 (1973) 15, 31, 32

Eu v. San Francisco Democratic Comm., 489 U.S. 214 (1989) . 12

Fitzgerald v. Porter Memorial Hospital, 523 F.2d 716 (7th Cir. 1975), *cert. denied*, 425 U.S. 916 (1976) 9

Harris v. McRae, 448 U.S. 297 (1980) 8, 10, 32

Hodgson v. Minnesota, 497 U.S. __, 111 L.Ed.2d 344, (1990) .. 8, 14, 25, 27, 28, 30

Hodgson v. Minnesota, 648 F. Supp. 756 (D. Minn. 1986) 28

Jacobson v. Mass., 197 U.S. 11 (1905) 15

Leigh v. Olson, 497 F.Supp. 1340 (D.N.D. 1980) 21

Maher v. Roe, 432 U.S. 464 (1977) 12, 13, 31

Planned Parenthood Ass'n of Kansas City, Missouri v. Ashcroft, 462 U.S. 476 (1983) 13

Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976) 11, 13, 32

Planned Parenthood v. Casey, 947 F.2d 682 (3d Cir. 1991) 16, 17, 30

Planned Parenthood v. Casey, 744 F. Supp. 1323 (E.D. Pa. 1990) 30

Pages:

Poelker v. Doe 432 U.S. 519 (1977) 32

Roe v. Wade, 410 U.S. 113 (1973) ..... passim

Rust v. Sullivan, 500 U.S. __, 114 L.Ed.2d 233 (1991) 32

Tashjihan v. Republican Party, 479 U.S. 208 (1986) 13

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) 8, 32, 33

U.S. v. Kras, 409 U.S. 434 (1973) 4

Webster v. Reproductive Health Services, 492 U.S. 490 (1989) 15, 32

Statutes: *Pages:*

18 Pa. Cons. Stat. Ann. § 3205 ..... 7, 19, 23

18 Pa. Cons. Stat. Ann. § 3206 7

18 Pa. Cons. Stat. Ann. § 3209 ..... 7, 30

Other Authorities: *Pages:*

American Civil Liberties Union Reproductive Freedom Project, *Parental Notification Laws: Their Catastrophic Impact on Teenagers' Right to Abortion* 15 (1986) 28

American Medical Association, Council on Ethical and Judicial Affairs, *Black-White Disparities in Health Care* 263 J.A.M.A. 2344 (May 2, 1990) 10

Association for Sickle Cell Education Research and Treatment Inc. *Sickle Cell Anemia: A Family Affair* (1988) 24

Avery, *A Question of Survival/A Conspiracy of Silence: Abortion and Black Women's Health*, in FROM ABORTION TO REPRODUCTIVE FREEDOM: TRANSFORMING A MOVEMENT 75 (Fried ed. 1990) 20

Belkin, *Women in Rural Areas Face Many Barriers to Abortion*, N.Y. Times, July 11, 1989, at A1, col. 3 22

Bland, *Racial and Ethnic Influences: The Black Woman and Abortion*, in PSYCHIATRIC ASPECTS OF ABORTION 171 (Stotland ed. 1991) 10

Bonavoglia, *Kathy's Day in Court* in FROM ABORTION TO REPRODUCTIVE FREEDOM: TRANSFORMING A MOVEMENT 161 (Fried ed. 1990) 27

Cates & Grimes, *Morbidity and Morality of Abortion in the United States*, in *Abortion and Sterilization: Medical and Social Aspects* 155 (Hodson ed. 1981) ... 29

Cates & Rochat, *Illegal Abortion in the United States: 1972-1974*, 8 Fam. Plan. Persp. 86 (1986) 4

Cates, Schulz, Grimes and Tyler, *The Effect of Delay and Method Choice on the Risk of Abortion Morbidity*, 9 Fam. Plan. Persp. 266 (Nov./Dec. 1977) 23

Centers for Disease Control, *HIV/AIDS Surveillance: Year-End Edition*, 15 (January, 1992) 24

Dixon, Ross, Avery & Jenkins, *Reproductive Health of Black Women and Other Women of Color* in FROM ABORTION TO REPRODUCTIVE FREEDOM: TRANSFORMING A MOVEMENT 157 (Fried ed. 1990) ... 3

Drury & Powell, *Prevalence of Known Diabetes Among Black Americans*, in ADVANCE DATA FROM VITAL AND HEALTH STATISTICS, Pub. No. (PHS) 87-1250 24

Foes Successfully Chip Away at Abortion Rights; Poor, Young Affected Most, USA Today, June 3, 1991, at 6A 22

Genovese, *Roll, Jordan, Roll: The World The Slaves Made* (1st Vintage Books Ed. 1972) 10

Gold, *Abortion and Women's Health; A Turning Point for America?* The Alan Guttmacher Institute 3

Grimes, *Second-Trimester Abortions in the United States*, 16 Fam. Plan. Persp. 260 (Nov./Dec. 1984) 29

Henshaw & Wallisch, *The Medicaid Cutoff and Abortion Services for the Poor*, 16 Fam. Plan. Persp. 170 (1984) 3

Henshaw, Forrest & Van Vort, *Abortion Services in the United States, 1984 & 1985*, 19 Fam. Plan. Persp. 63 (1987) 21

Koonin, Kochanek, Smith & Ramick, *Abortion Surveillance, United States, 1988*, 40 Morbidity & Morality 17 (July, 1991) 20, 28

Lincoln, Doring-Bradley, Lindheim & Cotterill, *The Court, The Congress and the President: Turning Back the Clock on the Pregnant Poor*, 9 Fam. Plan. Persp. 210 (Sept./Oct. 1977) 20

National Abortion Rights Action League Foundation, *Who Decides? A Reproductive Rights Manual* 10 (1990) 18, 26, 28, 29

Nsiah-Jefferson, *Reproductive Laws, Women of Color, and Low Income Women*, in REPRODUCTIVE LAWS FOR THE 1990'S: A BRIEFING HANDBOOK (1988) ... 22

O'Hair, *A Brief History of Abortion in the United States*, 262 J.A.M.A. 1875 (1989) 18

O'Keefe & Jones, *Easing Restrictions on Minor's Abortion Rights*, Issues in Sci. & Tech. 74 (Fall, 1990) 26

Radecki, *A Racial and Ethnic Comparison of Family Formation and Contraceptive Practices Among Low-Income Women*, 106 Pub. Health Rep. 494 (Sept./Oct. 1991). 18

Roberts, *The Future of Reproductive Choice for Poor Women and Women of Color*, 12 Women's Law Reporter 59 (1990) 9

Scott, *HHC Finds Hospitals Hurt by Budget Cuts*, N.Y. Newsday, March 4, 1992, at 21 20

Sharpe, *17 Year Old Died of Fear and Abortion*, Cincinnati Enquirer, Nov. 26, 1989. 26

Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261 (January, 1992) 16

The Alan Guttmacher Institute, *Abortions and the Poor: Private Morality, Public Responsibility* (1979) 18

United States Commission on Civil Rights, *The Economic Status of Black Women* (1990) 7

United States Dept. of Commerce, Bureau of Census, *Statistical Abstract of the United States, 1991*, No. 748 (1991) 7

United States Dept. of Health and Human Services, 1 *Report of the Secretary's Task Force on Black and Minority Health* (1985) 24

United States Dept. of Health and Human Services, *Health Status of Minorities and Low-Income Groups: Third Edition* (1991) 10, 24

United States Dept. of Health and Human Services, Office of Minority Health, *Diabetes and Minorities* in CLOSING THE GAP (1988) 24

United States Dept. of Health and Human Services, 1 *Report of the Secretary's Task Force on Black and Minority Health* (1986) 7, 24

Wilkerson, *Michigan Judges' Views of Abortion Are Berated*, N.Y. Times, May 3, 1991 27

Zambrana, *Research Issues Affecting Poor and Minority Women: A Model for Understanding Health Needs*, 14 Women and Health 137 (1988) 10

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PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *et al.*,

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PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Brief for the NAACP Legal Defense and Educational Fund, Inc. and Other Organizations as *Amicus Curiae* in Support of Planned Parenthood of Southeastern Pennsylvania

INTEREST OF *AMICI CURIAE*

This brief is filed on behalf of twenty-four organizations that share a deep concern for the health and life chances of poor women, and particularly, for poor

women of color -- *i.e.*, African American, Latina, Asian American and Native American women. Our ranks include attorneys, medical professionals, community educators, and researchers, who fear the devastating effects of greater governmental interference in the reproductive choices of poor women and the provision of abortion services.

Poor women lack access to the quality health care services that more affluent Americans take for granted. Poor communities have few health care providers and poor women are already forced to wait long hours in overcrowded clinics and emergency rooms and to travel at great expense for needed services. As fifteen studies recently reviewed by the Institute of Medicine found, financial barriers, particularly inadequate insurance coverage and limited personal funds, are the most important obstacle to care-seeking among women receiving insufficient care. United States Dept. of Health and Human Services, *Health Status of Minorities and Low-Income Groups: Third Edition* 99 (1991). Indeed, simply paying for the abortion procedure itself

entails serious hardship for indigent women who, in order to exercise their right to abortion, must often let bills go unpaid or buy fewer necessities, such as food and clothing. Henshaw & Wallisch, *The Medicaid Cutoff and Abortion Services for the Poor*, 16 Fam. Plan. Persp. 170, 171 (1984). *Amici* are concerned about the adverse impact of statutory provisions that require women to delay treatment, to undertake multiple efforts to obtain care, and to overcome other psychological and procedural obstacles, such as those posed by the need to obtain spousal notification and parental consent.

In 1969, fully seventy-five percent of all the women who died of illegal abortions in the United States were women of color, and from 1972 to 1974, the rate of mortality from illegal abortions for women of color was twelve times greater than that of white women. Gold, *Abortion and Women's Health: A Turning Point for America?* The Alan Guttmacher Institute 5 (1990)(hereinafter cited as Gold); Dixon, Ross, Avery & Jenkins, *Reproductive Health of Black*

Women and Other Women of Color in FROM ABORTION TO REPRODUCTIVE FREEDOM: TRANSFORMING A MOVEMENT 157 (Fried ed. 1990). Even after legalization, high numbers of poor women of color were still precluded from obtaining safe and legal abortions. As a result, in 1975 women of color comprised eighty percent of the deaths associated with illegal abortions. Cates & Rochat, *Illegal Abortion in the United States: 1972-1974*, 8 Fam. Plan. Persp. 86, 87 (1986).

If the undue burden standard is to be adopted, it is crucial that the Court seriously consider the impact of statutory restrictions in the real world context in which poor women live. As Justice Marshall admonished nearly two decades ago, "It may be easy for some people to think that weekly savings of less than $2 are no burden. But no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are." *U.S. v. Kras*, 409 U.S. 434, 460 (1973)(Marshall, J., dissenting). Restrictions on the provision of abortion services and the decision-making process do not fall with

equal measure upon rich and poor, and the burdens imposed on poor women should not be ignored.

A complete list of *amici* and their statements of interest are set forth in an Appendix to this brief.

SUMMARY OF ARGUMENT

Amici, supporting Planned Parenthood of Southeastern Pennsylvania, urge this Court to reaffirm *Roe v. Wade*, 410 U.S. 113 (1973). If, however, the Court adopts the undue burden test developed by Justice O'Connor, the Court would nevertheless be required to find the provisions of the Pennsylvania Abortion Control Act that define medical emergency, establish reporting requirements, and require informed consent, parental consent, and spousal notification unconstitutional.

The right to privacy is guaranteed to all women, regardless of income, race, or ethnicity. Accordingly, if the Court chooses to adopt the "undue burden" standard articulated by Justice O'Connor, the threshold examination of the statute's "burden" must include the practical impact of

the law on the ability of poor women to exercise the protected right. Laws that place obstacles in the path of poor women who have chosen to terminate pregnancy -- by imposing delays or procedural obstacles, economic barriers, or other impediments to access -- constitute a burden on the privacy rights of poor women.

The Pennsylvania provisions under review would impose enormous burdens on the abortion decisions of poor women. The 24-hour delay, parental consent, and spousal notification requirements, in particular, erect prohibitive barriers in the path of poor women who seek abortions, thereby threatening the health of, and life chances for, many women. These provisions, thus, constitute an undue burden on women's right to reproductive choice.

ARGUMENT

INTRODUCTION

The Court of Appeals erred in upholding the constitutionality of provisions of Pennsylvania's Abortion Control Act that force women to wait 24 hours between the

time that a woman's consent for abortion is obtained and the time that the abortion may be performed (18 Pa. Cons. Stat. Ann. § 3205(a) (informed consent)) and that mandate parental consent (18 Pa. Cons. Stat. Ann. § 3206). Through these provisions, as well as the Act's spousal notification requirement (18 Pa. Cons. Ann. § 3209), the state of Pennsylvania would actively restrict the provision of, and access to, abortion services.[1] The provisions unduly burden the right to privacy, particularly for poor women,[2] and are,

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[1]The issues presently before this Court pertain to five provisions of the Pennsylvania Abortion Control Act, *i.e.* (1) the definition of medical emergency; (2) informed consent; (3) parental consent; (4) reporting requirements; and (5) spousal notification. *Amici* assert that each of these provisions would have a severe and drastic impact upon the cost and timing of abortions, as well as the number of legal providers, and, consequently, would place an undue burden on a woman's abortion decision. The focus of this brief, however, is limited to the three provisions listed in the above text.

[2]Laws that restrict the provision of, and access to, abortion services for poor women will necessarily affect a high percentage of women of color. African American women, for example, are five times more likely to live in poverty and three times more likely to be unemployed than white women. United States Commission on Civil Rights, *The Economic Status of Black Women* 1 (1990). Indeed, the percentage of people of color living in poverty in the United States is dramatically high: 29% of Native Americans, United States Dept. of Health and Human Services, 1 *Report of the Secretary's Task Force on Black and Minority Health* 51 (1986), 31% of African Americans, and 26% of Latinos, as compared to 10% of whites. United States

therefore, unconstitutional.

In *Roe v. Wade*, 410 U.S. at 153, this Court recognized that the right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." This Court has repeatedly affirmed its recognition of "a freedom of personal choice in certain matters of marriage and family life ... [which] includes the freedom of a woman to decide whether to terminate a pregnancy." *See, e.g., Harris v. McRae*, 448 U.S. 297, 312 (1980); *Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 420, n. 1 (1983); *Hodgson v. Minnesota*, 497 U.S. __, 111 L.Ed.2d 344, 360 (1990). As Justice Stevens has reminded us, the Court's abortion cases implicate basic, fundamental values and address "the individual's right to make certain unusually important decisions that will affect [her] own, or [her] family's destiny." *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 781, n. 11

Dept. of Commerce, Bureau of Census, *Statistical Abstract of the United States, 1991*, No. 748, 463 (1991)(1989 data).

(1986)(quoting *Fitzgerald v. Porter Memorial Hospital*, 523 F.2d 716, 719-20 (7th Cir. 1975), *cert. denied*, 425 U.S. 916 (1976)).

For poor women, and particularly for poor African American women, the right to privacy in matters of body and reproduction -- a right that was trammeled with state sanction during centuries of slavery -- is fundamental to notions of freedom and liberty. For years, governmental protection of the individual's person or her private decision-making was non-existent. The right to make and carry out reproductive decisions without governmental intrusion or government sanctioned interference was, and continues to be, a valued part of freedom. *See generally* Roberts, *The Future of Reproductive Choice for Poor Women and Women of Color*, 12 Women's Law Reporter 59 (1990)(analysis of the historical significance for poor African American women of reproductive choice and the "struggle against fearful and overwhelming odds... to maintain and protect that which woman holds dearer than life... to keep hallowed their own

persons...."); Bland, *Racial and Ethnic Influences: The Black Woman and Abortion*, in PSYCHIATRIC ASPECTS OF ABORTION 171 (Stotland ed. 1991); Genovese, *Roll, Jordan, Roll: The World The Slaves Made* 497-98 (1st Vintage Books Ed. 1972).[3]

Roe and its progeny established the limits of state authority to regulate the performance of abortions and announced the standards of review by which restrictions on

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[3]Even today poor women of color are often unable to share in the freedom of personal choice in matters of reproduction guaranteed by *Roe*. Poor women often lack the economic means to avail themselves of health services and are alienated by the inaccessibility of health care. The tragic effects of what is truly a health care crisis for poor women are well known and widely documented. *See, e.g.*, United States Dept. of Health and Human Services, *Health Status of Minorities and Low-Income Groups: Third Edition* 99 (1991); Bland, *Racial and Ethnic Influences: The Black Woman and Abortion*, PSYCHIATRIC ASPECTS OF ABORTION 171 (Stotland ed. 1991); Zambrana, *Research Issues Affecting Poor and Minority Women: A Model for Understanding Health Needs*, 14 Women and Health 137, 148-50 (1988); American Medical Association, Council on Ethical and Judicial Affairs, *Black-White Disparities in Health Care* 263 J.A.M.A. 2344 (May 2, 1990)("Underlying the racial disparities in the quality of health among Americans are differences in both need and access. Blacks are more likely to require health care but are less likely to receive health care services."); *see also Harris*, 448 U.S. at 339 (1977)(Marshall, J., dissenting); *Beal v. Doe*, 432 U.S. 438, 455, n. 1, 459 (1977)(Marshall, J., dissenting)(taking note of the paucity of abortion providers available to poor women and the lack of a "meaningful opportunity" to obtain an abortion).

this right are to be adjudged. "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest' ... and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." *Roe*, 410 U.S. at 155, 164-66; *see Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 61 (1976).

Amici join Planned Parenthood of Southeastern Pennsylvania in urging this Court to reaffirm *Roe v. Wade*. If, however, the Court adopts the undue burden test developed by Justice O'Connor, the Court's prior decisions would also require reversal of the Third Circuit, which failed to analyze properly the burden imposed by the Pennsylvania statute.

In *Akron*, Justice O'Connor articulated the conceptual basis for the undue burden standard:

> This Court has acknowledged that 'the right in *Roe v. Wade* can be understood only by considering both the woman's interest and the nature of the State's interference with it. Roe did not declare an unqualified 'constitutional right to an abortion'.... Rather, the right

> protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy.'

Akron, 462 U.S. at 461 (O'Connor, J., dissenting)(quoting *Maher v. Roe*, 432 U.S. 464, 473-74 (1977)). If a statute "places no obstacles -- absolute or otherwise -- in the pregnant woman's path to an abortion" and imposes "no restriction," then, as this Court found in *Maher*, the "regulation does not impinge upon the fundamental right recognized in *Roe*," and the judicial inquiry has come to closure. *Maher*, 432 U.S. at 474. If, however, a regulation infringes, interferes, or coercively constrains the free exercise of the right, then the statutory *burden* is established and must be justified.[4] *See Akron*, 462 U.S. at 462, 464

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[4]The Court's application of a "burden" standard in cases involving First and Fourteenth Amendment protections of free speech and associational rights are instructive: the threshold issue is whether a law *burdens* the right, not whether there is an *undue* burden. In *Eu v. San Francisco Democratic Comm.*, 489 U.S. 214, 222 (1989), the Court summarized the standard applied in those cases:

> To assess the constitutionality of a state election law, we first examine whether it burdens rights protected by the First and Fourteenth Amendments. If the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest and is narrowly tailored to serve that interest.

(citations omitted). *See also Tashjihan v. Republican Party*, 479 U.S. 208, 213-14 (1986).

(O'Connor, dissenting). *Accord Maher*, 432 U.S. at 471 ("[T]he central question in this case is whether the regulation 'impinges upon a fundamental right explicitly or implicitly protected by the Constitution.'").

The application of the undue burden standard involves two steps. First, there is a threshold assessment of the burden imposed by a statute -- *i.e.*, an inquiry into whether the regulations restrict, or have a legally significant impact upon, the right to privacy. *See, e.g., Planned Parenthood Ass'n of Kansas City, Missouri v. Ashcroft*, 462 U.S. 476, 490 (1983)(Powell, J.)(regarding the cost of a requirement that pathology reports be conducted); *Akron*, 462 U.S. at 434 ("A primary burden created by the [hospitalization] requirement is additional cost to the woman."); *Danforth*, 428 U.S. at 79 (prohibition of abortion technique after the first twelve weeks of pregnancy would

have the effect of inhibiting abortions). To constitute a burden, then, regulations need not impose an absolute bar to obtaining an abortion or create an absolute deprivation. *See, e.g., Akron*, 462 U.S. at 435 (a second-trimester hospitalization requirement held unconstitutional upon finding that the requirement "may force women to travel to find available facilities, resulting in both financial expense and additional health risk").

Second, if a statute is found to be a burden, then courts must determine whether such burden is undue, or lacking in adequate justification.[5] *Hodgson*, 497 U.S. ___, 111 L.Ed.2d at 361 ("Because the Minnesota statute

[5]The undue burden standard cannot logically be read to require plaintiffs to establish that the burden is *undue* as a threshold matter. *Cf. Akron*, 462 U.S. at 463 (O'Connor, J., dissenting)("The 'undue burden' required in the abortion cases represents the required threshold inquiry...."). To require such an expansive assessment as a threshold matter would necessarily encompass a review of the statute's justifications and means -- *i.e.*, precisely the same issues considered by the court after the threshold is overcome.

In this brief, *Amici* discuss only the proper analysis for determining whether a protected right is "burdened" by state law. *Amici* refer to the briefs submitted by other *amici* in support of Planned Parenthood of Southeastern Pennsylvania for fu'ier discussion of how to determine whether the burden is "undue."

unquestionably places obstacles in the pregnant minor's path to an abortion, the State has the burden of establishing its constitutionality. Under any analysis, the Minnesota statute cannot be sustained if the obstacles it imposes are not reasonably related to legitimate state interests.") *Compare Webster v. Reproductive Health Services*, 492 U.S. 490, 519 (1989)(viability testing requirement deemed justifiable even though it would raise the cost of abortions) *with Doe v. Bolton*, 410 U.S. 179, 198 (1973)("the interposition of the hospital abortion committee is unduly restrictive of the patient's rights and needs..."). As the Court stated in *Jacobson v. Massachusetts*, "[T]he rights of the individual in respect to his liberty may at times, under *the pressure of great dangers*, be subjected to restraint..." 197 U.S. 11, 29 (1905)(emphasis added).

In assessing whether a constitutionally protected right is burdened by state law, the Court must consider the practical impact of the law on the ability of the individual to exercise the protected right. In this case, the Pennsylvania

Abortion Control Act would so severely restrict the ability of poor women to obtain abortions that it would render illusory the right to make a private, procreative choice without state interference.

A. LAWS THAT OPERATE TO INTERFERE WITH OR IMPAIR ACCESS TO ABORTIONS BURDEN THE PRIVACY RIGHTS OF POOR WOMEN

Laws that burden women's access to abortion include those laws that deter women from obtaining abortions by interposing procedural obstacles, economic barriers, or other practical impediments to access. *See generally* Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261, 371, n. 431 (1992).[6] To assess whether, and the

[6]The Third Circuit has acknowledged that abortion regulations infringe upon the abortion right in a number of ways, including,

> (1) causing a delay before the abortion is performed; (2) raising the monetary cost of an abortion; and (3) reducing the availability of an abortion by directly or indirectly causing a decrease in the number of legal abortion providers.

Planned Parenthood v. Casey, 947 F.2d 682, 698 (3d Cir. 1991).

degree to which, a regulation is burdensome, courts should not and, indeed, must not, ignore the way in which the regulation operates, including its impact on all women.

Any analysis of whether a law that regulates or restricts the provision of abortions burdens the right to privacy must include an examination of the law's burden on poor women for the simple reason that they, too, are guaranteed the constitutional right to privacy.[7] Moreover, poor women constitute a significant proportion of the women who utilize abortion services. For example, women with family incomes of under $11,000 are nearly four times more likely to have an abortion than women with family incomes of over $25,000.[8] The greater incidence of unintended pregnancies is a consequence of (i) the greater likelihood of experiencing contraceptive failure; and (2)

[7]As the Third Circuit correctly concludes, it is unnecessary that the regulations impact upon the entire "universe of pregnant women" in order to constitute a burden. *Planned Parenthood v. Casey*, 947 F.2d at 691.

[8]Gold at 16.

preferences for having fewer children than nonpoor women.[9] At least one study indicates that for women below the poverty level, six out of ten births are unintended, *i.e.*, unwanted or mistimed, compared to three out of ten births to women above 200% of the poverty level.[10]

In particular, restrictions on the right to abortion fall most heavily on poor women because they are in a worse position to overcome barriers of cost,[11] availability, or delay imposed or generated by the regulation of abortion.

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[9]The Alan Guttmacher Institute, *Abortions and the Poor: Private Morality, Public Responsibility* at 20 (1979).

[10]Radecki, *A Racial and Ethnic Comparison of Family Formation and Contraceptive Practices Among Low-Income Women*, 106 Pub. Health Rep. 494, text at n. 32, 33 (Sept./Oct. 1991).

[11]*See* O'Hair, *A Brief History of Abortion in the United States*, 262 J.A.M.A. 1875 (1989). Significantly, only 13 states permit the use of state funds for medically necessary abortions. National Abortion Rights Action League Foundation, *Who Decides? A Reproductive Rights Manual* 10 (1990)(hereinafter cited as NARAL).

B. PENNSYLVANIA'S ABORTION CONTROL ACT WOULD IMPEDE THE DECISION-MAKING PROCESS AND THE EXERCISE OF THE RIGHT TO REPRODUCTIVE CHOICE FOR POOR WOMEN AND THUS CONSTITUTES A BURDEN ON THE RIGHT TO PRIVACY.

Through its regulations and restrictions, Pennsylvania's Abortion Control Act would actively interfere with the ability of poor women to obtain abortions. And for many poor women, the obstacles caused by the Act would not be merely burdensome, but insurmountable.

1. Section 3205(a) of the Act, which requires a 24-hour delay between the time that a woman's consent for an abortion is obtained and the actual time when the procedure is performed, burdens the right to abortion.

First, the 24-hour delay may significantly increase the costs of abortion for poor women because of the limited availability of abortion services. For poor women, it is already more difficult to find the necessary financial resources, medical information, child care and time away

from work.[12] The additional delay imposed by the 24-hour waiting period -- exacerbated by the likelihood of scheduling difficulties at overcrowded facilities at which poor women receive care,[13] as well as barriers of distance and mobility -- will actively interfere with the ability of poor women and women of color to obtain abortions.

The need to travel long distances already presents a substantial barrier to care for many women. For example, one of the plaintiff clinics in this case, the Women's Health

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[12]Lincoln, Doring-Bradley, Lindheim & Cotterill, *The Court, The Congress and the President: Turning Back the Clock on the Pregnant Poor*, 9 Fam. Plan. Persp. 207, 210 (Sept./Oct. 1977); Koonin, Kochanek, Smith & Ramick, *Abortion Surveillance, United States, 1988*, 40 Morbidity & Morality 17, 18 (July, 1991). Even the informal networks built by women to ensure pregnant women access to abortion are often inaccessible to women of color and the solutions offered unaffordable. Avery, *A Question of Survival/A Conspiracy of Silence: Abortion and Black Women's Health*, in FROM ABORTION TO REPRODUCTIVE FREEDOM: TRANSFORMING A MOVEMENT 75 (Fried ed. 1990).

[13]Overcrowded conditions at public facilities delay and frequently foreclose timely treatment. At Health and Hospitals medical clinics in New York City, for example, patients must wait six to twenty-two weeks to get a first clinic appointment; women must wait four to fifteen weeks for an appointment with a gynecologist. A recent Health and Hospitals Corp. report found that "one patient in eight tires of waiting in city emergency rooms and leaves without treatment." Scott, *HHC Finds Hospitals Hurt by Budget Cuts*, N.Y. Newsday, March 4, 1992, at 21.

Services (WHS) in Pittsburgh services an area of 34 counties within Pennsylvania, portions of Ohio, West Virginia, Maryland and New York. Against this backdrop, patients travel great distances and, according to the testimony of that agency's Executive Director, "it is not unusual for women to travel three, four hours to get to the clinic. Sometimes it's much longer because they have to take buses to get in." Trial Testimony of Roselle, Vol. II at 80.

In 1985, eighty-two percent of all counties in the United States -- in which one-third of all women of reproductive age lived -- had no abortion provider.[14] In rural areas the problem is especially acute. Nine out of ten non-metropolitan counties in the United States have no facility that perform abortions.[15] For example,

- Not a single physician in residence in the state of North Dakota performs abortions.[16]

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[14]Henshaw, Forrest & Van Vort, *Abortion Services in the United States, 1984 & 1985*, 19 Fam. Plan. Persp. 63, 65 (1987).

[15]*Id.*

[16]*See Leigh v. Olson*, 497 F.Supp. 1340, 1347 (D.N.D. 1980).

- In South Dakota there is only one doctor who will perform abortions. As a result, women must travel hundreds of miles to obtain an abortion.[17]

- In northern Minnesota, one clinic must provide all abortions for 24 counties.[18]

In particular, poor Native American women face some of the largest obstacles, since the Indian Health Services, which may be the only familiar provider of health care and the only health service available for hundreds of miles, is prohibited from performing abortions even if women can find the monetary resources to pay for the procedure themselves.[19]

The 24-hour delay may require duplicate journeys, overnight stays away from home, and two or more absences from work, often without pay, as well as added transportation expenses. For many poor women, the

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[17]*Foes Successfully Chip Away at Abortion Rights; Poor, Young Affected Most*, USA Today, June 3, 1991, at 6A.

[18]Belkin, *Women in Rural Areas Face Many Barriers to Abortion*, N.Y. Times, July 11, 1989, at A1, col. 3.

[19]Nsiah-Jefferson, *Reproductive Laws, Women of Color, and Low Income Women*, in REPRODUCTIVE LAWS FOR THE 1990'S: A BRIEFING HANDBOOK 21-22 (1988).

additional expense caused by the waiting period will be prohibitive.

Secondly, Section 3205(a) may often result in delays greater than the 24 hours required by statute. The Executive Director of WHS in Pittsburgh testified that her agency would not be able to guarantee that delays would be limited to 24 hours because physicians are not available every day of the week. Trial Testimony of Roselle, Vol. II at 82.

Significant delays in obtaining abortions increase dramatically the health risks associated with abortions. "*[A]ny* delay increases the risk of complications to a pregnant woman who wishes an abortion. Moreover, this risk appears to increase continuously and linearly as the length of gestation increases."[20] The total morbidity rate rises 20% when abortion is delayed from the eighth to the twelfth week, and the complication rate increases 91% for

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[20]Cates, Schulz, Grimes & Tyler, *The Effect of Delay and Method Choice on the Risk of Abortion Morbidity*, 9 Fam. Plan. Persp. 266, 267 (Nov./Dec. 1977). *See also* Trial Testimony of Allen, Vol. I at 45.

that same delay.[21] Poor women of color in particular, who disproportionately suffer from illnesses exacerbated by pregnancy,[22] will be most affected by significant delays in obtaining abortion services.

In sum, the 24-hour waiting period places poor women at significant risk of harm and constitutes a burden.

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[21]*Id.*, at 267.

[22]Poor women of color suffer at high rates from a variety of serious health conditions that may be exacerbated by pregnancy. These include high blood pressure, hypertension, diabetes, sickle cell anemia, AIDS, and certain forms of cancer. *See* United States Dept. of Health and Human Services, *Health Status of Minorities and Low-Income Groups: Third Edition* 131-58 (1991); United States Dept. of Health and Human Services, I *Report of the Secretary's Task Force on Black and Minority Health* 74-75 (1985); United States Dept. of Health and Human Services, Office of Minority Health, *Diabetes and Minorities* in CLOSING THE GAP 2 (1988); Drury & Powell, *Prevalence of Known Diabetes Among Black Americans*, in ADVANCE DATA FROM VITAL AND HEALTH STATISTICS, Pub. No. (PHS) 87-1250; Association for Sickle Cell Education Research and Treatment Inc. *Sickle Cell Anemia: A Family Affair* (1988); Centers for Disease Control, *HIV/AIDS Surveillance: Year-End Edition* 15 (January 1992)(comparison of annual rate of reported AIDS cases for White females, 1.7 per 100,000, with rates for Black and Hispanic females, 24.6 and 12.6, respectively).

2. Section 3206 of the Act, which requires parental consent before an abortion can be obtained, burdens the rights of low-income young women, creating a virtual bar to abortion.

Although a parental consent requirement with a judicial bypass may be legal in some circumstances, *see Hodgson*, 497 U.S. at __, 111 L.Ed.2d at 375; *Bellotti v. Baird*, 443 U.S. 622, 633-39 (1979)(discussion of principles to be applied in parental consent cases), "the constitutional protection against unjustified state intrusion into the process of deciding whether or not to bear a child extends to pregnant minors as well as adult women." *Hodgson*, 497 U.S. at __, 111 L.Ed.2d at 360. The judicial inquiry begins with an examination of the burden imposed by the statute. *See, e.g., Hodgson*, 497 U.S. at __, 111 L.Ed.2d at 362-66.

As the Executive Director of WHS testified at trial, the combined effect of the 24-hour delay and parental consent provisions will be to create additional obstacles for teenagers who, in many instances, are already in difficult circumstances. "If you talk about a 24-hour period, we're

talking about delay and additional costs. If we're talking about parental consent, we're talking about additional delay. If we talk about a judicial bypass, it's still more delay, more expense, more trips to the clinic." Trial Testimony of Roselle, Vol. II at 81-82. In Massachusetts, for example, a parental consent law forced one-third of the state's minors to travel to a neighboring, less restrictive state to obtain an abortion.[23]

Anecdotal evidence points to the horrors of such restrictions: high school student Rebecca Bell died in 1988 of a massive infection after an illegal abortion that she obtained rather than telling her parents that she was pregnant.[24] Thirteen-year-old Spring Adams was shot to death by the father who had impregnated her when he learned that she was going to abort the pregnancy.[25]

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[23]O'Keefe & Jones, *Easing Restrictions on Minors' Abortion Rights*, Issues in Sci. & Tech. 74, 78 (Fall 1990).

[24]Sharpe, *17 Year Old Died of Fear and Abortion*, Cincinnati Enquirer, Nov. 26, 1989, *cited in* NARAL at 6.

[25]NARAL at 6.

Moreover, judicial bypass provisions frequently leave young women and the freedom to exercise their fundamental right to the discretion of hostile judges.[26] One judge, who openly demonstrated the impermissible grounds on which he would base a decision, stated that he did not like the law and that he would only allow a minor to have an abortion without parental consent in cases of incest or the rape of a White girl by a Black man.[27] In some Minnesota counties, judges refuse to hear petitions for judicial bypass, forcing minors to travel 250 miles to receive a hearing. Half of the minors who were able to utilize the bypass procedure of that state's notification law were not residents of the city in which the hearing was held.[28]

Parental consent provisions exacerbate delay and

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[26]*See, e.g.*, Bonavoglia, *Kathy's Day in Court* in FROM ABORTION TO REPRODUCTIVE FREEDOM: TRANSFORMING A MOVEMENT 161 (Fried ed. 1990).

[27]Wilkerson, *Michigan Judges' Views of Abortion Are Berated*, N.Y. Times, May 3, 1991.

[28]*Hodgson*, 497 U.S. at __, 111 L.Ed.2d at 387 (Marshall J., dissenting in part).

increase both the cost and the risk to teens: in Minnesota, the parental *notification* requirement -- a far less onerous law than Section 3206 of the Pennsylvania Abortion Control Act -- increased the number of minors who obtained second trimester abortions by 26.5%.[29] This change ran counter to the national trend toward earlier term abortions.[30]

The difficulties of obtaining an abortion and the additional obstacles created by statute fall heaviest on young low-income women of color. The proportion of women of color under 15 years of age who have abortions is high -- nearly double that for their white counterparts.[31] For these young women, the vast majority of whom had unintended

[29]NARAL at 6; *Hodgson v. Minnesota*, 648 F. Supp. 756 (D. Minn. 1986), *aff'd and rev'd in part*, 853 F.2d 1452 (8th Cir. 1988), *aff'd*, 497 U.S. __, 111 L.Ed.2d 344 (1990).

[30]American Civil Liberties Union Reproductive Freedom Project, *Parental Notification Laws: Their Catastrophic Impact on Teenagers' Right to Abortion* 15 (1986).

[31]Koonin, Kochanek, Smith & Ramick, *Abortion Surveillance, United States, 1988*, 40 Morbidity & Mortality 17 (July 1991).

pregnancies,[32] abortion is a necessary health service. Laws that place these services further from reach have a severe, detrimental impact.

The medical dangers of abortion are already particularly acute for adolescents, in part because they often postpone pregnancy confirmation and abortion. *See* Trial Testimony of Allen, Vol. I at 62-63. As a consequence of the parental consent provision, compounded by the 24-hour delay provision, teenagers will not be able to obtain abortion services until even later, more dangerous stages of pregnancy. The mortality rate for abortion increases fifty percent *each week* after the eighth week of pregnancy, and the risk of major complications in the procedure increases by approximately thirty percent per week.[33]

[32]Among teenagers, 84% of all pregnancies and 92% of pre-marital pregnancies, are unintended. NARAL at 7.

[33]Grimes, *Second-Trimester Abortions in the United States*, 16 Fam. Plan. Persp. 260-65 (Nov./Dec. 1984). *See also* Cates & Grimes, *Morbidity and Morality of Abortion in the United States*, in ABORTION AND STERILIZATION: MEDICAL AND SOCIAL ASPECTS 155 (Hodson ed. 1981).

> 3. Section 3209 of the Act, which requires spousal notification before an abortion can be obtained, burdens the right to abortion.

After conducting the requisite legal and factual analyses, the district court concluded that the spousal notification requirement "is constitutionally defective because it impermissibly invades a woman's fundamental right to privacy in the abortion decision." *Planned Parenthood v. Casey*, 744 F.Supp. 1323, 1384 (E.D.Pa. 1990). On appeal, the Third Circuit affirmed, holding that the provision imposes an undue burden on a woman's abortion decision and does not serve a compelling state interest. 947 F.2d 682 (3d Cir. 1991). In reaching this conclusion, the Third Circuit looked to this Court's opinion in *Hodgson*, 497 U.S. at __, 111 L.Ed.2d at 371, & n. 36, and observed,

> The Supreme Court has thus been attuned to the *real-world consequences* of forced notification in the context of minor child/parent relationships.... In this case, we conclude that the real-world consequences of forced notification in the context of wife/husband relationships impose similar

> kinds of undue burdens on a woman's right to an abortion.

947 F.2d at 711 (emphasis added). *Amici* fully agree. And just as the courts should be attuned to the real-world consequences of forced notification in the context of familial relationships, so too should they heed the real-world burdens caused by other statutory requirements that would unduly burden a woman's abortion decision.

* * *

Roe v. Wade and *Doe v. Bolton* did not countenance a test of constitutionality that would prohibit only absolute deprivations. *Roe*, 410 U.S. at 164-66 (1973)(specified standards of review); *Doe v. Bolton*, 410 U.S. 179 (1973)(procedural requirements held unduly restrictive). Correspondingly, under the undue burden standard, barriers to abortion that are constructed by government and that would impinge upon the ability of poor women to exercise their fundamental right must be recognized as burdensome.

Unlike the line of cases beginning with *Maher v. Roe*, 432 U.S. 464 (1977), and evidenced, most recently, in

Webster, 492 U.S. 490 (1989), and *Rust v. Sullivan*, 500 U.S. __, 114 L.Ed.2d 233 (1991), this case does not involve the question whether a state may choose not to grant benefits that would further the provision of abortion services. *See also Harris v. McRae*, 448 U.S. 297 (1980); *Poelker v. Doe* 432 U.S. 519 (1977); *Beal v. Doe*, 432 U.S. 438 (1977). To the contrary, the Pennsylvania laws at issue place discrete and burdensome obstacles in the pregnant woman's path to an abortion. Pennsylvania is not merely encouraging an alternative option, but, instead, actively delaying and otherwise burdening the exercise of a protected activity. *Compare Thornburgh*, 476 U.S. 747 (1986); *Akron*, 462 U.S. 416 (1983); *Danforth*, 428 U.S. 52 (1976); *Doe v. Bolton*, 410 U.S. 179 (1973).

"Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision... whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result... would protect inadequately

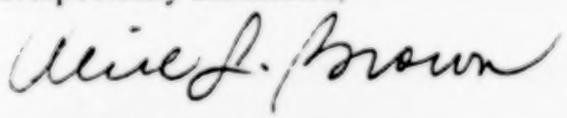
a central part of the sphere of liberty that our law guarantees equally to all...." *Thornburgh*, 476 U.S. at 772. *Amici* believe that the sphere of liberty guaranteed to all should contain protection for the right of poor women to make reproductive choices free from intrusion by burdensome government restrictions. We thus ask that the Court consider the burdens of governmental restrictions on the availability of abortions for poor women.

The provisions of the Pennsylvania Abortion Control Act requiring a 24-hour waiting period, parental consent and spousal notification actively interfere with women's decision-making and the provision of abortion services, and will limit the ability of poor women to obtain needed services. The provisions unduly burden the right to privacy and are unconstitutional.

CONCLUSION

For the foregoing reasons, the judgment of the Third Circuit regarding Sections 3205(a) and 3206 should be reversed, and the judgment regarding Section 3209 affirmed.

Respectfully submitted,



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INTEREST OF AMICI CURIAE

THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND (AALDEF) is a national civil rights organization that addresses the critical problems facing Asian American communities, including the growing trend of anti-Asian violence, immigrant rights, voting rights, labor and employment rights, and redress for Japanese Americans who were incarcerated in camps within the United States during World War II. AALDEF is committed to protecting the right to reproductive choice by women including Asian immigrant women and joins other amici curiae in support of reproductive choice as a fundamental right.

• • •

THE CENTER FOR CONSTITUTIONAL RIGHTS (CCR), a litigation/education organization headquartered in New York City, was founded in 1966. Born of the civil rights movement and the struggles of Black people in the United States for true equality, CCR has litigated for voting

rights, civil rights, and the fundamental and necessary right of each woman to obtain access to safe and legal abortion. CCR decries the disproportionate and potentially devastating effect that the limitation or loss of the right to abortion will have on women of color and low-income and working women, and we urge this Court to protect the right to accessible, safe and legal abortion in their names.

* * *

THE CENTER FOR LAW AND SOCIAL JUSTICE (CLSJ) at Medgar Evers College is a research and advocacy institution created in 1985 by a special appropriation of the New York State Legislature to establish a legally oriented civil rights and social justice institution in New York City. CLSJ conducts litigation and public policy projects on matters involving pressing civil and human rights issues in such areas as employment, health care and housing.

Discrimination in these areas has historically plagued the African-American communities CLSJ serves, particularly the women in these communities. For that reason, CLSJ

joins as *amicus curiae* in this consolidated appeal to the United States Supreme Court.

* * *

THE COMMITTEE FOR HISPANIC CHILDREN AND FAMILIES is a not-for-profit organization in New York City dedicated to promoting and strengthening the Hispanic family. In our community education efforts we seek to heighten awareness of issues such as domestic violence, teen pregnancy and child abuse and neglect. Clearly our goal is to mobilize our community in effective prevention strategies for these and other problems which afflict our community. Key to being able to confront these myriad problems is the need for quality and equitable medical care. We oppose the denial of access to health services including abortion for Hispanic women.

* * *

THE ECO-JUSTICE PROJECT AND NETWORK (a project of the Center for Religion, Ethnics, and Social Policy at Cornell University) is an organization concerned

about both environmental and social justice, and the well-being of all people on a thriving Earth. Our concern in this case focuses on the effect it may have on the lives of poor and socially disenfranchised women. Poor women, already significantly burdened in accessing medical services, will suffer even greater adverse consequences should the Court strip the right to abortion of constitutional protections. We also are concerned about women's rights of privacy, doctors' rights to free speech, and the physician-patient relationship of confidentiality. In a world in which human population may already be exceeding carrying capacity, we wholeheartedly support a women's right to choose whether or not to give birth to even more human beings.

* * *

Founded in 1978, the HISPANIC HEALTH COUNCIL is a community-based research, education, and advocacy organization devoted to the improvement of health, mental health and general social well-being of Puerto Ricans and other Latino populations in Hartford, Connecticut.

Specifically, the Council seeks to empower Latino families for community change through education about health and disease risks, health-related legal rights, and social conditions underlying poverty and illness. The Council also strives to alter existing inadequacies in the quality and quantity of health care available to low income groups.

We join this case as amicus curiae because this kind of legislation has only proven to be discriminatory towards underserved populations and impacts negatively on the lives of the poor because it does not look at other socio-economic factors which influence people's behavior.

* * *

THE JAPANESE AMERICAN CITIZENS LEAGUE (JACL) is a national civil and human rights and educational organization concerned with the welfare of Japanese and Asian Americans. It was formed in 1929 and is the oldest and largest Asian American civil rights organization. The JACL is committed to educating the public on the history, experience, contributions, and current

concerns of Japanese Americans and Asian Americans in the United States. As a civil rights organization, the JACL has worked to guarantee justice and due process to all persons. To that end, we are firmly committed to a women's fundamental right of choice and self-determination to exercise her reproductive rights. We believe that abortion -- choice -- is a fundamental right protected by the United States Constitution.

* * *

THE LATINA ROUNDTABLE ON HEALTH AND REPRODUCTIVE RIGHTS (LRHRR) is an organization of Latinas who have come together to examine and address the legislative, judicial, and policy initiatives that effect the health and reproductive freedom of Latinas in New York. The LRHRR is made up of Pro-Choice health care providers, attorneys, educators, policy makers, and community activists who through these efforts defend the rights of Latinas to access abortion services regardless of age, economic or marital status.

* * *

MADRE is a national women's friendship organization that sees the connections between U.S. policy and its effects on women and children in the U.S., Central America, the Caribbean and the Middle East. MADRE's work includes programs which address health care and child care issues affecting women's daily lives. We support reproductive freedom and quality affordable health care for all. We know that poor women and women of color are most affected by restrictive policies. We therefore sign on to the amicus brief in its opposition to any restrictions placed on a woman's reproductive choice.

* * *

THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND (MALDEF), established in 1967, is a national civil rights organization headquartered in Los Angeles. Its principal objective is to secure, through litigation and education, the civil and constitutional rights of Hispanics living in the United States. Fundamental among

those rights is the right to privacy which encompasses the right to choose in matters of family planning. MALDEF opposes restrictions on the right to choose, as such restrictions are devastating in their disproportionate effect upon low-income Hispanic women with regard to their family planning rights, choices, and alternatives.

* * *

THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. (LDF) is a non-profit corporation formed to assist African Americans to secure their constitutional and civil rights and liberties. For many years LDF has pursued litigation to secure the basic civil and economic rights of low-income African American families and individuals. Litigation to ensure the non-discriminatory delivery as well as the adequacy of health care services available to African American communities has been a long-standing LDF concern.

Through its Black Women's Employment and Poverty & Justice Programs, LDF is also challenging barriers to

economic advancement to help to improve the economic status and living conditions of the many in poverty.

This case implicates the full panoply of these important LDF concerns. Burdensome legislation can severely limit the availability of reproductive health services to poor African American women. This, in turn, will increase the number of unwanted pregnancies and promote continuing cycles of poverty and despair, while creating unnecessary medical risks for poor, African American women. LDF feels that it is crucial for the Court to fully consider how statutory restrictions on abortion operate in practice to limit the accessibility of health care for poor women.

* * *

THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, INC. (NASW), a non-profit professional association with over 135,000 members, is the largest association of social workers in the United States. The association is devoted to promoting the quality and

effectiveness of social work practice, to advancing the knowledge base of the social work profession and to improving the quality of life through utilization of social work knowledge and skills. NASW is deeply committed to the principle of self-determination and to the protection of individual rights and personal privacy. The association has been in the forefront of the struggle for women's equality, and is particularly concerned in the present instance that the state not override a pregnant woman's autonomy nor restrict her right to choose abortion.

* * *

THE NATIONAL BLACK WOMEN'S HEALTH PROJECT (NBWHP) is a self-help, health education and advocacy organization which works to improve the health status and quality of life for African American Women and their families. It consists of 150 developing and established chapters in 31 states serving a broad constituency of approximately 2,000 members. The NBWHP is deeply concerned about barriers that impede or prevent access to

quality health services, including abortion. The purpose of the NBWHP is the definition, promotion, and maintenance of health for Black women, including full reproductive rights and the essential authority of every woman to choose when, whether, and under what conditions she will bear children.

Because too many single family household in the United States are headed by Black women living in poverty, possessing fewer educational and job training opportunities, enduring inadequate, often non-existent child care services, subject to substandard housing conditions, and lacking access to appropriate health services of any kind; because more than half of all Black children are poor, born of mothers receiving inferior, if any, prenatal care, suffering the highest rate of infant mortality and neonatal deaths in the Western world; and because we lack fail-safe birth control methods, lack adequate human sexuality education, and suffer also the highest rate of teenage pregnancy in the Western world, we firmly insist upon continued access to safe, legal and affordable abortion. Restrictive abortion laws exacerbate the

low socioeconomic status of women of color, and the passage of such laws will further denigrate the dignity of Black womanhood. The NBWHP joins this brief to voice its opposition to laws which prevent African American women from exercising their rights.

* * *

THE NATIONAL COALITION FOR BLACK LESBIANS AND GAYS (NCBLG) is the oldest Black organization in the country working to advocate and promote the empowerment and enhancement of the lesbian and gay community. Formally a chapter organization with branches in Baltimore, Chicago, Detroit, New York, and Oakland/San Francisco, the national office is located in Washington, DC. We have over 500 members nationally and our numbers continue to increase.

Since NCBLG began in 1979, it has been dedicated to equal rights and civil liberties for the entire community regardless of race, gender, or sexual orientation. In spite of the strides that have been accomplished in the last 50 years.

injustices continue to be prevalent. NCBLG joins with other concerned organizations in opposing the restrictions on abortion services which threaten the right to reproductive choice and access to health care for low income women and women of color.

* * *

THE NATIONAL COUNCIL OF NEGRO WOMEN, INC. (NCNW) is a membership organization of 33 national African American's organizations, 250 community based sections in 42 states and 65,000 individual members. The NCNW has worked for a half century in support of the civil and human rights of African American women and their families. NCNW joins Planned Parenthood in this brief in opposition to the restrictive and burdensome requirements of the Pennsylvania statute, which interferes with the constitutional rights of women.

* * *

THE NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE is a not-for-profit organization

dedicated to the preservation and extension of civil liberties and civil rights. Founded in 1951, it has brought numerous actions in the federal courts to vindicate constitutional rights. Through its educational work, it likewise has sought to preserve our liberties. From time to time NECLC submits *amicus curiae* briefs to the courts when it believes issues of particular import for civil liberties are at stake.

• • •

THE NATIONAL LATINA HEALTH ORGANIZATION is committed to work toward the goal of bilingual access to quality health care, reproductive services and the self-empowerment of Latinas. Our health and reproductive issues have not been addressed. Lack of awareness on the part of the medical profession and the language barrier have had a major impact on our access to quality reproductive services and media care. Further restrictions and lack of access to safe and legal abortion will jeopardize our health and our lives further. We must have all information and services available to us so we can make

knowledgeable, educated and healthful choices for ourselves.

• • •

NATIONAL MINORITY AIDS COUNCIL is a national organization dedicated to creating a greater response among people of color to HIV/AIDS in our communities. The council has as its primary focus leadership. As such we take stands on issues impacting on minority health. Therefore, we recognize the importance of supporting increased access to public health, and a national focus on public health for all women.

• • •

THE NATIVE AMERICAN WOMEN'S HEALTH EDUCATION RESOURCE CENTER of Lake Andes, South Dakota (The Resource Center) is a reservation based organization that works with Native women in the empowerment process involving Native women's health, education and reproductive rights. The Resource Center is currently active in coalition building on the local and national levels with Native women from diverse tribes, in an

attempt to move forward policies that promote positive lifestyles and better reproductive health for Native women. As Native women, whose traditions have shown that abortion has always been women's business, determined by women, we must support other women in their fight to have the right to have abortion, and to make that decision within the personal circles of women's business.

* * *

THE NEW YORK WOMEN'S FOUNDATION is a cross-cultural alliance of women helping women and girls. With a membership of approximately 2000 and a board of forty, The Foundation is committed to address the unmet needs of low-income women in New York City through grants and advocacy. The board of The Foundation believes strongly that every woman has a fundamental right to full information about her reproductive health, a fundamental right to make an informed decision about her reproductive health options, and a fundamental right of access to all reproductive health services.

The Foundation believes that every woman must have access to safe, legal and affordable abortion and that the disproportionate lack of such access in the African-American, Latina and Asian-American communities is particularly deplorable.

* * *

THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND is a national organization based in New York City dedicated to protecting and furthering the civil rights of Puerto Ricans and other Latinos. The Fund's litigation efforts focus on the areas of employment, education, housing and voting rights, with a particular emphasis on safeguarding the rights of Puerto Ricans of low economic status. Puerto Rican woman and other woman of color are particularly vulnerable to discrimination and therefore the Fund supports efforts to protect their rights. The Fund opposes any efforts to overturn or in any way restrict the rights recognized in *Roe v. Wade*.

* * *

THE SOUTHERN POVERTY LAW CENTER is dedicated to protecting the legal rights of poor people and minorities. It has served as counsel in numerous cases raising constitutional issues of particular significance for women, including *Frontiero v. Richardson*, 411 U.S. 677 (1973).

* * *

WOMEN FOR RACIAL AND ECONOMIC EQUALITY is a multi-racial, multi-ethnic national organization founded in 1977. Our members are Black, White, Chicana, Puerto Rican, Caribbean, Asian and Native American Women who are workers, trade unionists, unemployed, welfare recipients, professionals, students and senior citizens. We are women who may be especially vulnerable to discrimination because of color, national origin, religious beliefs or sexual preference. We are women whose experiences have shown that racism is the major obstacle to bettering our living conditions in any real or meaningful way. Our program is a 12-point Women's Bill of

Rights which includes: the right to reproductive choice; access to federally-funded non-racist, nonsexist sex education and birth control, regardless of age; abortion upon demand; and outlawing of coerced sterilization.

* * *

THE WOMEN'S POLICY GROUP (WPG), formed in 1988, is a Georgia-based organization working to improve the lives of women. We study and analyze issues, and work with individuals and other groups on women's concerns. We are interested in a variety of issues affecting women's family, work, and personal lives including insurance coverage for pap smears and mammograms, child custody, child support, child care, family violence, Medicaid coverage for pregnant women and infants, obstetrical malpractice, family medical leave, universal health care coverage, sexual harassment and reproductive choice.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *et al.*,
Petitioners,

v.

ROBERT P. CASEY, *et al.*,
Respondents.

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PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR AMICUS CURIAE AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. PENNSYLVANIA'S COMPELLED SPOUSAL NOTIFICATION REQUIREMENT SEVERELY BURDENS WOMEN'S RIGHT TO CHOOSE	5
A. Many Women With Compelling Reasons For Non-Disclosure Are Not Exempted From The Act's Spousal Notification Requirement	6
B. Many Women Who Would Otherwise Be Exempted From Compelled Spousal Notification Are Burdened Because They Are Unable To Use The Statutory Exemptions	9
C. Mandatory Spousal Notification Places Extraordinary Burdens On Wives Who Have Decided Not To Notify Their Husbands Of The Planned Abortion	13
D. There Is No Empirical Support For The Proposition That Compelled Spousal Notification Promotes The Integrity Of The Marital Relationship	16
II. THE "INFORMED CONSENT" PROVISIONS OF THE PENNSYLVANIA ACT ARE UNCONSTITUTIONAL	18
A. The "Informed Consent" Provisions Require The Dissemination Of Exaggerated And Misleading Information That May Be Harmful To Women	20

TABLE OF CONTENTS—Continued

Page

B. The Mandatory Disclosure Provisions Interfere With Effective Counseling And Are Designed Not To Inform But To Bias Women Against Having Abortions 24

C. The Twenty-Four Hour Mandatory Delay Severely Burdens A Woman's Right To Choose 27

CONCLUSION 30

TABLE OF AUTHORITIES

CASES: Page

Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) 16
City of Akron v. Akron Center for Reproductive Health, Inc., 461 U.S. 416 (1983) 1, 18, 19, 24, 28, 29
Hodgson v. Minnesota, 110 S. Ct. 2926 (1990) 1, 5, 6, 16, 17, 18, 19
Planned Parenthood v. Casey, 744 F. Supp. 1323 (E.D. Pa. 1990), *aff'd in part & rev'd in part*, 947 F.2d 682 (3d Cir. 1991), *cert. granted in part*, 60 U.S.L.W. 3998 (1992) ..... *passim*
Planned Parenthood v. Casey, 947 F.2d 682 (3d Cir. 1991), *cert. granted in part*, 60 U.S.L.W. 3998 (1992) 11, 14, 16, 28, 29
Planned Parenthood v. Danforth, 428 U.S. 52 (1976) 18
Roe v. Wade, 410 U.S. 113 (1973) 4, 16
Rust v. Sullivan, 111 S. Ct. 1759 (1991) 24
Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) 1, 18, 22, 24, 25, 26, 27
Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989) 1, 16

STATUTORY AND REGULATORY PROVISIONS:

Pennsylvania Abortion Control Act

18 Pa. C.S.A. § 3205 ..... 18, 24, 26
18 Pa. C.S.A. § 3205(a) 2, 3, 28
18 Pa. C.S.A. § 3205(a)(1) 25, 26
18 Pa. C.S.A. § 3205(a)(2) 3, 18, 23, 25
18 Pa. C.S.A. § 3205(b) 26, 27
18 Pa. C.S.A. § 3208 ..... 18, 19, 20, 23, 24
18 Pa. C.S.A. § 3208(a)(1) 3
18 Pa. C.S.A. § 3208(a)(2) 3, 20, 27
18 Pa. C.S.A. § 3209 13
18 Pa. C.S.A. § 3209(a) 2, 16
18 Pa. C.S.A. § 3209(b)(1) 2, 9
18 Pa. C.S.A. § 3209(b)(2) 2
18 Pa. C.S.A. § 3209(b)(3) 2, 10
18 Pa. C.S.A. § 3209(b)(4) 2, 11

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS: Page

Adler, *Emotional Responses of Women Following Therapeutic Abortion*, 45 Am. J. Orthopsych. 446 (1975) 21

Adler, *Psychological Responses of Women Following Abortion* (1989) (Testimony before the Subcommittee on Human Resources, U.S. House of Representatives Committee on Government Relations) 22

Adler, David, Major, Roth, Russo & Wyatt, *Psychological Responses After Abortion*, 284 Science 41 (1990) 15, 21, 22

Adler & Dolcini, *Psychological Issues in Abortions for Adolescents*, in ADOLESCENT ABORTION: PSYCHOLOGICAL & LEGAL ISSUES 74 (G. Melton ed. 1986) 21, 22

APA COMMITTEE ON ACCREDITATION, ACCREDITATION HANDBOOK (1980) 25

American Psychological Ass'n, *Ethical Principles of Psychologists*, 45 Am. Psychologist 390 (1990) 24

Blumberg & Golbus, *Psychological Sequelae of Elective Abortion*, 123 Western J. Med. 188 (1975) 22

A. BROWNE, WHEN BATTERED WOMEN KILL (1987) 9, 13

Browne, *Violence Against Women: Report of the Council on Scientific Matters, Am. Medical Ass'n* (in press) 11

Browne, *The Victim's Experience: Pathways to Disclosure*, 28 Psychotherapy 150 (1991) 13

Condon, *Psychological Disability In Women Who Relinquish a Baby For Adoption*, 144 Med. J. of Australia 117 (1986) 20

D. CURRAN, TRAITS OF A HEALTHY FAMILY (1983) 17

Deykin, Campbell & Patti, *The Postadoption Experience of Surrendering Parents*, 54 Am. J. Orthopsych. 271 (1984) 21

TABLE OF AUTHORITIES—Continued

Page

Fagan, Stewart & Hansen, *Violent Men or Violent Husbands? Background Factors and Situational Correlates*, in THE DARK SIDE OF FAMILIES: CURRENT FAMILY VIOLENCE RESEARCH 64 (D. Finkelhor, R. Gelles, G. Hotaling & M. Straus eds. 1983) 12

Finkelhor & Yllo, *Rape in Marriage: A Sociological View*, in THE DARK SIDE OF FAMILIES: CURRENT FAMILY VIOLENCE RESEARCH 119 (D. Finkelhor, R. Gelles, G. Hotaling, M. Straus eds. 1983) 7, 10, 11

Freeman, *Influence of Personality Attributes on Abortion Experiences*, 47 Am. J. Orthopsych. 503 (1977) 22

Henshaw & Van Vort, *Abortion Services in the United States; 1987 and 1988*, 22 J. Fam. Planning Perspectives 102 (1990) 28, 29

Gelles, *Violence and Pregnancy: A Note On the Extent Of The Problem And Needed Services*, 24 Fam. Coordinator 81 (1975) 12

Gelles, *Violence and Pregnancy: Are Pregnant Women at Greater Risk of Abuse?*, 50 J. Marriage and Fam. 84 (1984) 12

R. GELLES & M. STRAUS, INTIMATE VIOLENCE: THE CAUSES AND CONSEQUENCES OF ABUSE IN THE AMERICAN FAMILY (1988) 8, 12, 14

R. GOLD, ABORTION AND WOMEN'S HEALTH: A TURNING POINT FOR AMERICA? (1990) 29

Harding, *Postpartum Psychiatric Disorders: A Review*, 30 Comprehensive Psychiatry 109 (1989) 20

Helton, McFarlane & Anderson, *Battered and Pregnant: A Prevalence Study*, 77 Am. J. Pub. Health 1338 (1987) 12

HOUSE COMM. ON GOVERNMENT OPERATIONS, THE FEDERAL ROLE IN DETERMINING THE MEDICAL AND PSYCHOLOGICAL IMPACT OF ABORTIONS ON WOMEN, H.R. REP. No. 392, 101st Cong., 2d Sess. 14 (1989) 23

TABLE OF AUTHORITIES—Continued

Page

Janoff-Bulman & Frieze, *A Theoretical Perspective for Understanding Reaction to Victimization*, 39 J. Soc. Issues 1 (1983) 13

Lazarus, *Psychiatric Sequelae of Legalized Elective First Trimester Abortion*, 4 J. Psychosomatic Obstetrics & Gyn. 141 (1985) 21, 22

Maracek, *Consequences of Adolescent Childbearing and Abortion*, in ADOLESCENT ABORTION: PSYCHOLOGICAL & LEGAL ISSUES 96 (G. Melton ed. 1986) 22

McFarlane, *Battering During Pregnancy: Tip of an Iceberg Revealed*, 15 Women and Health 69 (1989) 12

NATIONAL ACADEMY OF SCIENCES/INSTITUTE OF MEDICINE, LEGALIZED ABORTION AND THE PUBLIC HEALTH (1975) 22

Osofsky & Osofsky, *The Psychological Reaction of Patients to Legalized Abortion*, 42 Am. J. Orthopsych. 48 (1972) 21

Plutzer & Ryan, *Notifying Husbands About An Abortion: An Empirical Look at Constitutional and Policy Dilemmas*, 71 Sociology and Soc. Research 183 (1987) 6, 9, 14, 16

Randall, *Domestic Violence Intervention Calls For More Than Treating Injuries*, 268 J. Am. Med. Ass'n 939 (1990) 11

D. RUSSELL, RAPE IN MARRIAGE (1982) 10, 11

Russo, Horn & Schwartz, *U.S. Abortion in Context: Selected Characteristics and Motivations of Women Seeking Abortions*, J. Soc. Issues, manuscript (in press) 5, 7, 26

Russo & Zierk, *Abortion, Childbearing, and Women's Well-Being*, Prof. Psychology Research and Prac., manuscript (in press) 14, 20, 21, 22, 23

Ryan & Plutzer, *When Married Women Have Abortions: Spousal Notification and Marital Interaction*, 51 J. Marriage and Fam. 41 (1989) 5, 6, 7, 10, 17

TABLE OF AUTHORITIES—Continued

Page

Shelton, Brann & Shultz, *Abortion Utilization: Does Travel Distance Matter?*, 8 J. Fam. Planning Perspectives 260 (1976) 28

Shusterman, *The Psychological Factors of the Abortion Experience: A Critical Review*, 1 Psychology of Women Q. 79 (1976) 22

Stark & Fitarft, *Violence Among Intimates: An Epidemiological Review*, in HANDBOOK OF FAMILY VIOLENCE 293 (Van Hasselt, Morrison, Bellack & Hessen eds. 1988) 12

Straus & Gelles, *Societal Change and Change in Family Violence From 1975 to 1985 as Revealed by Two National Surveys*, 48 J. Marriage and Fam. 465 (1986) 12

Straus & Sweet, *Social Psychological Characteristics Associated With Verbal Aggression Between Husbands and Wives*, J. Marriage and Fam., manuscript (in press) 8

C. TIETZ, J. FORREST & S. HENSHAW, INTERNATIONAL HANDBOOK ON ABORTION (P. Sachdev ed. 1988) 15

C. TIETZE & S. HENSHAW, INDUCED ABORTION: A WORLD VIEW (6th ed. 1986) 29

Torres & Forrest, *Why Do Women Have Abortions?*, 20 Fam. Planning Perspectives 169 (1988) 15

U.S. Dept. of Justice, *Criminal Victimization in the United States, 1989: A National Crime Survey Report*, NCJ-129391 (1991) 10

L. WALKER, THE BATTERED WOMAN SYNDROME (1984) 7, 8, 12, 14

BRIEF FOR AMICUS CURIAE AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE [1]

The American Psychological Association (APA), a nonprofit scientific and professional organization founded in 1892, is the major association of psychologists in the United States. APA has more than 114,000 members and affiliates, including the vast majority of United States psychologists holding doctoral degrees. APA's purposes are to advance psychology as a science and profession, and to promote human welfare.

APA has participated frequently as an amicus in this Court and filed briefs in, *inter alia*, *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990); *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); and *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983).

Two issues raised by the Pennsylvania Abortion Control Act ("Pennsylvania Act" or "Act") are of particular interest to APA and its members. First, the Commonwealth prohibits abortion unless a woman first notifies her husband of her decision to undergo the procedure, regardless of the adverse consequences of compelled notification. Second, the Commonwealth mandates the provision of specific, sometimes misleading, information to women seeking abortion, without regard to whether such information is sought or is appropriate to the needs and circumstances of particular women. Counseling, including pre-abortion counseling, is an integral component of the functions psychologists are educated to perform.

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[1] The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of this Court.

Empirical research is relevant to both these issues, and much of the research has been conducted by APA members. That research is presented in this brief.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 3209 of the Pennsylvania Act stipulates that no physician may provide an abortion to a married woman unless the woman executes a signed statement that she has notified her husband about the abortion. 18 Pa. C.S.A. § 3209(a). A woman may omit spousal notice only if she certifies that: her husband is not the father, *id.* § 3209(b)(1); her husband, after diligent effort, could not be found, *id.* § 3209(b)(2); the pregnancy is the result of spousal assault that has been reported to appropriate law enforcement authorities, *id.* § 3209(b)(3); or she has reason to believe that notifying her husband is likely to result in the infliction of bodily injury upon her, *id.* § 3209(b)(4). The signed document must indicate that any false statement is punishable by law.

This compelled spousal notification places a substantial burden on a married woman's choice to terminate her pregnancy. Research shows that although the vast majority of wives *voluntarily* discuss planned abortions with their husbands, those women who decide *not* to do so have compelling reasons: they fear detrimental effects to themselves, their marriages, their spouses, or others. The Act supplants a married woman's presumptively rational decision not to tell her husband with the decision of a legislature not familiar with her circumstances or those of her family. Under the statute, a husband *must* be notified except in four narrow circumstances. Critically, many of the compelling reasons women have for nondisclosure to their husbands are not recognized within the statutory exemptions. Moreover, even if a woman has reasons the legislature has recognized as valid, she may

[2] Counsel gratefully acknowledge the assistance of APA staff members Janet O'Keeffe, Dr. P.H., Lisa Goodman, Ph.D., Brian Wilcox, Ph.D., Corinne Lindquist, M.A. and Gwendolyn Keita, Ph.D.

be unable to use the prescribed waiver procedure. Accordingly, the Act may impose an intolerable choice on a married woman: forgo an abortion she has decided is in her own or her family's best interest or face the potentially devastating consequences of notification. This burden cannot be justified by the Commonwealth's interest in promoting the integrity of the marital relationship. Empirical evidence suggests that compelled spousal disclosure of a planned abortion is most often harmful to the marriage. Part I.

The Pennsylvania Act also precludes provision of an abortion without what it terms the woman's "voluntary and informed consent." 18 Pa. C.S.A. § 3205(a). The statute provides that, except in the case of a medical emergency, a woman's consent is valid "if and only if," at least 24 hours prior to the abortion, the referring or treating physician or other health care professional orally tells the woman, *inter alia*, that (i) the Commonwealth publishes a brochure, which she has a right to review, that "describes the unborn child and list[s] agencies which offer alternatives to abortion"; (ii) medical assistance, also discussed in the brochure, may be available if she carries the pregnancy to term; and (iii) fathers are liable for child support. *Id.* § 3205(a)(2). The woman must be provided a copy of the brochure if she requests it. Before undergoing the abortion, every woman must certify in writing that she has received this information.

The Act dictates the contents of the government-created brochure. The brochure must include "objective information describing . . . the possible detrimental psychological effects of abortion," *id.* § 3208(a)(2); "[g]eographically indexed materials designed to inform the woman of public and private agencies and services available to assist [her] through pregnancy, upon childbirth and while the child is dependent, including adoption agencies," *id.* § 3208(a)(1); and "realistic" "pictures representing the development of unborn children at two-week gestational increments, and any relevant information on the possibility of the unborn child's survival," *id.* § 3208(a)(2).

These provisions confuse the purpose and process of obtaining "informed consent" with that of pre-abortion counseling. Such counseling, which is unlike traditional notions of "informed consent" for a specific medical procedure, should be designed to assist women in deciding whether to undergo an abortion through consideration of *all* relevant factors, most of which, for many women, are not "medical" in nature. The inflexible "counseling" mandated by the Commonwealth is likely to be contrary to the best interests of many women who are subject to it and severely burdens their right to choose.[3] *First*, some of the state-mandated information is actually exaggerated and misleading. Contrary to the impression conveyed by the Commonwealth's brochure, *empirical research does not support the contention that abortion is a significant risk factor for detrimental psychological effects.*[4] Misrepresenting the psychological sequelae of abortion—particularly when the psychological effects of its alternatives are omitted—may actually compromise a woman's recovery from an abortion. *Second*, requiring counselors to give the *same* litany of information to every pregnant woman, regardless of its relevance to or likely impact on her, is the antithesis of effective counseling. Indeed, it may result in unnecessary anxiety, stress and harm to many women. *Further*, the dictated information is biased—obviously designed more to discourage a woman from choosing to terminate her pregnancy than to inform her decision. As such, it forces health care providers to slant their "counseling" toward a politically dictated outcome, and may serve only to confuse and distress many women. Part II.

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[3] The mandatory, inflexible 24-hour waiting period exacerbates the burdens imposed by the "informed consent" provisions of the Act and is independently unconstitutional. *See infra*, pp. 27-30.

[4] The lack of support for claims that abortion is frequently psychologically damaging, and the demonstrated risks of psychological harm that sometimes inhere in carrying an unwanted pregnancy to term, undercut arguments for overruling *Roe v. Wade*, 410 U.S. 113 (1973), based on concern about pregnant women's mental health.

ARGUMENT

I. PENNSYLVANIA'S COMPELLED SPOUSAL NOTIFICATION REQUIREMENT SEVERELY BURDENS WOMEN'S RIGHT TO CHOOSE.

The decision whether to have a child is made in the total context of the particular marital relationship and is influenced by all aspects of that relationship. Research shows that the vast majority of married women—more than 92%—*voluntarily* consult with their husbands prior to having an abortion.[5] The Pennsylvania spousal notification requirement cannot further any state interest in those instances.[6]

Married women who, in the absence of compelled spousal notification, decide not to inform their husbands of their pregnancy and intention to have an abortion generally have good reasons based upon their beliefs about the negative consequences of such disclosure. The most detailed study to date strongly suggests that women who do not notify their husbands are already involved in troubled marriages; many base their decision not to inform their husbands on current marital problems, including separation since conception, or fear that discussion of pregnancy and abortion would make a bad situation

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[5] Ryan & Plutzer, *When Married Women Have Abortions: Spousal Notification and Marital Interaction*, 51 J. Marriage and Fam. 41, 45 (1989) [hereinafter Ryan & Plutzer]. In this study of 506 women (12% of whom were married), every married woman who told her husband she was pregnant also discussed the abortion decision with him. *Id.* at 44. Married women are not an insignificant proportion of the women seeking abortions; in 1987, nearly one in five abortion patients was married. Russo, Horn & Schwartz, *U.S. Abortion in Context: Selected Characteristics and Motivations of Women Seeking Abortions*, J. Soc. Issues, manuscript at 8-9 (in press) [hereinafter Russo]. [Authorities cited in this brief are available to the Court upon request to counsel.]

[6] *Cf. Hodgson*, 110 S.Ct. at 2945 (holding that statute requiring two-parent notification "would not further any state interest" in family setting where the second parent is voluntarily notified by the first parent).

worse and reconciliation more difficult.[7] Other women base their decision on fears concerning their own emotional or physical well-being.[8] Still other women indicate that they did not tell their husbands of the pregnancy and abortion in order to protect their spouses from emotional hardship or crisis.[9]

A. Many Women With Compelling Reasons For Non-Disclosure Are Not Exempted From The Act's Spousal Notification Requirement.

Empirical evidence supports the District Court's conclusion that "[t]he exceptions do not provide adequate protection for pregnant wives with perfectly valid reasons for not informing [their] husband[s] of the decision" to terminate their pregnancies. *Planned Parenthood v. Casey*, 744 F. Supp. 1323, 1386 (E.D. Pa. 1990). Many of the compelling reasons for non-disclosure are simply not recognized in Section 3209.

1. *No exception is provided where the woman fears that notification will harm the marriage.* In many if not most marriages, serious problems arise at some point. These may lead to separation and divorce; they may persist; or they may be resolved. Procreation and the decision to have an abortion may be intricately intertwined with these marital difficulties. As noted, one study shows that many women who do not notify their husbands cite marital difficulties and fear of harming their

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[7] Ryan & Plutzer, *supra* n.5, at 46. Three-fourths of the women who did not inform their husbands of their abortion reported extra-marital affairs or marital difficulties of some sort. *Id.*

[8] *Id.* Spousal abuse—both physical and psychological—is not uncommon. Its victims may reasonably fear that notification would prompt further abuse. *See infra* at 7-8, 11-13. *Cf. Hodgson* 110 S.Ct. at 2945 & n.36 (notification of second parent most often does not occur because the second parent is a child-batterer or spouse-batterer and "notification would have provoked further abuse").

[9] Ryan & Plutzer, *supra* n.5, at 46; Plutzer & Ryan, *Notifying Husbands About An Abortion: An Empirical Look at Constitutional and Policy Dilemmas*, 71 Sociology and Soc. Research 183, 186 (1987) [hereinafter Plutzer & Ryan].

marriages, as the reason for nondisclosure.[10] In another comprehensive nationwide empirical study, 17%-28% of married adult women mentioned partner-related reasons for seeking abortion.[11] Under the Pennsylvania scheme such women *must* notify their husbands and risk the destructive impact on their marriages, or forego the abortion.

2. *No exception is provided where the woman fears notification will negatively affect her husband.* A woman may fear that her husband is not psychologically prepared to cope with an unplanned or unwanted pregnancy, whether terminated or not; or as the District Court suggested, where "her husband is suffering from an illness, [the woman may] fear[] communication concerning the decision could worsen his condition." 744 F. Supp. at 1386 n.42. Section 3209 forces her to risk such injury, or forego the abortion.

3. *No exception is provided where the woman fears she will be psychologically or emotionally abused as a result of notification.* Domestic abuse is not limited to infliction of "bodily injury." Many researchers have noted the high prevalence and traumatic effects of psychological or emotional spousal abuse.[12] Indeed, some of the most respected researchers in the area have described emotional abuse as "[t]he most hidden, most insidious, least

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[10] Ryan & Plutzer, *supra* n.5, at 46.

[11] Russo, *supra* n.5, at 17. 17.2% of the married mothers (*i.e.*, married women with one or more children) and 28.3% of the married non-mothers cited partner-related reasons for seeking an abortion, including fear that the marriage might break up. *Id.*, at Table 5.

[12] Finkelhor & Yllo, *Rape in Marriage: A Sociological View*, in THE DARK SIDE OF FAMILIES: CURRENT FAMILY VIOLENCE RESEARCH 119 (D. Finkelhor, R. Gelles, G. Hotaling, M. Straus eds. 1983) [hereinafter Finkelhor & Yllo]; L. WALKER, THE BATTERED WOMAN SYNDROME (1984) [hereinafter Walker].

researched, and perhaps in the long run most damaging form of intimate victimization." [13]

Psychological abuse takes many forms. Reported psychological aggression by husbands toward their wives includes insulting and swearing, threatening physical assault, and destruction of physical property in the home.[14] Other studies report threats, isolation, degradation, close monitoring or surveillance, withholding of transportation, and economic control.[15] Section 3209 requires victims of psychological abuse, no matter how serious, to give their husbands prior notice of the pregnancy and planned abortion even if the wives believe that such notice will cause their husbands to victimize them further. The only alternative is to forego the abortion.

4. *No exception is provided for women who fear that notifying their husbands of their planned abortion will result in physical or psychological abuse of someone other than themselves.* An abusive husband may seek to control his wife through physical or psychological harm to their children, or threats of such harm.[16] To exercise their

[13] R. GELLES & M. STRAUS, INTIMATE VIOLENCE: THE CAUSES AND CONSEQUENCES OF ABUSE IN THE AMERICAN FAMILY 67 (1988) [hereinafter Gelles & Straus].

[14] Straus & Sweet, *Social Psychological Characteristics Associated With Verbal Aggression Between Husbands and Wives*, J. Marriage and Fam., manuscript at 7 (in press). In one national study that examined the prevalence of psychological abuse in marital relationships, 74% of the husbands engaged in one or more attacks during the year covered by the study. *Id.* at 9.

[15] Walker, *supra* n.12, at 28-29. This study focused on abuse of battered women. However, forms of psychological abuse used by men who physically abuse their wives may also be employed by men who do not. Moreover, although battered women theoretically may be exempted from spousal notification if they fear "bodily injury" as a result of notification, they—like women who are not physically abused by their husbands—cannot obtain a waiver if they fear only *psychological* abuse as a result of compelled notification.

[16] In one study, 57% of the battered women reported that their spouses had threatened to kill someone else including their children. Walker, *supra* n.12, at 42. Another study of women who even-

constitutional right to terminate their pregnancies, these women must first notify their abusive husbands, regardless of the devastating effects.

B. Many Women Who Would Otherwise Be Exempted From Compelled Spousal Notification Are Burdened Because They Are Unable To Use The Statutory Exemptions.

Many women with reasons for not notifying their husbands recognized as valid in the Act's narrow statutory exemptions will be unable to use these exemptions for a variety of reasons.

The statute makes an exception for a married woman impregnated by someone other than her husband, *but only if she certifies this fact in writing.* 18 Pa. C.S.A. § 3209(b)(1). That is, to be exempted from the obligation to notify her husband, the woman must execute an official document saying that she has become pregnant as a result of an extra-marital affair.[17] The Act offers no assurance that this document will remain confidential, or be protected from subpoena. *See* 744 F. Supp. at 1361. Thus, a woman would rationally fear the consequences of making such a certification.[18] Research strongly suggests that disclosure to the husband when he is not the

tually killed their abusive husbands found that 83% of the husbands had threatened to kill someone other than their wives. A. BROWNE, WHEN BATTERED WOMEN KILL 65 (1987) [hereinafter *When Battered Women Kill*].

[17] There may be other reasons that the husband is not the father, such as when the woman is raped by someone else. In those circumstances, a woman may not want to disclose her rape and subsequent pregnancy and abortion, for fear of rejection by her husband.

[18] In the one study to date directly concerning spousal notification, almost half of the women who had been involved in extramarital affairs and had not notified their husbands of their pregnancies and abortion decisions, indicated a concern about anybody finding out about the pregnancy. Plutzer & Ryan, *supra* n.9, 186. A principal concern is likely to be preventing the husband from learning about the affair.

father is generally harmful to both the woman and the future of the marriage.[19]

Section 3209 also provides that the husband need not be notified if the pregnancy resulted from statutorily-defined "spousal sexual assault," *but only if the wife has reported her husband to law enforcement authorities having jurisdiction over the matter.* 18 Pa. C.S.A. § 3209(b)(3). Evidence strongly suggests that this reporting requirement renders this exception virtually meaningless. Marital rape is a common, though neglected aspect of spouse abuse.[20] But marital rape (like other forms of domestic violence) is vastly underreported. One study concluded that only 9.5% of sexual assaults by husbands, ex-husbands and co-habitating partners are reported to the police.[21]

There are many reasons for a woman's reluctance to report rape and attempted rape (within and outside marriage) to law enforcement officials. According to the most recent National Crime Survey Report, women who did not report the sexual assaults to police gave the following reasons: 16.6% believed that the event was a private or personal matter; 14% reported the matter to a person *other* than a law enforcement official; 11.5% feared a reprisal; 11.3% cited lack of proof; 4% believed the police were too ineffective, inefficient, or biased; and 2.5% said the police would not want to be bothered.[22] Clinical

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[19] Ryan & Plutzer, *supra* n.5, at 46 (citing studies).

[20] Estimates of the percentage of American women sexually assaulted by their own husbands, ex-husbands or co-habitating partners range from 10% to 14%. Eighty-five percent of the women are raped. Finkelhor & Yllo, *supra* n.12, at 121; D. RUSSELL, RAPE IN MARRIAGE 57 (1982) [hereinafter Russell].

[21] Russell, *supra* n.20, at 303.

[22] U.S. Dept. of Justice, *Criminal Victimization in the United States, 1989: A National Crime Survey Report*, NCJ-129391, at 96-97 (1991).

observations suggest *marital* rape is underreported for these and additional reasons. Many women, believing in notions of "wifely duty" or obligation, do not define a forced sexual experience with a husband as "rape" or "sexual assault."[23] Those women who acknowledge such experiences as spousal rape have other reasons for not reporting: self-blame, shame, and fear of not being believed.[24] The Third Circuit also noted "the devastating effect that a report to law enforcement authorities is likely to have on the marital relationship and the economic support provided the wife by the marriage." *Planned Parenthood v. Casey*, 947 F.2d 682, 713 (3d Cir. 1991). These women are unlikely to overcome their reluctance to report, and suffer such consequences, in order to have an abortion.[25]

Finally, the Act exempts women who fear notification will result in bodily injury to themselves,[26] *but only if they certify their fear in writing. See* 18 Pa. C.S.A. § 3209(b)(4). Research suggests that it is unrealistic to expect battered women to do this. The vast majority of wives

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[23] In the most comprehensive study to date, only 7% of the women who met the criteria for having been raped by their husbands (*e.g.*, force, threat of force, or consent is not possible because of woman's physical state) mentioned the experience when asked if they had ever been the victim of rape. Russell, *supra* n. 20, at 52-53.

[24] Finkelhor & Yllo, *supra* n.12, at 126; Browne, *Violence Against Women: Report of the Council on Scientific Affairs, Am. Medical Ass'n*, at 15 (in press).

[25] The ninety-day reporting requirement under Pennsylvania's spousal sexual assault statute "further narrows the class of sexually abused wives who can claim the exception, since many of these women may be psychologically unable to discuss or report the rape for several years after the incident." 744 F. Supp. at 1362.

[26] Domestic violence is the single most common cause of injury to women in the United States and is responsible for 22-35% of emergency room visits by women. Randall, *Domestic Violence Intervention Calls For More Than Treating Injuries*, 268 J. Am. Med. Ass'n 939 (1990). The most comprehensive study of vio-

are unlikely to report their abusive experience to a health care provider. Research indicates that only 24.1% of women who experience "minor violence" (*e.g.*, slapping) and 37.9% of the victims of "severe violence" (*e.g.*, kicking or hitting with a hard object) at the hands of their husbands report the abuse to human services personnel (including psychologists, physicians, nurses, and staff of community mental health centers or other social service or counseling agencies).[27]

Women do not report these abusive experiences for a number of reasons. Clinical observations suggest that for many victims, battering has been such a constant part of family life that they may define their experiences as

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lence in American families conducted to date revealed that one out of eight wives had been struck by her husband during the year covered. Straus & Gelles, *Societal Change and Change in Family Violence From 1975 to 1985 as Revealed by Two National Surveys*, 48 J. Marriage and Fam. 465, 470 (1986). A review of available epidemiological research on domestic violence concluded that 20-25% of women in the United States have been physically abused by a male intimate. Stark & Fitarft, *Violence Among Intimates: An Epidemiological Review*, in HANDBOOK OF FAMILY VIOLENCE 293, 300 (Van Hasselt, Morrison, Bellack & Hessen eds. 1988).

Research on domestic violence has demonstrated that pregnancy does not deter and may even precipitate physical attacks by batterers. Gelles, *Violence and Pregnancy: A Note On the Extent Of The Problem And Needed Services*, 24 Fam. Coordinator 81 (1975); Gelles, *Violence and Pregnancy: Are Pregnant Women at Greater Risk of Abuse?*, 50 J. Marriage and Fam. 84 (1984); Helton, McFarlane & Anderson, *Battered and Pregnant: A Prevalence Study*, 77 Am. J. Pub. Health 1338 (1987); Walker, *supra* n.12, at 51. Still other data indicate that battering becomes more severe during pregnancy, potentially causing severe injury to the woman. Fagan, Stewart & Hansen, *Violent Men or Violent Husbands? Background Factors and Situational Correlates*, in THE DARK SIDE OF FAMILIES: CURRENT FAMILY VIOLENCE RESEARCH 64 (D. Finkelhor, R. Gelles, G. Hotaling & M. Straus eds. 1983); Helton, McFarlane & Anderson, *supra*, at 1338; McFarlane, *Battering During Pregnancy: Tip of an Iceberg Revealed*, 15 Women and Health 69, 72 (1989).

[27] Gelles & Straus, *supra* n.13, at 237.

normative.[28] Further, defining oneself as a victim can be a painful process, requiring alterations of one's self-perception and perception of the perpetrator.[29] Even when they recognize it as battery, women may be reluctant to report violence out of family loyalty, distrust of people outside their own ethnic or social group, or desire to protect their families' privacy.[30] Battered women may, in addition, fear retaliation by their husbands.[31] The risk of disclosure may also seem too great when victims are economically dependent on their abusers, or when they fear that disclosure could destroy the integrity of the family unit.[32] Given the fact that the confidentiality of the spousal notification exemption form cannot be guaranteed, many battered women will be reluctant to implicate their husbands. Compelling spousal notification in such instances is likely to intensify or exacerbate an already traumatic and emotionally volatile situation.

C. Mandatory Spousal Notification Places Extraordinary Burdens On Wives Who Have Decided Not To Notify Their Husbands Of The Planned Abortion.

The burdens Section 3209 places on wives who would not otherwise notify their husbands of their decision to terminate their pregnancies are numerous and significant. *First*, in many circumstances, rather than notify her spouse about the abortion or utilize an exemption, a woman may forego the abortion. These women avoid compelled spousal notification, but only at the cost of sacrificing their right to choose.

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[28] Browne, *The Victim's Experience: Pathways to Disclosure*, 28 Psychotherapy 150 (1991) [hereinafter Browne].

[29] *Id.* at 151; Janoff-Bulman & Frieze, *A Theoretical Perspective for Understanding Reaction to Victimization*, 39 J. Soc. Issues 1, 5 (1983).

[30] Browne, *supra* n.28, at 152.

[31] *When Battered Women Kill*, *supra* n.16, at 114.

[32] Browne, *supra* n.28, at 152-53.

Second, a woman who *does* notify her husband of her intention to undergo an abortion because the Act makes it a precondition to terminating her pregnancy, may nonetheless be denied the ability to exercise her choice, as both lower courts concluded. 744 F. Supp. at 1385; 947 F.2d at 712-13. Several of the women in the most comprehensive study of spousal notification indicated that they did not tell their husbands of their planned abortion for fear that the men would insist that they continue the pregnancy.[33] Forced notification to husbands who strongly oppose abortion "will predictably result in an effort to prevent the abortion." 947 F.2d at 712. Empirical data show that women in abusive marriages are particularly susceptible to successful attempts to block their right to choose.[34]

Third, as the District Court correctly concluded, "the woman who is forced to notify her husband . . . in order to obtain an abortion despite her better judgment to the contrary will be subjected to additional anxiety and stress." 744 F. Supp. at 1385. Unwanted pregnancy is itself a stressful experience.[35] The spousal notification requirement only increases the stress by forcing a pregnant woman to choose between equally intolerable alternatives: (1) to notify her husband of her planned abortion and suffer the consequences, the fear of which had led her to decide not to notify him in the first place; or (2)

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[33] Plutzer & Ryan, *supra* n.9, at 186.

[34] One study of battered women showed that, in violent relationships, men prevailed in 73% of the major disagreements. Walker, *supra* n.12, at 28-29. Moreover, the largest proportion of battered wives in another study reported that, in order to stop the violence, they consciously avoid confrontational situations with their husbands. Gelles & Straus, *supra* n.13, at 259 (53% of the "minor violence" group and 69% of the "severe violence" group).

[35] Russo & Zierk, *Abortion, Childbearing, and Women's Well-Being*, Prof. Psychology Research and Prac., manuscript at 3 (in press) [hereinafter Russo & Zierk].

to forego the abortion, which may result in the very harm she had hoped to avoid by not disclosing her pregnancy and having the abortion.[36]

Fourth, the decision-making and notification imposed by the Act's spousal notice requirement will result in later,[37] and thus more hazardous and more expensive abortions.[38]

Fifth, the spousal notice requirement demeans and stigmatizes married women. Of all the reproductive-related medical procedures a woman can undergo, abortion alone requires spousal notification. Married women are not required to notify their husbands before obtaining tubal ligations or hysterectomies, for example. Moreover, Pennsylvania law is strikingly one-sided: husbands are not required to inform their wives before undergoing reproductive-related medical procedures, such as sterilization.[39] Nor are unmarried women deprived of their autonomy in making the abortion decision. Section 3209 thus sends a clear message to married, pregnant women

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[36] In those cases where an exemption might apply, the woman has a third, often unacceptable option: certifying that she fits within one of the statutory exceptions—and taking any steps necessary to qualify, such as notifying the police of her husband's sexual assault—and suffering the consequences.

[37] In one study examining the reasons why women have late abortions, one-third of the women indicated that they were afraid to tell their partners or parents; 8% reported that they were waiting for the relationship with their partners to change. Torres & Forrest, *Why Do Women Have Abortions*, 20 Fam. Planning Perspectives 169 (1988).

[38] *See* 744 F. Supp. at 1385. The period of gestation at which an abortion is performed is related to the potential medical and psychological effects of the procedure. Adler, David, Major, Roth, Russo & Wyatt, *Psychological Responses After Abortion*, 248 Science 41 (1990) [hereinafter Adler]; C. Tietze, J. Forrest & S. Henshaw, International Handbook on Abortion (P. Sachdev ed. 1988).

[39] *See* 744 F. Supp. at 1362-63, 1387 n.44.

that their judgment on the abortion issue alone is not trusted or respected.[40]

As the Third Circuit concluded, "if § 3209 is allowed to go into effect, abortions can and will be prevented . . . and wives can and will be penalized . . . for electing abortions." 947 F.2d at 713.

D. There Is No Empirical Support For The Proposition That Compelled Spousal Notification Promotes The Integrity Of The Marital Relationship.

This Court has asserted, as a guiding principle, that:

> [W]hen a State, as here, burdens the exercise of a fundamental right, its attempt to justify that burden as a rational means for the accomplishment of some significant state policy requires more than a bare assertion, based on a conceded complete absence of supporting evidence, that the burden is connected to such a policy.

Carey v. Population Servs. Int'l, 431 U.S. 678, 696 (1977) (plurality opn.). The right to secure an abortion is fundamental, *Roe v. Wade*, 410 U.S. 113 (1973), protected at a minimum against the imposition of "undue burden[s]," *Webster v. Reproductive Health Services*, 109 S. Ct. at 3063 (O'Connor, J., concurring); *Hodgson v. Minnesota*, 110 S. Ct. at 2949-50 (O'Connor, J., concurring). There can be no serious question, for the reasons set forth above, that Section 3209 imposes a substantial burden on married women's right to terminate their pregnancies.

Pennsylvania seeks to justify its burdensome spousal notification requirement, *inter alia*, as "promoting the integrity of the marital relationship." 18 Pa. C.S.A.

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[40] *See* Plutzer & Ryan, *supra* n.9, at 187 (noting that spousal notification statutes "send[] the message that women do not have autonomy in their reproductive decisions" as well as "the alternative, unintended message that only single, sexually active women are free to exercise the choice of an abortion without the interference of the man involved").

§ 3209(a).[41] The Commonwealth's rationale necessarily assumes either that women are wrong in believing notification will have an adverse impact or that any adverse impact will be outweighed by the enhancement to the marriage compelled notification purportedly would promote. Both assumptions are unfounded.

Studies suggest that married women are capable of making reasonable judgments regarding the effect notification would have on themselves and/or the harmony of their marital relationships.[42] Women who believe notification will be beneficial *voluntarily* notify their husbands. For that small minority who conclude that notification will adversely affect them, their spouses, their children, or their marriages, there is no reason to believe that the Commonwealth is in a position to make a better judgment. As the Court held in *Hodgson*, "the State has no legitimate interest in questioning one parent's judgment that notice to the other parent" of their minor daughter's intent to have an abortion would not be in the family's best interest. 110 S. Ct. at 2945. For the same reasons, the Commonwealth surely has no legitimate interest in questioning a married woman's judgment that notification to her husband would not be wise.

Nor is there support for the assumption that compelled notification (when the woman has decided against it) has a positive effect on the marital relationship. To the contrary, the productive communication patterns of a normal, healthy marriage are based upon trust and the *voluntary* desire to share or to know; compelled or coerced communication lacks these qualities.[43] Indeed, compelled notification may actually be *detrimental* to the marriage, or to

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[41] *Amicus* does not address the other purported rationales for compelled spousal notification because psychological evidence has little if any bearing on them.

[42] Ryan & Plutzer, *supra* n.5, at 47.

[43] *See generally* D. CURRAN, TRAITS OF A HEALTHY FAMILY (1983).

one or both of the parties.[44] As the District Court concluded, "not only could forced notice hasten the dissolution of a troubled marriage, but it could have potentially disastrous consequences, including subjecting the woman to physical abuse." 744 F. Supp. at 1388. As in *Hodgson*, "[i]n these circumstances, the statute [is] not merely ineffectual in achieving the State's goals but actually counterproductive." 110 S. Ct. at 2945.

II. THE "INFORMED CONSENT" PROVISIONS OF THE PENNSYLVANIA ACT ARE UNCONSTITUTIONAL.

In *Akron*, this Court noted: "The validity of an informed consent requirement . . . rests on the State's interest in protecting the health of the pregnant woman." 462 U.S. at 443. Two principles limit state regulation designed to ensure that a woman's decision is "informed and freely given and is not the result of coercion."[45] The State must (1) defer to the judgment of health care professionals involved in counseling the woman and performing the abortion, and (2) respect the woman's constitutionally protected right to exercise her choice unburdened by the State's coercive efforts to inject its policy preferences into her decision-making process. *Thornburgh*, 476 U.S. at 762; *Akron*, 462 U.S. at 443-44. *See Thornburgh*, 476 U.S. at 830-31 (O'Connor, J., dissenting) (state-compelled information cannot be irrelevant, inaccurate, or inflammatory). The "informed consent" provisions of the Pennsylvania Act violate these principles.

At the outset, Sections 3205 and 3208 confuse two separate and distinct processes—obtaining "informed consent" and pre-abortion counseling. Informed consent is a legal doctrine that requires physicians to obtain consent for any diagnostic procedure or treatment that "touches" the person. Informed consent for abortion focuses on the

[44] From the data available, it is not even clear that *voluntary* notification about a planned abortion enhances the marital relationship. Ryan & Plutzer, *supra* n.5, at 42, 45.

[45] *Planned Parenthood v. Danforth*, 428 U.S. 52, 85 (1976).

material, non-remote *medical* risks associated with the specific procedure to be performed.[46] Customarily, it is obtained immediately prior to the procedure, and does not entail discussion of the myriad non-medical factors that inform women's decision whether to terminate their pregnancies.

The information required by the Act goes far beyond the medical subject matter relevant to "informed consent." Much of the information—in particular that required by Sections 3205(a)(2) and 3208—has nothing to do with the medical risks of abortion or its alternatives. Rather, it relates to social, cultural and economic issues associated with carrying a pregnancy to term. In the guise of obtaining "informed consent," the Pennsylvania Act thrusts health care professionals into the woman's broader decision-making process and involves them in what is more appropriately done in pre-abortion counseling.

Properly done, pre-abortion or "options" counseling can be helpful to women in making a decision regarding the outcome of an unplanned or unwanted pregnancy; it is meant to assist them in weighing their options. It should not be imposed on pregnant women, many of whom prefer to consider non-medical issues affecting this personal decision in private or with relatives or friends. Unlike the information mandated by the Pennsylvania Act, options counseling is provided in circumstances when and where it is needed and wanted by the particular patient.

As discussed *infra*, the "counseling" the Act dictates is not appropriate. It forces health care professionals to convey misleading and ideologically skewed information, and forces every woman seeking an abortion to listen to a fixed litany of information irrespective of her individual needs and wants, or its impact on her.

[46] *See Akron*, 462 U.S. at 443 (construing "informed consent" to mean "the giving of information to the patient as to just what would be done and as to its consequences").

A. The "Informed Consent" Provisions Require The Dissemination Of Exaggerated And Misleading Information That May Be Harmful To Women.

In the guise of "informed consent," the Act's requirements affirmatively deceive pregnant women seeking abortions. Section 3208 requires health care professionals to offer materials containing "objective information describing . . . the possible detrimental psychological effects of abortion." 18 Pa. C.S.A. § 3208(a)(2). Singling out abortion for the recitation of purported detrimental effects conveys the false and misleading impression that abortions are more likely than alternatives to abortion to produce such detrimental effects.[47] Indeed, research shows that substantial adverse emotional and psychological consequences to having an abortion are very rare. And the alternatives are not always psychologically benign. Studies demonstrate that potential negative psychological consequences may result from bearing and raising a child or relinquishing a child for adoption.[48]

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[47] To the extent the likely psychological consequences of the decision whether to abort or carry an unwanted pregnancy to term are pertinent to a particular woman when deciding whether to have an abortion, studies of women's psychological responses following abortion and term birth have found few differences. When differences were found, early abortion was associated with more positive effects. Russo & Zierk, *supra* n.35, at 3-4.

[48] Having a child can be associated with a variety of stressful outcomes: women's risk for depressive symptoms, including low self-esteem, is higher among women with young children, and increases with the number of children. Russo & Zierk, *supra* n.35, at 5. Anywhere from 50-80% of mothers experience postpartum "blues" (mild depression, mood instability, and anxiety). Postpartum depression is suffered by 10% of mothers, and nearly .02% of women suffer full-blown psychoses after birth. Harding, *Postpartum Psychiatric Disorders: A Review*, 30 Comprehensive Psychiatry 109, 109-110 (1989). There is also evidence suggesting that women who relinquish a child for adoption are at high risk for negative psychological consequences, which may not diminish over decades. Condon, *Psychological Disability In Women Who Relinquish a Baby For Adoption*, 144 Med. J. of Australia 117, 117-19 (1986); Deykin, Campbell & Patti, *The Postadoption Experience of Surrendering Parents*, 54 Am. J. Orthopsych. 271 (1984). In addition, negative emotions—anger, sadness, and guilt—may intensify over time. *Id.*

Psychological reactions after abortion are complex and may include both negative and positive responses. Importantly, a woman's response to abortion cannot be separated from the effects of the stressful experience of an unwanted pregnancy. In this context, it is not surprising that the great majority of women who have had abortions express feelings of relief and happiness.[49] Indeed, positive emotions are more often experienced and experienced more strongly than negative emotions, both immediately after the abortion as well as in the months following.[50] And the positive feelings increase over time whereas any negative feelings diminish.[51]

Abortion rarely causes or exacerbates psychological or emotional problems. When women do experience regret, depression, or guilt, such feelings are mild and diminish rapidly without adversely affecting general functioning.[52] The few women who do experience negative psycholog-

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[49] *E.g.*, Adler, *supra* n.38, at 41; Adler & Dolcini, *Psychological Issues in Abortion for Adolescents*, in ADOLESCENT ABORTION: PSYCHOLOGICAL & LEGAL ISSUES 74 (G. Melton ed. 1986) [hereinafter Adler & Dolcini]; Russo & Zierk, *supra* n.35, at 20-21; Lazarus, *Psychiatric Sequelae of Legalized Elective First Trimester Abortion*, 4 J. Psychosomatic Obstetrics & Gyn. 141 (1985) [hereinafter Lazarus]; Osofsky & Osofsky, *The Psychological Reaction of Patients to Legalized Abortion*, 42 Am. J. Orthopsych. 48 (1972).

[50] *E.g.*, Russo & Zierk, *supra* n. 35, at 3; Adler, *supra* n.38, at 41. Research suggests that women who show no evidence of severe negative responses either a few months or up to a year after having an abortion are unlikely to develop future significant psychological problems related to the experience of abortion. Russo & Zierk, *supra* n.35, at 6, 24; Adler, *supra* n.38, at 43.

[51] *E.g.*, Adler & Dolcini, *supra* n.49, at 84; Adler, *Emotional Responses of Women Following Therapeutic Abortion*, 45 Am. J. Orthopsych. 446, 447 (1975).

[52] *E.g.*, Adler & Dolcini, *supra* n.49, at 84; Adler, *supra* n.38, at 41, 43; Russo & Zierk, *supra* n.35, at 2-3, 24.

ical responses after abortion appear to be those with preexisting emotional problems or who choose to abort because of medical or genetic indications rather than because the pregnancy is unwanted.[53] Case studies suggest that the greater the difficulty in deciding to terminate the pregnancy—either because of negative feelings about abortion, perceived social stigma, or lack of support—the more likely there will be a negative response afterwards.[54] In addition, some women have little access to resources that enable them to cope with stressful situations generally and are therefore at risk for psychological distress whether their unwanted pregnancy is resolved by abortion *or birth*.[55] The conclusions from the most rigorous scientific studies are consistent: for the overwhelming majority of women who undergo abortion, there are no long-term negative emotional effects.[56] As

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[53] *E.g.*, Russo & Zierk, *supra* n.35, at 3; Adler & Dolcini, *supra* n.49, at 84; Lazarus, *supra* n.49; Blumberg & Golbus, *Psychological Sequelae of Elective Abortion*, 123 Western J. Med. 188 (1977); Freeman, *Influence of Personality Attributes on Abortion Experiences*, 47 Am. J. Orthopsych. 503 (1977).

[54] Adler, *supra* n.38, at 42.

[55] Russo & Zierk, *supra* n.35, at 22. Evidence suggests that a woman's coping resources associated with employment, income, and education are more important to her psychological well-being than whether or not she has had an abortion. *Id.* at 26.

[56] *E.g.*, Adler, *supra*, n.38, at 41, 43 (reviewing research); Russo & Zierk, *supra* n.35, at 2-3; Adler, *Psychological Responses of Women Following Abortion* (1989) (testimony on behalf of APA to Subcommittee on Human Resources and Intergovernmental Relations of the House of Representatives Committee on Government Relations); Marecek, *Consequences of Adolescent Childbearing and Abortion* in ADOLESCENT ABORTION: PSYCHOLOGICAL & LEGAL ISSUES 96 (G. Melton ed. 1986) [hereinafter Maracek]; NATIONAL ACADEMY OF SCIENCES/INSTITUTE OF MEDICINE, LEGALIZED ABORTION AND THE PUBLIC HEALTH (1975); Adler & Dolcini, *supra* n.49; Shusterman, *The Psychological Factors of the Abortion Experience: A Critical Review*, 1 Psychology of Women Q. 79 (1976).

former Surgeon General C. Everett Koop testified before Congress, the development of significant psychological problems related to abortion is "miniscule from a public health perspective." [57]

In sum, it is grossly misleading to tell a woman that abortion imposes possible detrimental psychological effects when the risks are negligible in most cases, when the evidence shows that she is more likely to experience feelings of relief and happiness, and when child-birth and child-rearing or adoption may pose concomitant (if not greater) risks of adverse psychological effects for some women depending on their individual circumstances. Such inaccuracies are likely to lead to unnecessary anxiety and may actually produce negative post-abortion reactions where they would not otherwise have occurred.[58]

The fact that this misinformation is "offered" to every pregnant woman seeking an abortion, rather than being forced upon her, is a distinction without a difference. *See Thornburgh*, 476 U.S. at 831 (O'Connor, J., joined by Rehnquist, C.J.). When a health care provider offers a brochure to a patient and describes its contents, and states that "a copy will be provided to her free of charge if she chooses to review it," 18 Pa. C.S.A. § 3205(a)(2)(i), that offer carries the weight of a recommendation. A patient may justifiably conclude that a health care provider would not offer her material that was not relevant and meaningful to her medical procedure. In practice and effect, Section 3208 exploits the trust critical to the health care provider-patient relationship.

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[57] HOUSE COMM. ON GOVERNMENT OPERATIONS, THE FEDERAL ROLE IN DETERMINING THE MEDICAL AND PSYCHOLOGICAL IMPACT OF ABORTIONS ON WOMEN, H.R. REP. No. 329, 101st Cong., 2d Sess. 14 (1989).

[58] One study revealed that exposing women to unfounded claims that abortion will have severe and long-term negative psychological effects could undermine their ability to cope with the abortion experience. Russo & Zierk, *supra* n.35, at 7.

B. The Mandatory Disclosure Provisions Interfere With Effective Counseling And Are Designed Not To Inform But To Bias Women Against Having Abortions.

Even apart from the exaggerated and misleading information concerning the psychological sequelae of abortion, the "informed consent" provisions are harmful because they require the physician and/or other health care professional to recite and make available a specified list of information to every woman before obtaining her consent to an abortion. This Court has twice struck down such requirements. *Thornburgh*, 476 U.S. at 759-64; *Akron*, 462 U.S. at 444-45. As the Court recently explained, such laws are unconstitutional because they "require[] *all* doctors within their respective jurisdictions to provide *all* pregnant patients contemplating an abortion a litany of information, regardless of whether the patient sought the information or whether the doctor thought the information necessary to the patient's decision." *Rust v. Sullivan*, 111 S. Ct. 1759, 1777 (1991) (emphasis in original).

Effective counseling requires the exercise of professional judgment regarding what should *not* be said, as well as what should be said, in a particular situation. There is no universal set of information that is appropriate for every patient. Pregnant women approach the possibility of abortion with widely varying backgrounds, attitudes, levels of knowledge and familial and social support systems. To be effective, the *content* of the counseling must be tailored to those individual differences and needs. Each woman is unique and should receive only the counseling she agrees to based on her needs and wants, and at the appropriate time—during the decision-making process. Sections 3205 and 3208 preclude the exercise of such professional discretion and judgment. The "counseling" techniques these provisions mandate are contrary to the currently accepted practice of health care professionals,[59] and are likely to undermine women's well-being.

[59] *See* American Psychological Ass'n, *Ethical Principles of Psychologists*, 45 Am. Psychologist 390 (1990) (instructing psychologists to treat people as individuals, with full respect for their individual differences); APA's Criteria for Accreditation of Doctoral Training Programs and Internships in Professional Psychology in APA COMMITTEE ON ACCREDITATION, ACCREDITATION HANDBOOK (1980) (noting importance of respect for individual differences).

For example, the requirement that every woman be informed that "[m]edical assistance benefits may be available for prenatal care, childbirth and neonatal care," and that "the father . . . is liable to assist in the support of her child" (18 Pa. C.S.A. § 3205(a)(2)(ii) & (iii)), may be irrelevant to a woman for whom an abortion is required as a life-preserving measure or for genetic reasons. Further, the requirement that such information be communicated may interfere significantly with a health professional's ability to counsel such a woman effectively, particularly if she has moral, religious or other personal beliefs that make her ambivalent. Informing a woman who believes that she has no effective alternative to abortion of the potential liability of the father if she carries to term, or the possible availability of medical assistance benefits for child-birth, may increase any depression and anxiety regarding the procedure and thereby increase her stress and interfere with her recovery. *See Thornburgh*, 476 U.S. at 764. Rigid, mandatory disclosure requirements such as Section 3205 fail to allow for situations in which the provision of certain information to a particular patient would result in anxiety, fear or emotional distress. As the Supreme Court held in *Thornburgh*, "[t]his type of compelled information is the antithesis of informed consent." *Id.*

It is not the counselor's role to guide the woman to a particular outcome. Effective options counseling must provide the woman with only information that is relevant to her particular situation, and must offer a neutral and balanced presentation and discussion of all relevant facts. Additionally, it is essential for women who request and need counseling to discuss not only the "medical risks" of carrying the pregnancy to term, as Section 3205 requires (18 Pa. C.S.A. § 3205(a)(1)(i) & (iii)), but also

the social, economic, emotional and psychological risks of the alternatives to abortion, disclosure of which the Act does not mention. Such counseling should focus on the issues—such as consequences for the woman's relationship with the father and her children, her economic status, moral and religious beliefs, and attitudes toward adoption—that are of primary importance for many women in the abortion decision.[60]

In fact, the Pennsylvania Act is designed more to bias a woman's choice than to inform it. Like the almost identical provisions struck down in *Thornburgh*, Sections 3205 and 3208 "require the delivery of information designed 'to influence the woman's informed choice between abortion or childbirth.'" 476 U.S. at 760, quoting *Akron*, 462 U.S. at 443-44. Apart from the misleading nature of the psychological "information" contained in the government-created brochure, the stipulated information gives the strong impression that the Commonwealth disapproves of the woman's decision to abort; it is clearly designed to deter pregnant women from making that choice.[61]

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[60] A recent empirical study found that women's abortion decision reflects a desire to optimize the quality of marriage and childbearing, and to reduce risk of physical, psychological, social, and economic disadvantage for themselves and their existing and future children. Russo, *supra* n.5, at 21. The abortion decision is complex, involving many factors. In general, however, reasons associated with developmental level or life stage play a critical role: 11% of the women in the study indicated that they were "not mature enough" or were "too young" to have a child, while another 21% gave "unready for the responsibility" as the most important reason for having an abortion. Twenty-three percent mentioned that a husband or partner wanted the abortion; 68% mentioned inability to afford a baby. *Id.* at 12.

[61] Under Section 3205, the woman must be told about alternatives to abortion and the gestational age of the "unborn child," 18 Pa. C.S.A. § 3205(a)(1)(i) & (ii), and she must be told about possible medical assistance benefits if she carries the pregnancy to term and paternal liability for child support, *id.* § 3205(b)(ii) & (iii). The material offered and made available by the health care provider must include a state-compiled list of agencies offering abortion alternatives and "pictures representing the development of unborn children at two-week gestational increments, and any relevant information on the possibility of the unborn child's survival." *Id.* § 3208(a)(2); *see id.* § 3205(b)(i).

The District Court found that, in some cases, merely offering this material "will create undesirable and unnecessary anxiety, anguish and fear." 744 F. Supp. at 1354. As the Court determined in *Thornburgh*, the mandated description of fetal characteristics at two-week intervals, no matter how objective, "is not medical information that is always relevant to the woman's decision, and it may serve only to confuse and punish her and to heighten her anxiety, contrary to accepted medical practice." 476 U.S. at 762.

[62] As the Court concluded in *Thornburgh*, "[f]orcing the physician or counselor to present [this information] to the woman makes him or her in effect the agent of the State in treating the woman and places his or her imprimatur upon [the material]." 476 U.S. at 763.

[63] *See supra* at 22.

The Act converts health care providers into advocates for the State in seeking to discourage women from terminating their pregnancies.[62] This role is the antithesis of effective and appropriate counseling, does not provide the professional guidance the woman is entitled to expect, and is likely to be highly destructive of the patient-counselor relationship. Indeed, like the exaggerated and misleading information concerning the adverse psychological sequelae of abortion, the provision of a disapproving official message may harm the woman it is purportedly intended to assist: studies show that women who believe that their decision to have an abortion is not supported or is stigmatizing run an increased risk of negative post-abortion emotional and psychological reactions;[63] the Pennsylvania Act's strongly biased presentation, which the health-care provider is forced to communicate, may convey just such a non-supportive, stigmatizing message.

C. The Twenty-Four Hour Mandatory Delay Severely Burdens A Woman's Right To Choose.

The requirement that every woman wait 24 hours between disclosure of the biased mandatory "informed

consent" information and the abortion procedure imposes still other burdens on a woman's right to obtain an abortion. *See* 18 Pa. C.S.A. § 3205(a). In *Akron*, this Court concluded that the State "failed to demonstrate that any legitimate state interest is furthered by an arbitrary and inflexible [24-hour] waiting period," and held that such a mandatory delay was unconstitutional. 462 U.S. at 450. The Court noted that the waiting period increased the cost and risk of obtaining an abortion, *inter alia*, because scheduling difficulties effectively delayed the planned abortion more than 24 hours. *Id.* This conclusion was correct.[64]

In many geographic areas of the country, women live long distances, even hundreds of miles, from the nearest abortion provider.[65] Research has shown that the greater the distance from a provider, the less likely a woman is to gain access to the abortion service.[66] The lack of local services can result in numerous difficulties for women seeking an abortion: travel expenses, overnight lodging, loss of pay, and jeopardized privacy because of

[64] Both lower courts found that Pennsylvania's 24-hour waiting period may result in significantly longer waits (up to two weeks) and will require every woman to make at least two visits to a clinic or doctor's office rather than one, thereby increasing the cost of the procedure, sometimes significantly. 744 F. Supp. at 1351-52, 1378-79; 947 F.2d at 706.

[65] The abortion patients of one petitioner in this case come from an 18-county area; many of those counties have no abortion providers. 744 F. Supp. at 1341. Another petitioner serves a significant number of patients who travel in excess of two hours to the clinic. *Id.* at 1338.

[66] Shelton, Brann & Shultz, *Abortion Utilization: Does Travel Distance Matter?*, 8 J. Fam. Planning Perspectives 260 (1976); Henshaw & Van Vort, *Abortion Services in the United States, 1987 and 1988*, 22 J. Fam. Planning Perspectives 102, 105 (1990) [hereinafter Henshaw & Van Vort]. A national survey of abortion providers in 1989 found that 83% of U.S. counties have no identified abortion services. In non-metropolitan areas, 93% of the counties are without a provider, and 83% of all non-metropolitan women reside in these counties. Henshaw & Van Vort, *supra*, at 106.

absence from work and/or home for a significant period of time.[67] For battered women who cannot inform their husbands, these burdens may be insurmountable.

To add a 24-hour mandatory waiting period will impose an excessive burden on many women, and for some women may prevent them from receiving an abortion.[68] A mandatory waiting period needlessly increases the health risks of an abortion.[69] It also greatly increases the risk of physical or psychological harm to women in abusive relationships.[70] As the Court ruled in *Akron*, "if a woman, after appropriate counseling, is prepared to give her written informed consent and proceed with the abortion, a State may not demand that she delay the effectuation of that decision." *Id.* at 450-51.[71]

[67] *Id.* at 105.

[68] *See id.* at 108.

[69] The risk of complications increases with each week of delay, especially after the first eight weeks. *See* R. Gold, Abortion and Women's Health: A Turning Point for America? 29 (Figure 15) (1990); C. Tietze & S. Henshaw, Induced Abortion: A World View 1986 104 (Table 16) (6th ed. 1986).

[70] The burden of this delay and required additional trip "falls most heavily on battered wives who often find it difficult to free themselves from their husband's surveillance." 947 F.2d at 706; *accord* 744 F. Supp. at 1379. *See supra* at 8 & n.15.

[71] In *Hodgson*, the Court upheld a requirement that a minor wait 48 hours after notifying a single parent of her intention to get an abortion before undergoing the procedure. The Court concluded that the waiting period was not an inappropriate length of time to allow the minor to consult with her parent. *See* 110 S. Ct. at 2944 (Stevens, J., joined by O'Connor, J.); *id.* at 2969 (Kennedy, J., joined by Rehnquist, C.J., White and Scalia, JJ.). Pennsylvania's 24-hour waiting period is very different, as members of the *Hodgson* Court acknowledged. It, like the provision invalidated in *Akron*, requires a mature woman, capable of consenting to abortion, to wait after giving her consent before undergoing the abortion. *See id.* at 2944 n.35 (Stevens, J., joined by O'Connor, J.). Significantly, the statute in *Hodgson* did not require any delay once the designated competent decision-maker consented to the abortion. *See id.*

The small proportion of women who are ambivalent about having an abortion and who require additional time to make a considered decision can be afforded that time; counselors are trained to identify and advise such women.[72] But the Commonwealth's assumption that *every* woman must have 24 hours to rethink her decision is unsupported by the evidence. Contrary to the court of appeals' suggestion, there is no evidence that women in general are making unduly hasty or inadequately considered decisions to have abortions.

CONCLUSION

For the foregoing reasons, *amicus* respectfully submits that the decision of the Third Circuit should be affirmed insofar as it struck down the spousal notification provision of the Penntsylvania Act, and reversed insofar as it upheld the "informed consent" and 24-hour waiting period provisions of the Act.

Respectfully submitted,

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[72] The District Court found this is the practice in Pennsylvania. 744 F. Supp. at 1351 (noting trial testimony that "[a]rrangements for special counseling sessions are made for women demonstrating any ambivalence about [their] decision"). *Accord id.* at 1338 ¶ 76; *id.* at 1340 ¶ 104; *id.* at 1342 ¶ 123.

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OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA,
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WOMEN'S HEALTH SERVICES, INC.,
WOMEN'S SUBURBAN CLINIC,
ALLENTOWN WOMEN'S CENTER, and
THOMAS ALLEN, M.D.,
on behalf of himself and all others similarly situated,
Petitioners,

v.

ROBERT P. CASEY, N. MARK RICHARDS, and
ERNEST D. PREATE, JR.,
personally and in their official capacities,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR REPRESENTATIVES DON EDWARDS, PATRICIA SCHROEDER, LES AUCOIN, VIC FAZIO, BILL GREEN AND CONSTANCE A. MORELLA; SENATORS ALAN CRANSTON, BOB PACKWOOD, HOWARD METZENBAUM, JOHN CHAFEE, TIMOTHY E. WIRTH, WILLIAM S. COHEN, BROCK ADAMS, AND BARBARA MIKULSKI; AND CERTAIN OTHER MEMBERS OF THE CONGRESS OF THE UNITED STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
INTEREST OF THE AMICI CURIAE	2
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. *STARE DECISIS* CONCERNS ARE IMPLICATED BY THIS CASE BECAUSE THE CONTINUED VALIDITY OF THE CONSTITUTIONAL PRINCIPLES ESTABLISHED IN *ROE v. WADE* ARE DIRECTLY AT ISSUE	4
II. *STARE DECISIS* CONCERNS STRONGLY COUNSEL ADHERENCE TO THE CONSTITUTIONAL PRINCIPLES ESTABLISHED IN *ROE v. WADE*	9
A. *Stare Decisis* Fosters Respect For The Rule of Law and Government Institutions, and Preserves the Settled Expectations and Practices of Individuals Who Have Relied on Court Precedent in Ordering Their Lives	9
B. *Stare Decisis* Concerns Apply with Special Force to *Roe v. Wade*	12
III. THERE IS NO JUSTIFICATION FOR DEPARTING FROM *STARE DECISIS* AND ABANDONING THE CONSTITUTIONAL PRINCIPLES OF *ROE v. WADE*	17
A. *Roe v. Wade* Has Not Been Undermined by Subsequent Developments	17
B. *Roe* is Neither "Unsound In Principle" Nor "Unworkable In Practice"	19
1. The Principles Established in *Roe* are Sound, and Cannot be Rejected Without Imperiling Other Aspects of Privacy and Liberty	19

TABLE OF CONTENTS—Continued

	Page
2. *Roe* Has Proven No Less Workable in Practice Than Other Constitutional Precedents	24
C. Overruling *Roe* Would Have Profoundly Adverse Consequences	25
CONCLUSION	30

TABLE OF AUTHORITIES

CASES	Page
Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983)	*passim*
Arizona v. Fulminante, 111 S. Ct. 1246 (1991)	15
Beal v. Doe, 432 U.S. 438 (1977)	5
Bellotti v. Baird, 443 U.S. 622 (1979)	5
Bowers v. Hardwick, 478 U.S. 186 (1986)	19
Brown v. Board of Education, 347 U.S. 483 (1954)	13, 29
Brown v. Board of Education, 349 U.S. 294 (1955)	11
Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1932)	14, 17
California v. Acevedo, 111 S. Ct. 1982 (1991)	15
Canada Packers, Ltd. v. Atchison, Topeka & Santa Fe Railway, 385 U.S. 182 (1966)	17, 25
Carey v. Population Services International, 431 U.S. 678 (1977)	19, 22
Colautti v. Franklin, 439 U.S. 379 (1979)	5
Connecticut v. Menillo, 423 U.S. 9 (1975)	5
Cooper v. Aaron, 358 U.S. 1 (1958)	11
Doe v. Bolton, 410 U.S. 179 (1973)	5, 26
Eisenstadt v. Baird, 405 U.S. 438 (1972)	18, 20, 22
Ferguson v. Skrupa, 372 U.S. 726 (1963)	18
Florida Department of Health v. Florida Nursing Home Ass'n, 450 U.S. 147 (1981)	10
Frontiero v. Richardson, 411 U.S. 677 (1973)	14
Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985)	16, 17, 24
Green v. United States, 355 U.S. 184 (1957)	11
Griswold v. Connecticut, 381 U.S. 479 (1965)	18, 20, 22
Guam Society of Obstetricians & Gynecologists v. Ada, 776 F. Supp. 1422 (D. Guam 1990)	28
H.L. v. Matheson, 450 U.S. 398 (1981)	5
Harmelin v. Michigan, 111 S. Ct. 2680 (1991)	18
Harris v. McRae, 448 U.S. 297 (1980)	5
Hilton v. South Carolina Public Railway Commission, 112 S. Ct. 560 (1991)	9
Hodgson v. Minnesota, 110 S. Ct. 2926 (1990)	5, 8
Hudgens v. NLRB, 424 U.S. 507 (1976)	17, 18

TABLE OF AUTHORITIES—Continued

	Page
King v. Palmer, 950 F.2d 771 (D.C. Cir. 1991)	8, 9
Jane L. v. Bangerter, No. 91-C-345-G (D. Utah complaint filed April 4, 1991)	28
Lochner v. New York, 198 U.S. 45 (1905)	16, 17
Loving v. Virginia, 388 U.S. 1 (1967)	18, 20, 21
Maher v. Roe, 432 U.S. 464 (1977)	5
Marks v. United States, 430 U.S. 188 (1977)	7
Meyer v. Nebraska, 262 U.S. 390 (1923)	19
Monell v. Department of Social Services, 436 U.S. 658 (1978)	12
Moore v. City of East Cleveland, 431 U.S. 494 (1977)	19
Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970)	10, 11
NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)	18
National League of Cities v. Usery, 426 U.S. 833 (1976)	16
New York v. Quarles, 467 U.S. 649 (1984)	12
Ohio v. Akron Center for Reproductive Health, 110 S. Ct. 2972 (1990)	5
Patterson v. McLean Credit Union, 491 U.S. 164 (1989)	10
Payne v. Tennessee, 111 S. Ct. 2597 (1991)	12, 15
Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989)	12
Pierce v. Society of Sisters, 268 U.S. 510 (1925)	18, 20
Planned Parenthood v. Casey, 947 F.2d 682 (3d Cir. 1991), *cert. granted in part*, 60 U.S.L.W. 3498 (U.S. January 21, 1992)	7, 8
Planned Parenthood v. Danforth, 428 U.S. 52 (1976)	5
Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983)	5
Poe v. Ullman, 367 U.S. 497 (1961)	25
Poelker v. Doe, 432 U.S. 519 (1977)	5
Rhode Island v. Innis, 446 U.S. 291 (1980)	11
Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989)	7

TABLE OF AUTHORITIES—Continued

	Page
Roe v. Wade, 410 U.S. 113 (1973)	2
Runyon v. McCrary, 427 U.S. 160 (1976)	11
Rust v. Sullivan, 111 S. Ct. 1759 (1991)	5
Schloendorff v. Society of New York Hospital, 105 N.E. 92 (N.Y. 1914)	18
Screws v. United States, 325 U.S. 91 (1945)	18
Simopolous v. Virginia, 462 U.S. 506 (1983)	5
Skinner v. Oklahoma, 316 U.S. 535 (1942)	18, 20
Sojourner, T. v. Roemer, 772 F. Supp. 930 (E.D. La. 1991)	28
Swift & Co. v. Wickham, 382 U.S. 111 (1965)	25
Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986)	*passim*
United States v. Nordic Village, 60 U.S.L.W. 4159 (U.S. February 25, 1992)	8
Vasquez v. Hillery, 474 U.S. 254 (1986)	10
Webster v. Reproductive Health Services, 492 U.S. 490 (1989)	*passim*
Welch v. Texas Department of Highways & Public Transportation, 483 U.S. 468 (1987)	10, 12
Whalen v. Roe, 429 U.S. 589 (1977)	19
Williams v. Florida, 399 U.S. 78 (1970)	11
Williams v. Zbaraz, 448 U.S. 358 (1980)	5
Winston v. Lee, 470 U.S. 753 (1985)	24
Zablocki v. Redhail, 434 U.S. 374 (1978)	19

BOOKS, ARTICLES, AND MISCELLANEOUS

Bruce Ackerman, *We The People: Foundations* (1991)	18
Berger, *et al., Maternal Mortality Associated With Legal Abortion in New York State: July 1, 1970-June 30, 1972*, 43 J. Obstet. & Gynec. 315 (1974)	28
Cates, *Legal Abortion: The Public Health Record* 215 Science 1586 (1982)	28
Cates & Rochat, *Illegal Abortions in the United States, 1972-74*, 8 Fam. Plan. Persp. 86 (1976)	28
Frank Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 Cornell L. Rev. 422 (1988)	12, 14

TABLE OF AUTHORITIES—Continued

	Page
Henshaw *et al., Abortion Services in the United Siates 1984 and 1985*, 19 Fam. Plan. Persp. 63 (1987)	26
Jerold Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 Sup. Ct. Rev. 211	11
John Kaplan, *Abortion as a Vice Crime: A "What If" Story*, 51 Law & Contemp. Probs. No. 1, 151 (1988)	27
LeBolt *et al., Mortality from Abortion and Childbirth: Are the Populations Comparable?*, 248 JAMA 188 (1982)	23-24
Henry Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723 (1988)	10, 25
Placet & Taffel, *Recent Patterns in Caesarean Delivery in the United States*, 15 Obstet. Gynec. Clin. N.A. 607 (1988)	24
Jed Rubenfeld, *The Right of Privacy*, 102 Harv. L. Rev. 737 (1989)	16
Frederick Schauer, *Precedent*, 39 Stan. L. Rev. 571 (1987)	11
Note, *Constitutional Stare Decisis*, 103 Harv. L. Rev. 1344 (1990)	17
Correction Officials Fined Over Abortions, New York Times, October 4, 1989, at B2, col. 5	23
Irish Court Says Girl Can Leave to Obtain Abortion in Britain, New York Times, February 27, 1992, at A1, col. 1	27
7 Contend Correction Dept. Urged Abortions for Guards, New York Times, May 24, 1989, at B3, col. 1	23
Transcript of Oral Arguments Before Court on Abortion Case, New York Times, April 27, 1989, at B12, col. 5	23
Brief of United States as *Amicus Curiae, Webster v. Reproductive Health Services*, 492 U.S. 490 (1989)	22

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On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR REPRESENTATIVES DON EDWARDS, PATRICIA SCHROEDER, LES AUCOIN, VIC FAZIO, BILL GREEN AND CONSTANCE A. MORELLA; SENATORS ALAN CRANSTON, BOB PACKWOOD, HOWARD METZENBAUM, JOHN CHAFEE, TIMOTHY E. WIRTH, WILLIAM S. COHEN, BROCK ADAMS, AND BARBARA MIKULSKI; AND CERTAIN OTHER MEMBERS OF THE CONGRESS OF THE UNITED STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*[1]

Amici are a bipartisan group of members of the United States Congress who share a concern for the stability and integrity of our system of constitutional government. We believe that if the system is to work, certain fundamental rights of individuals must be insulated from the shifting winds of politics. We also believe that the doctrine of *stare decisis* plays a leading role in fostering confidence in government by reassuring citizens that their fundamental rights, once secure, will not lightly be discarded. *Stare decisis* concerns are strongly implicated by this case, as it calls directly into question the continued validity of the constitutional principles governing a woman's decision whether to have an abortion—principles that were established in *Roe v. Wade*, applied the same day in *Doe v. Bolton*, and have been relied upon by this Court in more than a dozen cases since. We believe that the abandonment of those principles would weaken the foundations of other fundamental rights, and subject intimate personal decisions of millions of women to government interference under a patchwork of conflicting state and local laws. Our concern with the constitutional protection of individual rights and with the preservation of the rule of law lead us to urge this Court to reaffirm the principles of *Roe v. Wade*.[2]

SUMMARY OF ARGUMENT

In *Roe v. Wade*,[3] this Court established two basic constitutional principles: first, that a woman's right to decide whether to terminate a pregnancy is a fundamental liberty; and second, that laws that infringe on that liberty must be subjected to the most exacting judicial scrutiny. Applying those principles in previous cases, this Court

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[1] A list of the *amici* appears in the appendix to this brief.

[2] The parties have consented to the filing of this brief. Letters of consent are on file with the Clerk of the Court.

[3] 410 U.S. 113 (1973).

has struck down laws that essentially mirror the Pennsylvania statute at issue here. Accordingly, the doctrine of *stare decisis*—which counsels adherence to precedent—should compel the Court to apply *Roe*'s principles again, and strike down this statute as well.

The Court of Appeals erroneously concluded that *stare decisis* concerns are not implicated here because, in its view, this Court abandoned the principles of *Roe* in *Webster v. Reproductive Health Services*.[4] But neither in *Webster* nor in any other case has a majority of this Court joined an opinion rejecting the principles of *Roe*. Those principles remain the law of the land today, and thus are still entitled to respect under *stare decisis*.

Stare decisis concerns apply with particular force in this case. A ruling from this Court rejecting the principles of *Roe* after a marked transformation in the membership of the Court would shake confidence in government institutions and undermine faith in the rule of law. More importantly, such a ruling would profoundly disturb the settled expectations of millions of women who have come to regard *Roe* as firmly and properly embedded in our law. To discard the principles of *Roe* would be to embark on a novel adventure in constitutional adjudication: never before has this Court overruled a precedent around which so many citizens have built deep-seated reliance interests that affect the most personal, intimate, and life-shaping choices that one can ever make.

There are no justifications for ignoring the dictates of *stare decisis* in this case. First, *Roe* did not emanate from a constitutional void: its principles are entirely consistent with what preceded and what has followed. Second, *Roe* has not proven unsound in principle or unworkable in practice. There is no legitimate basis by which *Roe*'s principles can be distinguished from the steady line of precedents recognizing that individuals have a fundamental constitutional right to make sensitive

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[4] 492 U.S. 490 (1989).

decisions for themselves regarding procreation, childrearing, marriage, and family formation. Indeed, to single out *Roe* and overrule it would threaten the stability of those other aspects of liberty and privacy. Finally, the withdrawal of the uniform constitutional standard of *Roe* would have harsh consequences: a myriad of conflicting state and local laws will continuously subject the health and lives of women throughout the country to the vagaries of the political process.

For two decades, *Roe v. Wade* has been part of the fabric of our national law, permitting all women to live secure in the knowledge that difficult and personal reproductive choices will be theirs to make. And so it should remain: the freedom to make one's own decisions about whether to become pregnant and whether to carry a pregnancy to term should continue to be a national right secured to every American woman.

ARGUMENT

I. *STARE DECISIS* CONCERNS ARE IMPLICATED BY THIS CASE BECAUSE THE CONTINUED VALIDITY OF THE CONSTITUTIONAL PRINCIPLES ESTABLISHED IN *ROE v. WADE* ARE DIRECTLY AT ISSUE

At issue in this case is the continued validity of *Roe v. Wade* as a constitutional precedent. At its narrowest level, *Roe* stands for the proposition that it is unconstitutional for a state to enforce a statute criminalizing virtually all abortions. If this were all that *Roe* stood for, it would not necessarily be called into question by this case.[5]

The more profound importance of *Roe*, however, lies in the basic constitutional principles it established: first, that the freedom of a woman to decide for herself whether

[5] *Cf. Webster v. Reproductive Health Servs.*, 492 U.S. 490, 521 (1989) (plurality opinion) (Missouri law that did not impose broad criminalization of abortion afforded "no occasion to revisit the holding of *Roe*" striking down a Texas criminal statute).

or not to terminate a pregnancy is a fundamentally important constitutional liberty; and second, that state laws that infringe on that liberty prior to fetal viability must be subjected to "strict scrutiny"—the most demanding standard of constitutional review—and are permissible only if they genuinely promote maternal health.

On the same day that this Court decided *Roe*, it applied those same constitutional principles in the companion case of *Doe v. Bolton*,[6] and invalidated pre-viability abortion restrictions in Georgia that were based on a model penal code used nationwide. Those restrictions, which included a provision that a woman's decision to have an abortion was subject to review by a "hospital committee," were not as severe as the criminal prohibitions of the Texas statute in *Roe*. But this Court held them unlawful under the principles announced in *Roe*.

In the two decades since *Roe* and *Doe*, this Court has addressed the constitutionality of a wide variety of abortion restrictions in more than a dozen cases.[7] In some of these cases, the restrictions were struck down; in others, they were upheld. But in every case, a majority of this Court stated that it was applying the principles of *Roe* in arriving at the ultimate result.

[6] 410 U.S. 179 (1973).

[7] *Connecticut v. Menillo*, 423 U.S. 9 (1975); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Beal v. Doe*, 432 U.S. 438 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Harris v. McRae*, 448 U.S. 297 (1980); *Williams v. Zbaraz*, 448 U.S. 358 (1980); *H.L. v. Matheson*, 450 U.S. 398 (1981); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983); *Simopolous v. Virginia*, 462 U.S. 506 (1983); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989); *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990); *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990); *Rust v. Sullivan*, 111 S. Ct. 1759 (1991).

The Pennsylvania statute challenged in this case is remarkably similar to another Pennsylvania statute that the Court has already held unconstitutional under the principles of *Roe* in *Thornburgh v. American College of Obstetricians and Gynecologists.*[8] Indeed, the law at issue here is a virtual copy of that earlier Pennsylvania law.[9] Because there is no way to distinguish one from the other, the new statute can stand only if *Roe* and its progeny fall. Thus, the continued validity of the core constitutional principles of *Roe* is very much in question here, and the doctrine of *stare decisis* necessarily bears on the resolution of this case.[10]

The Court of Appeals nonetheless claimed that it was not constrained by *stare decisis* because, in its view, *Roe* had been implicitly overruled in *Webster v. Reproductive Health Services,*[11] even though no single opinion in that

[8] 476 U.S. 747 (1986). *Thornburgh* is not the only case in which this Court has invalidated restrictions that parallel those of the current Pennsylvania law. Even before *Thornburgh*, this Court had struck down an Ohio law that, like the Pennsylvania laws at issue in *Thornburgh* and in this case, forced a woman to be subjected to a battery of government-scripted information about abortion before she was allowed to exercise her constitutional right to terminate her pregnancy. *See Akron*, 462 U.S. at 442-49.

[9] Of the parts of the Pennsylvania law that have been challenged in this case, the only one not at issue when this Court struck down the earlier Pennsylvania law was the "husband notification" provision.

[10] To uphold the current Pennsylvania law without rejecting the principles of *Roe* itself, this Court would have to assert that *Thornburgh* and *Akron* were wrongly decided, and overrule them as misapplications of *Roe*. But to do so would fail to give the respect that is due *Roe*'s progeny under the doctrine of *stare decisis*. Moreover, it would, in effect, entail a rejection of *Roe*. As a practical matter, to overrule precedents that have applied *Roe* in striking down abortion restrictions that mirror those at issue in this case would be to read *Roe* at its narrowest: a case that involved only the constitutionality of near-blanket criminal laws, rather than a case that established a set of core constitutional principles.

[11] 492 U.S. 490 (1989).

case commanded five votes, and even though a majority of the Court in that case did not assert that *Roe* had been or should be overruled. In reaching its conclusion, the Court of Appeals purported to apply to *Webster* the rules of *Marks v. United States* [12] for identifying the "controlling opinion" of this Court when no one opinion "enjoys the assent of five Justices." [13] According to the Court of Appeals, the teachings of *Marks* pointed to Justice O'Connor's concurrence as the controlling opinion in *Webster*. Moreover, the Court of Appeals concluded, this concurrence had the effect of reversing *Roe*.[14]

The Court of Appeals' conclusion reflects a misreading of *Webster* and a misapplication of *Marks*.[15] Roe is still standing, even after the recent assault on its foundations. Only four Justices in *Webster* advocated abandoning the principles of *Roe*. The fifth vote to sustain the Missouri law at issue in *Webster* was supplied by Justice O'Connor, who found it unnecessary to reexamine the validity of *Roe*'s principles because she perceived "no conflict" between them and the Missouri law.[16] For Justice O'Connor, *Webster* could be decided simply by applying *Roe*. To be sure, in dissenting opinions in cases prior to *Webster*, Justice O'Connor had articulated the "undue burden" test for assessing pre-viability restrictions on abortion. Under that test, strict scrutiny is triggered only after a threshold showing of a burden on the exercise of a

[12] 430 U.S. 188 (1977).

[13] *Id.* at 193.

[14] *See Planned Parenthood v. Casey*, 947 F.2d 682, 698 (3d Cir. 1991), *cert. granted in part*, 60 U.S.L.W. 3498 (U.S. Jan. 21, 1992).

[15] It also contradicts the cardinal tenet that it is not for a lower court to declare that a Supreme Court decision has been overruled until this Court has expressly said so. *See, e.g., Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

[16] *See Webster*, 492 U.S. at 525, 530 (O'Connor, J., concurring).

woman's right to choose to have an abortion.[17] In *Webster*, however, Justice O'Connor referred only in passing to the "undue burden" inquiry, and stated that it was "more to the point" that the Missouri law satisfied the strict scrutiny standard of *Roe*, regardless of whether the law satisfied the "undue burden" standard as well.[18]

Even if the Court of Appeals was right to read Justice O'Connor's *Webster* concurrence as having abandoned *Roe*, its application of *Marks* and elevation of the concurrence to the "law of the land" [19] was wrong. The *Marks* rule for locating the controlling opinion of this Court when the majority is split can work "only when one opinion is a logical subset of other, broader opinions. In essence, the narrowest opinion must represent a common denominator of the Court's reasoning . . . ." [20] That does not describe the relationship between Justice O'Connor's opinion in *Webster*, even as misread by the Court of Appeals, and the opinions of the other four Justices who voted to uphold the Missouri law: based on the views they expressed in *Webster*, the other Justices would not agree that a test at least as rigorous as the "undue burden" test should be applied to laws that limit a woman's decision whether to have an abortion. In fact, in *Webster* they signaled their belief that all abortion restrictions should be assessed under the lenient "rational basis" test. Under that test, any law will generally pass muster, regardless of the degree of burden imposed on constitutional rights. Simply put, even if the "undue burden" approach had been employed by Justice O'Connor in *Webster*, it would not represent a position upon which the Justices who formed the *Webster* majority agree. Thus, *Marks* is inapposite here.[21]

In the final analysis, *Webster* is analogous to cases in which a divided 4-4 Court affirms a lower court judgment and maintains the status quo. Therefore, the constitutional principles of *Roe* remain the law of the land. And as such, those principles will continue to be entitled to respect under the doctrine of *stare decisis* unless and until a majority of that Court expressly rejects them.

II. *STARE DECISIS* CONCERNS STRONGLY COUNSEL ADHERENCE TO THE CONSTITUTIONAL PRINCIPLES ESTABLISHED IN *ROE v. WADE*

A. *Stare Decisis* Fosters Respect For The Rule of Law and Government Institutions, and Preserves the Settled Expectations and Practices of Individuals Who Have Relied on Court Precedent in Ordering Their Lives

As this Court has recognized "time and time again," [22] the doctrine of *stare decisis* has earned a special niche in

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[17] *See Thornburgh*, 467 U.S. at 828 (O'Connor, J., dissenting); *Akron*, 462 U.S. at 453 (O'Connor, J., dissenting).

[18] Nor did Justice O'Connor's opinion in *Hodgson*—or any of the other Justices' opinions in *Hodgson*—reshape the constitutional terrain charted by *Roe*. In *Hodgson*, Justice O'Connor said only that she found one part of the law at issue to be unconstitutional because it amounted to an "undue burden" on a woman's right to choose abortion. *See Hodgson*, 110 S. Ct. at 2949-50 (O'Connor, J., concurring). The Court of Appeals construed this to mean that Justice O'Connor had definitively rejected *Roe*. *See* 947 F.2d at 696-97. But to conclude from a brief reference in a concurring opinion that Justice O'Connor intended to make new law is at odds with her firm statement in *Webster* that when it is time to reexamine *Roe*, it must be done "carefully." *Webster*, 492 U.S. at 526 (O'Connor, J., concurring).

[19] 947 F.2d at 698.

[20] *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc). This Court held just last week that a prior decision was not controlling in a subsequent case because in the earlier decision, the plurality and dissent were evenly divided with respect to a particular issue, and the concurring Justice—who cast the fifth vote in support of the judgment—had not addressed that issue at all. *See United States v. Nordic Village*, 60 U.S.L.W. 4159 (U.S. February 25, 1992).

[21] Even if it could be said that Justice O'Connor's *Webster* concurrence is a subset of the *dissenting* opinions in *Webster*, the *Marks* rule would still be of no utility in this case, because this Court has never used *Marks* to manufacture a controlling opinion out of dissents. *See King v. Palmer*, 950 F.2d at 783.

[22] *Hilton v. South Carolina Pub. Ry. Comm'n*, 112 S. Ct. 560, 563 (1991).

the American system of government. By mandating respect for established judicial precedents, *stare decisis* helps to ensure that our society is governed by the steady rule of law, rather than by "arbitrary discretion." [23] In that role, *stare decisis* serves two vital functions.

First, *stare decisis* helps to promote the legitimacy of governmental institutions. As this Court has repeatedly acknowledged, the evenhanded and consistent application of the rule of law "contributes to the integrity of our constitutional system of government, both in appearance and in fact." [24] Public confidence in the system is shaken when the law is seen as fluctuating on the basis of vagary and whim. In Justice Harlan's words, *stare decisis* is critical to the maintenance of "public faith in the judiciary as a source of impersonal and reasoned judgments." [25]

This trust-building function of *stare decisis* looms even larger in cases that invite the reconsideration of a long-standing precedent after a marked transformation in the composition of the Court. As Justice Frankfurter observed, the respect for precedent that is mandated by *stare decisis* demonstrates "the wisdom of this Court as

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[23] *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (quoting *The Federalist* No. 78, at 490 (H. Lodge ed. 1888) (A. Hamilton)). *See Welch v. Texas Dep't of Highways & Public Transp.*, 483 U.S. 468, 478-79 (1987) (plurality opinion) ("[t]he rule of law depends in large part on adherence to the doctrine of *stare decisis*.").

[24] *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986).

[25] *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970). *See Florida Dep't of Health v. Florida Nursing Home Ass'n*, 450 U.S. 147, 154 (1981) (Stevens, J., concurring) ("Citizens must have confidence that the rules on which they rely in ordering their affairs . . . are rules of law and not merely the opinions of a small group of men who temporarily occupy high office."); *see also* Henry Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723, 752 (1988) ("A general judicial adherence to constitutional precedent supports a consensus about the rule of law, specifically the belief that all organs of government, including the Court are bound by the law.").

an institution transcending the moment." [26] Accordingly, departure from precedent after the membership of the Court has been dramatically altered can only "raise doubts both as to the Court's impersonality and as to the principled foundations of its decisions." [27] The institutional authority and legitimacy of the Court may actually be enhanced in the long run if, at a critical juncture, it stands behind such a precedent, and is ultimately vindicated when the once controversial decision becomes widely regarded as firmly and properly embedded in our law.[28]

The second function of *stare decisis* is to foster reliance on judicial decisions. The stable and predictable application of precedent helps guide the conduct of everyday life throughout the country: citizens can plan their affairs "with assurance against untoward surprise," [29] and other

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[26] *Green v. United States*, 355 U.S. 184, 215 (1957) (Frankfurter, J., dissenting).

[27] Jerold Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 Sup. Ct. Rev. 211, 218.

[28] *See Brown v. Board of Educ.*, 349 U.S. 294, 300 (1955) ("[T]he vitality of . . . constitutional principles cannot be allowed to yield simply because of disagreement with them."); *Cooper v. Aaron*, 358 U.S. 1, 19 (1958) (stressing importance of adhering to *Brown* in light of appointment of "three new Justices" all of whom were "at one with the Justices still on the Court who participated in [*Brown*]"); *see also Rhode Island v. Innis*, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring) (noting that after initial controversy, "[t]he meaning" of *Miranda v. Arizona*, 384 U.S. 436 (1966), [had] "become reasonably clear and law enforcement practices [had] adjusted to its strictures"); *Runyon v. McCrary*, 427 U.S. 160, 190 (1976) (Stevens, J., concurring) (acknowledging that principles articulated in the controversial civil rights decision, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), had become "part of the fabric of our law" during the intervening years, and thus were entitled to respect under *stare decisis*).

[29] *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970). *See Williams v. Florida*, 399 U.S. 78, 127 (1970) (Harlan, J., concurring in part and dissenting in part) (*stare decisis* promotes the "predictability required for the ordering of human affairs over the course of time"); Frederick Schauer, *Precedent*, 39 Stan. L. Rev. 571, 597 (1987) (*stare decisis* "helps us plan our

branches of government—at all levels—can chart the nation's agenda "against the background of known rules." [30] *Stare decisis* thus reflects a common sense notion that the judiciary should not be in the habit of disturbing "the settled practices and expectations of a democratic society." [31] Prudence and caution are the watchwords that *stare decisis* impresses upon this Court when the reversal of a precedent will uproot the moorings around which "individuals may have arranged their affairs." [32]

B. *Stare Decisis* Concerns Apply with Special Force to *Roe v. Wade*

However one might have initially approached the constitutionality of government restrictions on abortion, the Court no longer "write[s] on a clean slate." [33] The question in this case, therefore, is not reducible to whether *Roe* and the decisions applying it were wrongly decided. Instead, when looking at *Roe* and its progeny now, this Court must do so against the backdrop of *stare decisis*—which this Court has already found to provide "especially compelling reasons" for continued adherence to *Roe*.[34]

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lives, have some degree of repose, and avoid the paralysis of foreseeing only the unknown").

[30] Frank Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 Cornell L. Rev. 422, 430 (1988). *See Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 35 (1989) (Scalia, J., concurring in part and dissenting in part) (Supreme Court precedent can have a "pervasive effect on statutory law," and governmental bodies "legislate [] under [the] assurance" that develops around precedent).

[31] *Payne v. Tennessee*, 111 S. Ct. 2597, 2614 (1991) (Scalia, J., concurring).

[32] *Monell v. Department of Social Servs.*, 436 U.S. 658, 700 (1978) (quoting *Monroe v. Pape*, 365 U.S. 167, 221-22 (1961) (Frankfurter, J., dissenting)).

[33] *Welch*, 483 U.S. at 493; *see also New York v. Quarles*, 467 U.S. 649, 660 (1984) (O'Connor, J., concurring in part and dissenting in part) (Because *Miranda* is "now the law," the Court no longer is "writing from a clean slate").

[34] *Akron*, 462 U.S. at 420 n.1.

As a matter of institutional legitimacy, this Court should be reluctant to overturn *Roe*. A concern for the Court's integrity resonates in Justice's Powell's majority opinion in *Akron*—a case in which the Court was asked, but refused, to abandon *Roe*. Stressing the "special care" with which the Court originally decided *Roe*, Justice Powell noted that the case "was first argued during the 1971 Term, and reargued—with extensive briefing—the following Term." Justice Powell also thought it salient that "the decision was joined by THE CHIEF JUSTICE and six other Justices." [35] Finally Justice Powell emphasized that the Court had continuously applied *Roe* for over a decade, thus creating an imposing legacy of case law [36]—a legacy that obviously has only grown in the decade since *Akron*.

At the same time, the years since *Akron* have been a period of flux on the Court. The strong *Roe* majority to which Justice Powell referred has contracted. In the past six years alone, four of the Justices who were part of the *Roe* majority have left the Court; only one Justice from that majority remains on the Court today. To renounce *Roe* in the wake of this change in the composition of the Court would be to undermine faith in this Court as an impartial arbiter of constitutional rights.

The second function of *stare decisis*—its role in safeguarding settled expectations and practices—weighs even more powerfully in favor of continued fidelity to *Roe*. Few opinions of this Court have had such a profound impact on the lives of so many.[37] Millions of women have come to count on *Roe*. Because of *Roe*, they are secure in the knowledge that if they should ever be confronted with one of the most difficult and intimate choices that a woman can ever make—whether or not to have an abortion—the choice is theirs to make, free from the shifting

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[35] *Id.*

[36] *See id.* (citing decisions applying *Roe*).

[37] In that regard, *Roe* may be matched only by *Brown v. Board of Education*, 347 U.S. 483 (1954).

proclivities of government. Because of *Roe*, they are secure in the knowledge that if they do choose to have an abortion, the procedure will generally be safe and legal. And because of *Roe*, they have been better able to shape their lives and futures, and to participate equally in our society.[38]

It is said that *stare decisis* is not "an inexorable command" in constitutional cases, and that the doctrine has more potency in cases involving statutory construction.[39] Whatever force that axiom carries,[40] this Court has already considered its application to *Roe* and concluded that *Roe* is fully entitled to *stare decisis* respect. Justice Stevens put it succinctly in *Thornburgh*:

> [t]he fact that the doctrine of *stare decisis* is not an absolute bar to the reexamination of past interpretations of the Constitution [does not] mean that the values underlying that doctrine may be summarily put to one side. There is a strong public interest in stability, and in the orderly conduct of our affairs, that is served by a consistent course of constitutional adjudication.[41]

[38] With the freedoms that *Roe* granted has come a moral obligation to take responsibility for the choices made. Arguments for restrictions on abortion frequently reflect, implicitly or explicitly, the view that women are not fully capable of making such ethical decisions. That stereotyped assumption, which is a product of a "long and unfortunate history of sex discrimination," *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion), no longer has a place in this Court's jurisprudence or in any of our nation's laws.

[39] *See Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting).

[40] At least one prominent scholar and jurist has questioned its validity:

> I doubt that judges should be any more ready to unravel long-standing constitutional doctrines than they should be to revise long-standing statutory interpretations. Indeed, things should work the other way. Precisely because constitutional rules establish governmental structures, because they are the framework for all political interactions, it ought to be *harder* to revise them than to change statutory rules.

Easterbrook, *supra*, at 431 (emphasis in original).

Justice Stevens' admonition reflects an understanding that where individuals have built firm and legitimate reliance interests around a constitutional precedent, *stare decisis* deserves to be applied with at least as much vigor as in the non-constitutional setting. Accordingly, for purposes of evaluating the relative strength of *stare decisis* concerns, a distinction can be drawn between types of constitutional precedents.

This Court stated only last Term that constitutional precedents involving "procedural and evidentiary rules" may more readily be abandoned than other constitutional precedents, because it is harder to identify any widespread reliance interests that have developed around them.[42] Thus, the Court felt less inhibited when overruling its opinions that had prohibited the introduction of "victim impact" statements in murder trials. The Court determined that reversal of those rulings did not implicate any serious reliance interest concerns: those affected by the Court's decision could not legitimately be heard to complain that they had ordered their affairs—or to put it more bluntly, had chosen a particular course of criminal conduct—on the expectation that evidence concerning the victims of their crimes would not be introduced at their trials.[43] Similarly, the recent overruling of this Court's "coerced confession" [44] and "car search" [45] precedents did not, in the Court's view, directly affect any settled expectations and practices in the country at large. It would be difficult indeed to show that citizens made

[41] *Thornburgh*, 476 U.S. at 780-81 (Stevens, J., concurring).

[42] *Payne*, 111 S. Ct. at 2610.

[43] *Id.* (overruling *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989)).

[44] *Arizona v. Fulminante*, 111 S. Ct. 1246 (1991) (overruling in part *Chapman v. California*, 386 U.S. 18 (1967)).

[45] *California v. Acevedo*, 111 S. Ct. 1982 (1991) (overruling *United States v. Ross*, 456 U.S. 798 (1982)).

basic, day-to-day and life-shaping decisions based on those precedents.[46] The same could not be said, however, if this Court were to reverse *Roe*, and no longer protect as fundamental the right upon which women have relied in making "decisions that have a profound effect on their destin[ies]." [47]

The reliance interests that evolve from rulings of this Court recognizing fundamental, personal rights may explain an important historical phenomenon in the area of *stare decisis*: this Court has *never* overruled a precedent that recognized a constitutional liberty of the type that was established in *Roe*.[48] It is one thing for this Court to find a constitutional right where one did not previously exist, or to refuse to recognize a right in the first instance, or to decline to expand the contours of a right. But it is another thing for the Court to take away a right wholesale, defeating the expectations and practices of millions of citizens who have come to rely on the prece-

[46] Differences in the degree and nature of reliance interests also distinguish *Roe* from the series of opinions in which this Court overruled one Tenth Amendment precedent and subsequently restored it. In those cases, the Court was not directly affecting the everyday conduct of individuals, but merely adjusting the relationship between governmental units in specific types of regulatory matters. *See National League of Cities v. Usery*, 426 U.S. 833 (1976) (overruling *Maryland v. Wirtz*, 392 U.S. 183 (1968)); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (overruling *National League of Cities*).

[47] *Thornburgh*, 476 U.S. at 781 (Stevens, J., concurring).

[48] This Court's eventual repudiation of *Lochner v. New York*, 198 U.S. 45 (1905), is not to the contrary. *Lochner* involved the rights of individuals to run their businesses as they saw fit. True, overruling *Lochner* upset certain expectations. But taking away the right to make one's employees labor for more than 60 hours a week is just not the same as taking away the right to make basic life choices about intimate personal relationships, which the overruling of *Roe* would entail. *See* Jed Rubenfeld, *The Right of Privacy*, 102 Harv. L. Rev. 737, 806 (1989) (minimum wage and hour laws that were upheld after *Lochner* was overruled did not "positively take over and redirect [the] lives" of those whose rights were circumscribed).

dent establishing the right, and of other branches of government—such as Congress—that have acted or refrained from acting in reliance on that precedent as well. The Court would, in sum, be embarking on a novel adventure in constitutional adjudication if it overruled *Roe*.[49]

III. THERE IS NO JUSTIFICATION FOR DEPARTING FROM *STARE DECISIS* AND ABANDONING THE CONSTITUTIONAL PRINCIPLES OF *ROE v. WADE*

Notwithstanding the institutional legitimacy and reliance interest considerations that make *stare decisis* concerns so compelling in this case, this Court could discard the principles of *Roe* if it could be shown that they (a) have been undermined by subsequent developments;[50] (b) have proven "unsound in principle and unworkable in practice;" [51] or (c) have been attended by "particularly unfortunate consequences," and their abandonment would have beneficial results.[52] No such showing can be made.

A. *Roe v. Wade* Has Not Been Undermined by Subsequent Developments

Roe has not been undermined by developments in the law.[53] That justification for overruling a precedent exists

[49] Moreover, the evisceration of one fundamental personal liberty would degrade the entire concept of "fundamental rights," and cast doubt on the stability of all such rights. *See* Note, *Constitutional Stare Decisis*, 103 Harv. L. Rev. 1344, 1361 (1990).

[50] *See Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting); *Hudgens v. NLRB*, 424 U.S. 507 (1976).

[51] *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985).

[52] *Canada Packers, Ltd. v. Atchison, T. & S.F. Ry.*, 385 U.S. 182, 184 (1966) (per curiam).

[53] Nor have there been any changes in social conditions that would undermine *Roe*. The prime example of changed social conditions justifying the reversal of precedent is the repudiation of *Lochner v. New York*, 198 U.S. 45 (1905). No one can dispute that *Lochner*—and the whole era of jurisprudence which it represented—became outmoded over time. When the nation adjusted to

when the precedent has become a "sport in the law . . . inconsistent with what preceded and what followed." [54] Last Term's decision in *Harmelin v. Michigan* [55] reflected the most recent variation on this theme. There, the Court said that it was not bound to follow a precedent that "was scarcely the expression of clear and well accepted constitutional law," and was in "apparent tension with other decisions." [56]

Roe, however, followed from a long line of decisions of this Court recognizing fundamental rights in procreation,[57] childrearing,[58] marriage,[59] and contraceptive choice.[60] *Roe* also was rooted in a venerable common law tradition that "every human being of adult years and sound mind has a right to determine what shall be done with his own body." [61] Moreover, *Roe* has stood the test of time: this Court "repeatedly and consistently has accepted and applied" *Roe*'s principles in its subsequent abortion cases.[62] For years, this Court has been asked

a changed world, so too did this Court. *See* Bruce Ackerman, *We the People: Foundations* 63-66 (1991); *see also NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (modifying construction of Commerce Clause in light of changed economic conditions).

[54] *Screws v. United States*, 325 U.S. 91, 112 (1945) (plurality opinion). *See also Hudgens v. NLRB*, 424 U.S. 507 (1976); *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

[55] 111 S. Ct. 2680 (1991).

[56] *Id.* at 2686 (opinion of Scalia, J.); *see id.* at 2703 (Kennedy, J., concurring) (Eighth Amendment precedent that was overruled in *Harmelin* had "appeared to apply a different analysis" than the analysis employed in all other Eighth Amendment cases).

[57] *See Skinner v. Oklahoma*, 316 U.S. 535 (1942).

[58] *See Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

[59] *See Loving v. Virginia*, 388 U.S. 1 (1967).

[60] *See Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

[61] *Schloendorff v. Society of New York Hosp.*, 105 N.E. 92, (N.Y. 1914) (Cardozo, J.).

[62] *Akron*, 462 U.S. at 420 n.1.

to jettison those principles, but has yet to do so. Finally, *Roe* has influenced constitutional developments beyond the abortion context. The principles of *Roe* inhere in this Court's later rulings supporting the fundamental rights of individuals to make other sensitive decisions regarding contraception,[63] and personal living arrangements and family life.[64] *Roe* has also provided support for the right of individuals to withhold certain personal information from the government.[65] In short, it cannot be claimed that *Roe* is "inconsistent with what preceded and what followed."

B. *Roe* is Neither "Unsound In Principle" Nor "Unworkable In Practice"

1. *The Principles Established in* Roe *are Sound, and Cannot be Rejected Without Imperiling Other Aspects of Privacy and Liberty*

The soundness of *Roe* as a matter of principle can be demonstrated in two ways. First, as already emphasized, *Roe* flowed from a steady stream of precedents recognizing that the Due Process Clause of the Fourteenth Amendment protects certain fundamentally important liberties.[66] The freedom that enables individuals to make their own choices about matters of reproduction and family formation is soundly grounded in this constitutional protection of liberty. Dating back to *Meyer v. Nebraska* [67]

[63] *Carey v. Population Servs. Int'l.*, 431 U.S. 678 (1977).

[64] *See Zablocki v. Redhail*, 434 U.S. 374 (1978); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

[65] *See Whalen v. Roe*, 429 U.S. 589 (1977).

[66] The idea that the Due Process Clause should be limited to guaranteeing procedural fairness has long since been rejected: "*the cases are legion* in which [the Due Process Clauses of the Fifth and Fourteenth Amendments] have been interpreted to have substantive content, subsuming rights that to a great extent are immune from federal or state regulation or proscription." *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (emphasis added).

[67] 262 U.S. 390 (1923).

in 1923 and *Pierce v. Society of Sisters*[68] in 1925, this Court has recognized that a couple's decision about how to raise and educate their children is a fundamental liberty. From the time of *Skinner v. Oklahoma*[69] in 1942, this Court has recognized that a state needs an extraordinary justification for its acts to control a person's reproductive functions. In *Loving v. Virgina*[70] in 1967, this Court recognized that these principles protect the liberty of individuals to decide whether and whom to marry. In *Griswold v. Connecticut*[71] in 1965, this Court recognized that the freedom to decide whether or not to conceive children was a fundamental right. And in *Eisenstadt v. Baird*[72] in 1972, this Court held that fundamental liberties in matters of conception precluded the government from imposing barriers to access to contraceptives.

Second, this Court is presumably not prepared to overturn six decades of precedent recognizing that the Constitution guarantees the right of individuals to make choices about reproduction and family formation. If that is true, then the burden is on those who would single *Roe* out for reversal—while maintaining those other precedents—to show that a woman's decision whether to have an abortion is not of the same magnitude as the other decisions that individuals have a fundamental right to make. Efforts by members of this Court even to begin to meet that burden have been scattered.[73] The four Justices in *Webster* who advocated the abandonment of *Roe*'s principles offered no

[68] 268 U.S. 510 (1925).

[69] 316 U.S. 535 (1942).

[70] 388 U.S. 1 (1967).

[71] 381 U.S. 479 (1965).

[72] 405 U.S. 438 (1972).

[73] The dissents of Justice White in *Roe* and *Thornburgh*, and of then-Justice Rehnquist in *Roe*, represent the only real effort to articulate distinctions between the principles of *Roe* and the principles of this Court's other fundamental rights precedents.

basis for distinguishing the right to choose to have an abortion from other fundamental rights in matters of reproduction and family formation. We submit that there is no principled basis for making any such distinction.

As a threshold matter, none of the other liberties which the Court has held to be fundamental is explicitly mentioned in the text of the Constitution. Indeed, since the Fourteenth Amendment does not specify any particularized liberties, protecting only those aspects of liberty that are specifically described would not preserve *any* of this Court's fundamental liberty precedents.[74] Thus, the fact that the Constitution does not mention abortion fails to distinguish *Roe* from this Court's other fundamental liberties precedents.

More importantly, all of the fundamental liberties in matters of reproduction and family formation are interconnected, and all go to the heart of personal freedom. If, for example, the right to make sensitive decisions with respect to conception established in *Griswold* means anything, it must mean that women have the right to make the most critical of decisions regarding their reproductive capacities—the decision whether to terminate a pregnancy. Indeed, as Justice Stevens has forcefully stated, it is difficult "to see how a decision on childbearing becomes *less* important the day after conception than the day before."[75]

[74] Any attempt to limit fundamental liberties to those for which there is a historical tradition of protection at the "most specific level" would be contrary to the Court's decisions in cases such as *Loving v. Virginia*, which struck down state laws forbidding interracial marriage. Before *Loving*, there had unquestionably been a long and intensely emotional tradition of *not* allowing interracial marriages. *See Loving*, 388 U.S. at 9-10. It was the Court's understanding of more general constitutional principles—the right to form a family and racial equality—that enabled the Court to find anti-miscegenation laws both a violation of the Equal Protection Clause *and* a violation of the fundamental liberty to marry protected by the Due Process Clause.

[75] *Thornburgh*, 476 U.S. at 776 (Stevens, J., concurring) (emphasis in original). Concerns for potential human life that are

In an effort to convince the Court that *Griswold* could be saved if *Roe* were discarded, the United States argued in *Webster* that the reference in Justice Douglas' opinion to "police search[es] of marital bedrooms for tell-tale signs of the use of contraceptives" [76] means that *Griswold* can be read as a narrow Fourth Amendment search and seizure case.[77] But that bare-bones interpretation of *Griswold* would reduce it to a largely inconsequential decision: if *Griswold* only protects couples from police searches of marital bedrooms, the government would be free to ban the marketing of birth control devices, thereby denying citizens access to birth control—as long as the ban was enforced by means other than searching marital bedrooms. Furthermore, that interpretation of *Griswold* does not square with landmark precedents of this Court recognizing that the right to privacy in matters of conception precludes the government from restricting access to birth control through wide-scale limitations on the sale, manufacture, and distribution of contraceptives.[78]

The inability to decouple *Roe* from *Griswold* and this Court's other precedents curbing government encroachment on reproductive freedom is further amplified by the "forced abortion" question, which was raised in the *Webster* oral argument, and which Justice Stevens touched

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necessarily implicated in the abortion question do not make preconception decisions any less fundamental than post-conception decisions. Those concerns relate only to the question of whether and when a state's assertion of an interest in potential life should constrain or override the right to make post-conception decisions—a question that *Roe* resolved through the proposition that the state's interest becomes more compelling after the point of fetal viability. *See id.* at 776 (Stevens, J. concurring) (concerns for potential life relate to the "difference in the strength of the countervailing state interest").

[76] *Griswold*, 381 U.S. at 485.

[77] *Webster*, Brief of the United States as *Amicus Curiae* at 12 n.9.

[78] *See Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

upon in *Thornburgh*. If the right to choose abortion is anything less than fundamental, states (and perhaps 14,000 local governments) would need only a minimal justification to *require* women to undergo abortions as a matter of the routine exercise of the police power.[79] And if only a rational basis is required to justify such laws, the government could defend them on the grounds that they "rationally" advance objectives such as reducing housing shortages and public school overcrowding.[80] By the same token, "rational" grounds could also be proffered to justify laws that force women to become pregnant in the first place. In both instances, the government would be running roughshod over the right recognized in *Griswold*.[81]

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[79] "[I]f federal judges must allow the State to make the abortion decision, presumably the State is free to decide that a woman may *never* abort, may *sometimes* abort, or, as in the People's Republic of China, must *always* abort if her family is already too large." *Thornburgh*, 476 U.S. at 778 n.6 (Stevens, J., concurring) (emphasis in original).)

[80] The possibility that some government officials would coerce women into having abortions if *Roe* were overturned is not necessarily farfetched. *See 7 Contend Correction Dept. Urged Abortions for Guards*, New York Times, May 24, 1989, at B3, col. 1 ("Seven present and former New York City Correction officers contended yesterday that the Correction Department regularly told pregnant officers to have abortions or resign."); *see also Correction Officials Fined Over Abortions*, New York Times, October 4, 1989, at B2, col. 5 ("A senior official of New York City's Department of Correction has resigned and four others have been penalized in an investigation into charges that the department has told pregnant correction officers to have abortions or resign.").

[81] The United States argued in *Webster* that even if this Court held that the right to choose an abortion is not a fundamental liberty, it could still strike down a compulsory abortion law as an unconstitutional seizure, because the state would be "violently . . . laying hands on a woman and submitting her to an operation . . . ." *Transcript of Oral Arguments Before Court on Abortion Case*, New York Times, April 27, 1989, at B12, col. 5. This attempt to distinguish between forced abortion and forced childbirth—a far more painful and dangerous procedure than first trimester abortion—is wholly inadequate. *See LeBolt et al., Mortality*

2. Roe *Has Proven No Less Workable in Practice Than Other Constitutional Precedents*

A review of post-*Roe* litigation would show that *Roe*'s principles have been at least as "workable" as other constitutional doctrines. Neither this Court nor the lower courts have encountered any particular problem in applying the common sense principle that prior to fetal viability, a state may regulate abortions to protect a woman's health only when her health interests are genuinely implicated, and not otherwise.[82] That principle has not proven especially difficult to apply, even in the face of regulations that are *deliberately* near to the edge of constitutionality. All areas of constitutional law require courts to make close calls. But the existence of inevitable distinctions at the margin of a constitutional doctrine does not in any way suggest that its underlying principles are unworkable. The constitutional principles of freedom of speech and of the press, for example, are still considered to be workable, notwithstanding cases drawing fine lines between the traditional public forum, the designated public forum, and the non-public forum. Like *Roe*'s viability benchmark, these lines are not themselves "found in text of the Constitution," [83] but no one advocates abandoning them as "unworkable."

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from Abortion and Childbirth: Are the Populations Comparable?, 248 JAMA 188, 190 (1982). Moreover, in nearly one in four cases, childbirth is by caesarean section. Thus, as a result of restrictive abortion laws, the government would be "submitting" many women to a major surgical procedure. *See* Placet & Taffel, *Recent Patterns in Caesarean Delivery in the United States*, 15 Obstet. Gynec. Clin. N.A. 607 (1988). *Compare Winston v. Lee*, 470 U.S. 753 (1985) (holding unconstitutional a state-compelled surgical procedure to remove a bullet from a criminal suspect).

[82] *Compare Garcia*, 469 U.S. at 539 ("We find it difficult, if not impossible, to identify an organizing principle that places each of the cases [applying *National League of Cities*] in [one] group on one side of a line and each of the cases in the [other] group on the other side.").

[83] *Webster*, 492 U.S. at 518 (plurality opinion).

C. Overruling *Roe* Would Have Profoundly Adverse Consequences

It has been argued that restrictive abortion laws advance the asserted government interest in protecting potential life from the moment of conception. As Justice Harlan admonished, however, "[t]he mere assertion that the action of the State finds justification in the controversial realm of morals cannot justify alone any and every restriction it imposes." [84] In any event, it has not been shown that a return to the pre-*Roe* era would materially serve any such goal. If governments are free to criminalize abortion, or to promulgate regulations placing abortion beyond the reach of most women, the principal consequence will be not the "protection of all potential human life," but rather the substitution of delayed, dangerous and illegal abortions for safe and legal ones. When harmful, rather than beneficial, consequences would attend the overruling of a constitutional precedent, this Court is even more inclined to rely on *stare decisis* and maintain that precedent.[85]

The pernicious consequences of overruling *Roe* are readily apparent. Most dramatically, in states that respond by enacting unyielding criminal statutes, the conduct of scores of law-abiding citizens—pregnant women, doctors, and nurses—could be criminalized overnight. This would lead to widespread disobedience, undermine the effectiveness of the criminal justice system, and promote a general disrespect for the law unprecedented in our two centuries of constitutional jurisprudence.

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[84] *Poe v. Ullman*, 367 U.S. 497, 545 (1961) (Harlan, J., dissenting).

[85] *See* Monaghan, *supra*, at 758-60; *see also Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965) (Court will reconsider precedent in light of its "mischievous consequences"); *Canada Packers, Ltd. v. Atchison, T. & S.F. Ry.*, 385 U.S. at 184 (Court will not reconsider precedent that has not "produced any particularly unfortunate consequences").

Laws that fall short of broad criminal bans could also have severe and harmful ramifications. For example, restricting the reasons for which women may terminate a pregnancy would inevitably lead to the establishment of enforcement mechanisms that would make every woman submit herself to those who would be empowered to ascertain whether her reasons met with official state approval.[86] Even where a state might "approve" a woman's decision, the very process of subjecting her decision to state review could impose an unacceptable barrier to the exercise of her rights. A rape victim's right to abort is by no means fully protected by a statute that prohibits abortion generally, but makes an exception for pregnancy by rape. A rape victim is in a far worse position under such a statute than she is under *Roe*, where a woman who has been raped can make her own decision to abort the resulting pregnancy. If *Roe* is overturned, and a rape victim must rely on a "rape exception" in a statute, she will not have the right to choose abortion, but only the quite different "right" to *prove* to some government officials that she was "in fact" raped—often a difficult and traumatic task. Moreover, even proving that she was raped might not be enough. To come within a rape exception, a woman could also be required to prove that her pregnancy actually *resulted from* the rape and not from some other act of sexual intercourse. Choice would thus be replaced by cross-examination.

Other burdensome restrictions on access to pre-viability abortions, short of an outright ban, would have the practical effect of withdrawing the right recognized in *Roe* from millions of poor and rural women.[87] And for all

[86] *See, e.g., Doe v. Bolton*, 410 U.S. 179, 195-98 (1973).

[87] For example, almost 80% of rural Americans live in counties with no abortion services. *See* Henshaw *et al., Abortion Services in the United States 1984 and 1985*, 19 Fam. Plan. Persp. 63, 64-65 (1987). The prospect of a long journey to a distant facility—or, indeed, being forced to undertake such a trip *twice* to satisfy waiting period requirements—would effectively deny many pregnant women access to abortion services. *See Akron*, 462 U.S. at

women, medically unnecessary restrictions would tend to delay abortions to a later point in pregnancy when the procedure is more complicated and dangerous. In such circumstances, states would, ironically, be subjecting women to an enforced reproductive code at great cost to their well-being, while attempting to justify the code "under the guise of protecting maternal health."[88]

In addition, abortion is particularly unsuited to a multiplicity of inconsistent state and local laws. The conflicting regulations that would result from subjecting abortion to the raw political process would not promote any cognizable federalism concern, but would only lead to an interstate traffic of women seeking to terminate their pregnancies.[89] The simple fact is that coercive abortion laws are unenforceable against the state's more affluent citizens. Those women who can afford it will travel to other states, while any "marginal reduction in abortions will come from among the very poor who are unable to afford transportation to states where the practice is permitted."[90] In the end, there will not be separate policies on abortion for women living in different states as much as there will be separate policies for women of different social and economic status. Women who are unable to travel elsewhere will be returned to the darkness of the pre-*Roe* era: whiskey as an anesthetic; doctors who are sometimes marginal or unlicensed practitioners, sometimes alcoholic, sometimes sexually abusive; unsanitary conditions; incom-

434-35 (hospitalization requirement "may force women to travel to find available facilities, resulting in both financial expense and additional health risk . . . [and therefore] may significantly limit a woman's ability to obtain an abortion").

[88] *Thornburgh*, 476 U.S. at 759.

[89] Some states or localities might attempt to make it a crime for women to travel elsewhere to seek an abortion, but such laws would be virtually unenforceable in a nation of open interstate borders. *Cf. Irish Court Says Girl Can Leave to Obtain Abortion in Britain*, New York Times, February 27, 1992, at A1, col. 1.

[90] John Kaplan, *Abortion as a Vice Crime: A "What If" Story*, 51 Law & Contemp. Probs. No. 1, 151, 159 (1988).

petent treatment; infection, hemorrhage, disfigurement and even death.[91]

As members of Congress, we are concerned that a patchwork of conflicting abortion laws will both produce friction among states and increase the burdens on already overtaxed health care systems in states that continue to maintain access to safe and legal abortions.[92] At the same time, health care facilities in those states and localities that curtail access to abortion will face a substantial increase in the number of women experiencing serious medical complications as a result of self-induced or back-alley abortions.

Some Justices have suggested that withdrawal by this Court of the right of women to choose to have an abortion would not necessarily result in the enactment of draconian anti-abortion laws.[93] We now know, however, that some legislatures will indeed enact very severe restrictions.[94]

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[91] As a consequence of *Roe*, abortion-related deaths dropped sharply. *See* Cates & Rochat, *Illegal Abortions in the United States: 1972-74*, 8 Fam. Plan. Persp. 86, 87, 91-92 (1976); *see also* Cates, *Legal Abortion: The Public Health Record*, 215 Science 1586 (1982).

[92] In the two years following New York's decision to permit licensed physicians to provide abortions to women less than 24 weeks pregnant, 60% of the approximately 440,000 abortions performed in New York City were performed on nonresidents. Berger *et al.*, *Maternal Mortality Associated with Legal Abortion in New York State: July 1, 1970—June 30, 1972*, 43 J. Obstet. & Gynec. 315 (1974). A return now to the pre-*Roe* regime, when metropolitan hospitals are already overwhelmed with AIDS cases, would be a disaster.

[93] *See Webster*, 492 U.S. at 521 (plurality opinion).

[94] Louisiana, Guam, and Utah have all recently passed the strictest possible criminal prohibitions on abortion. These laws track the criminal statute struck down in *Roe*, and in certain respects, are even more stringent. *Sojourner, T. v. Roemer*, 772 F. Supp. 930 (E.D. La. 1991); *Guam Society of Obstetricians & Gynecologists v. Ada*, 776 F. Supp. 1422 (D. Guam. 1990); *Jane L. v. Bangerter*, No. 91-C-345-G (D. Utah complaint filed April 4, 1991).

While it is also true that some state legislatures would respond to a reversal of *Roe* by retaining access to safe and legal abortions, that freedom could be ephemeral: each future legislature could consider whether to reverse an earlier legislature's decision. Thus, in many—perhaps most—states, a woman's right to choose to have an abortion would be subject to the shifting winds of state and local legislative politics in never-ending struggles, session after session, year after year.

Even assuming that some state legislatures would consistently retain for their own residents the freedom to choose safe and legal abortions, there is nonetheless a compelling need for a national constitutional standard. During the "Jim Crow" era, only a minority of the states imposed *de jure* racial segregation in public schools and other public facilities. This Court nonetheless concluded that it was essential that freedom from state-imposed segregation be enjoyed by every American as a basic constitutional right.[95] The freedom to make one's own determinations about whether to become pregnant and whether to continue a pregnancy should similarly be a national right secured to every American woman, no matter what state she calls home.

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[95] *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

CONCLUSION

For the foregoing reasons, we urge the Court to reaffirm the principles of *Roe v. Wade*, and reverse the judgment below in 91-744 and affirm the judgment below in 91-902.

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APPENDIX

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Michael A. Andrews (D-TX)
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Supreme Court of the United States

OCTOBER TERM, 1991

Planned Parenthood of Southeastern Pennsylvania, et al.,
Petitioners and Cross-Respondents,

-v.-

Robert P. Casey, et al.,
Respondents and Cross-Petitioners.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE CITY OF NEW YORK, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, COMMITTEES ON SEX AND LAW, CIVIL RIGHTS AND MEDICINE AND LAW, AND THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS AND CROSS-RESPONDENTS

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TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES		iii
INTEREST OF AMICI CURIAE		1
SUMMARY OF ARGUMENT		2
ARGUMENT		3
I.	REPRODUCTIVE FREEDOM IS RECOGNIZED AS A CONSTITUTIONALLY PROTECTED RIGHT PRECISELY BECAUSE IT IS CENTRAL TO WOMEN'S LIVES AND HEALTH	3
II.	NEW YORK CITY'S PRE-*ROE* EXPERIENCE COMPELS THE CONCLUSION THAT RESTRICTIVE ABORTION LAWS STRAIN LARGE CITY RESOURCES AND ENDANGER WOMEN'S HEALTH	6
A.	After Abortion Was Legalized In New York State, Large Numbers Of Women Flooded New York City In Search of Safe And Legal Reproductive Health Care	8
B.	The Influx Of Out-of-State Patients Strained The City's Health Care Resources While Threatening Women's Health	12
III.	A SUPREME COURT RULING UPHOLDING PENNSYLVANIA'S ABORTION RESTRICTIONS WOULD USHER IN A NEW ERA OF ENDANGERMENT OF WOMEN'S HEALTH	16

A. The Influx Of Nonresident Women Seeking Abortions Will Burden An Already Overextended City Health Care System, At Great Cost To Women's Health 17

B. Both Resident And Nonresident Women Of Color Will Be Harmed The Most If *Roe* Is Not Reaffirmed 20

CONCLUSION 23

TABLE OF AUTHORITIES

Cases: Page

Califano v. Goldfarb, 430 U.S. 199 (1977) 4

Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) 3

Colautti v. Franklin, 439 U.S. 379 (1979) 6

Craig v. Boren 429 U.S. 190 (1976) 3

Eisenstadt v. Baird, 405 U.S. 438 (1972) 3

Frontiero v. Richardson, 411 U.S. 677 (1973) 4

Griswold v. Connecticut, 381 U.S. 479 (1965) 3

Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) 3, 4

Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 273 (1979) 3

Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976) 3

Roe v. Wade, 410 U.S. 113 (1973) . . . . . *passim*

Skinner v. Oklahoma, ex rel. Williamson, 316 U.S. 535 (1942) 3

Stanton v. Stanton, 421 U.S. 7 (1975) 4

Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) 3, 4

Whalen v. Roe, 429 U.S. 589 (1977) 3

Statutes:

N.Y. Penal Law § 125.05(3) (McKinney 1987 & Supp. 1992) 8

N.Y. Unconsol. Laws § 7382 (McKinney 1985 & Supp. 1992) 12

Other Authorities:

Abortion Facilities Under Strain, N.Y. Times, July 19, 1970, at 7 13

Adler, *Sex Roles and Unwanted Pregnancy in Adolescent and Adult Women*, 12 Prof. Psychol. 56 (1981) 5

Alan Guttmacher Institute, *Abortion and Women's Health: A Turning Point for America?* (1990) 13, 14

American Public Health Ass'n, *APHA Recommended Program Guide for Abortion Services (Revised 1979)*, 70 Am. J. Pub. Health 652 (1980) 14, 20

Baxter, Raymond J., Acting President, New York City Health & Hospitals Corp., Letter to Pat Maher (Feb. 26, 1990) 18, 19

Bellevue Hospital, *Some Thoughts on the Abortion Crisis in New York City* (July 31, 1970) 12

Brellochs & Carter, Community Services Society, *Building Primary Health Care Services in New York City's Low-Income Communities* (1990) 22

Brody, *City is Planning for Abortions at a Rate of 25,000 a Year*, N.Y. Times, May 30, 1970, at A1 12

Brody, *State's Liberal Abortion Law Takes Effect Today Amid Prospects for Delay*, N.Y. Times, July 1, 1970, at A36. 12

Brody, *Decline in Maternal Death Rate Linked to Liberalized Abortion*, N.Y. Times, Oct. 13, 1971, at A13. 15

Cartoof & Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 76 Am. J. Pub. Health 397 (1986) 16

Cates, *Legal Abortion: The Public Health Record*, 215 Sci. 1586 (1982) 4, 11

Cates & Rochat, *Illegal Abortion in the United-States: 1972-1974*, 8 Fam. Plan. Persp. 86 (1976) 7, 11

Cates et al., *Mortality from Abortion and Childbirth: Are the Statistics Biased?*, 248 J.A.M.A. 192 (1982) 14

Centers for Disease Control, *Abortion Surveillance: 1971* (Dec. 1972) 10

David, *Born Unwanted: The Developmental Effects of Denied Abortion* (1988) 5

Digest 8 Fam. Plan. Persp. 70 (1976) (Summary of Centers for Disease Control, *Abortion Surveillance, Annual Summary, 1974*) 17, 20

Dumpson, Chairman, HHC Board of Directors, HHC's Annual Public Meeting, Manhattan/ Bronx Session (Nov. 6, 1991) 19

Fosburgh, *Abortion Law Seen Burdening State*, N.Y. Times, Apr. 27, 1970, at A28 12

Gordon, *Woman's Body, Woman's Right: A Social History of Birth Control in America* (1976) 8

Grimes, *Second Trimester Abortions in the United States*, 16 Fam. Plan. Persp. 260 (1984) . 14, 17, 20

Harris et al., *Legal Abortion 1970-71 -- The New York City Experience*, 63 Am. J. Pub. Health 409 (1973) 8, 11, 15

Henshaw, *Characteristics of U.S. Women Having Abortions*, 19 Fam. Plan. Persp. 5 (1987) 20

Henshaw, *Characteristics of U.S. Women Having Abortions, 1987*, 23 Fam. Plan. Persp. 75, 77 (1991) 21

Institute of Medicine, *Legalized Abortion and The Public Health* (1975) 15

Karst, *The Right to Intimate Association*, 89 Yale L.J. 624 (1980) 3

Koop, Letter to President Reagan, dated Jan. 9, 1989, reprinted as *A Measured Response: Koop on Abortion* , 21 Fam. Plan. Persp. 31 (1989) 4

Kopelman & Douglas, *Abortions by Resident Physicians in a Municipal Hospital Center*, 111 Am. J. Obstetrics & Gynecology 666 (1971) 14

McGrath et al., *Women and Depression* (1990) 5

Memorandum of Josie Morales, Office of Women's Health, New York City Health & Hospitals Corp., to Meredith Feinman (Dec. 6, 1991) 18

Memorandum of Josie Morales, Office of Women's Health, New York City Health & Hospitals Corp., to Meredith Feinman (Feb. 12, 1992) 21

More-Carvar, *International Inventory on Induced Abortion* (1974) 7

National Center for Health Statistics, *Vital-Statistics of the United States, 1965*, Vol. II - Mortality, Part A (1967) 7

New York City Dep't of Health, *All Abortions-Performed in New York City Since July 1, 1970* (n.d.) 8, 9, 16

New York City Dep't of Health, *Induced Terminations By Residence, New York City, 1980-1989* (Jan. 22, 1991) 16

New York City Dep't of Health, *New York City-Health Department Study Indicates Nearly Half Million Abortions to City Residents Since 1970 Legalization* (Aug. 4, 1977) 9, 10, 11, 16, 17

New York City Dep't of Health, Office of Women's Health, *Selected Characteristics of Live Births: 1990* (Nov. 1991) 18

New York City Health & Hospitals Corp., *A Program Analysis of the New York City Health and Hospitals Corporation's Abortion Services* (June 1972) 13

New York City Health & Hospitals Corp., *Announcement of Policy to Fellow Providers* (Jan. 12, 1990) 19

New York City Health & Hospitals Corp., *HHC Resolution Adopting a Corporate Policy Supporting Federal Legislation to Establish Universal Access to Health Care and to Reform the Health Care Delivery System* (Nov. 1991) 19

New York City Health & Hospitals Corp., *Mission Statement* (adopted May 18, 1968) 12

New York City Health & Hospitals Corp., *Selected Characteristicx of Live Births: 1990* (Nov. 1991) 18

New York City Health & Hospitals Corp., *Waiting Time for Abortion Services, 1990 HHC Survey Results* (Sept. 1990) 19-20

New York State Dep't of Health, *AIDS in New York State* (1990) 18

New York State Dep't of Health, *Induced Abortions Recorded in New York State: 1987-1989 With Five-Year Summary* (1991) 16

New York State Dep't of Health, *Report of Selected Characteristics of Induced Terminations of Pregnancy in New York State* (Apr. 1971) 10

New York State Dep't of Health, *Report of Selected Characteristics of Induced-Terminations of Pregnancy Recorded in New York State, 1971-1975* (n.d.) 11, 13, 16

New York State Dep't of Health, *Report of Selected Characteristics of Induced-Terminations of Pregnancy Recorded in New York State: January--December 1971* (Aug. 1972) 9

New York State Dep't of Health, *Report of Selected Characteristics of Induced-Terminations of Pregnancy Recorded in New York State: January--December 1972* (Jan. 1974) 9, 10

Pakter et al., *Impact of Liberalized Abortion-Law in New York City on Deaths Associated with Pregnancy: A Two-Year Experience*, 49 Bull. N.Y. Acad. Med. 804 (1973) 14, 15, 17

Pakter et al., *Legal Abortion: A Half Decade of Experience*, 7 Fam. Plan. Persp. 248 (1975) 13

Pakter et al., *Surveillance of the Abortion Program inNew York City: Preliminary Report*, 3 Clinical Obstetrics & Gynecology 267 (March 1970) 9, 14

Pakter et al., *Two Years of Experience in New York City with the Liberalized Abortion Law--Progress and Problems*, 63 Am. J. Pub. Health 524 (1973) 9

Pipel, *The Abortion Crisis* in *The Case for Legalized Abortion Now* 101 (Alan Guttmacher ed. 1967) 9

Polgar & Fried, *The Bad Old Days: Clandestine Abortions Among the Poor in New York City Before Liberalization of the Abortion Law;* 8 Fam. Plan. Persp. 125 (1976) 7

Reiman, *Privacy, Intimacy, and Personhood*, 6 Phil. & Pub. Aff. 26 (1976) 3

Rovinsky, *Abortion in New York City: A Consideration of the Practical Problems Which May Follow Elimination of Statutory Restrictions on Termination of Pregnancy* (July 1, 1970) 13

Rubenfeld, *The Right to Privacy*, 102 Harv. L. Rev. 737 (1989) 5

Russo, *Psychological Aspects of Unwanted Pregnancy and Its Resolution*, in *Abortion, Medicine and the Law* (Butler & Walbert, eds., 4th ed. forthcoming 1992) 5

Shelton et al., *Abortion Utilization: Does Travel Distance Matter?* 8 Fam. Plan. Persp. 260 (1976) 21

Sibley, *69,000 Abortions in 6 Months Here*, N.Y. Times, Feb. 7, 1971, at 70 15

State Communities Aid Ass'n, *Minutes of the Third Meeting on Implementation of the 1970 New York State Abortion Law* (Aug. 12, 1970, ... 13

Swartz & Paranjpe, *Abortion Services in a Municipal Hospital*, 47 Bull. N.Y. Acad. Med. 846 (1971) 7

Tietze, *The Public Health Effects of Legal Abortions in the United States*, 16 Fam. Plan. Persp. 26 (1984) 4, 17

Tietze & Henshaw, The Alan Guttmacher Institute, *Induced Abortion, A World Review 1986* (1986) 14

Weinstock et al., *Abortion and the Need for Services in the United States, 1974-1975*, 8 Fam. Plan. Persp. 58 (1976) 17

Weisman, *Open legal abortion "on request" is working in New York City, but is it the answer?* 112 Am. J. Obstetrics & Gynecology 138 (1972) 9

INTEREST OF AMICI CURIAE[1]

The City of New York ("the City") has fought to keep abortion safe and legal. Through its extensive health care system, the City has worked to translate this right into a reality for *all* women. New York City's historic role in this struggle, however, has extended far beyond its borders. Between the time abortion was legalized in New York State in 1970, and the time this Court recognized reproductive freedom as a constitutionally protected right in *Roe v. Wade*, over 350,000 out-of-state women traveled to New York City for abortions; over two-thirds of all New York City abortions performed during this time period were sought by nonresidents. This influx of women, who traveled at great cost to their lives and health, strained the City's ability to provide for the health care needs of residents and nonresidents alike.

The Association of the Bar of the City of New York ("the Association") has more than 19,000 members. Although the Association has members in nearly every state and in forty countries, most members practice in the New York City metropolitan area. The Association has traditionally focused on issues relating to New York City, including the delivery of safe and adequate health care for all. The Association is deeply committed to the principle of individual liberty embodied in the right to privacy. It has long advocated the constitutional right of women to make reproductive decisions and believes that the challenged legislation abridges that choice.

The New York City Health and Hospitals Corporation ("HHC") is the largest municipal hospital system in the United States, with eleven acute care hospitals, five long-term care facilities, and over twenty community-based primary care sites. Last year it provided hospital and long-term care to over a quarter of a million people. HHC's commitment to women's health is demonstrated by a variety of programs; its specific

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[1] The parties have consented to the filing of this brief. Letters of consent are on file with the Clerk of the Court.

commitment to reproductive freedom is evidenced by its long-standing policy of providing both pre-natal care and abortions to women regardless of ability to pay.

The City, the Association, and HHC submit this brief to show that restrictive abortion laws have endangered women's lives and health in the past and, if permitted in the future, will have a deleterious impact on the health of women in states with restrictive abortion laws seeking abortions and on health care in New York City. The pre-*Roe* experience in New York City underscores why this Court should reaffirm the principles set forth in *Roe v. Wade*.

SUMMARY OF ARGUMENT

In warning of the inevitable, destructive impact of restrictive abortion laws, no City can better wear the cloak of the sage than the City of New York. Just over twenty years ago, after New York State liberalized its abortion law, the City became the destination of hundreds of thousands of women seeking safe and legal abortions. Ninety percent of the women who could afford to travel to the City for reproductive health care were white; those left behind were frequently at the mercy of back alley abortionists. What happened to these women, how their travels harmed their own health and strained City resources to provide for them as well as others, and why we have every reason to believe that a return to pre-*Roe* days would raise this specter anew, is the focus of this brief.

It was against the backdrop of these experiences that this Court granted reproductive freedom constitutional protection nineteen years ago. Now, as then, states cannot set forth a compelling interest warranting the imposition of such a severe and inequitable burden on women's lives and health. Indeed, in these days when cities like New York are facing acute social and health crises, the harm imposed on women will be particularly harsh. This Court thus should reaffirm the principles set forth in *Roe v. Wade* and continue to hold restrictive abortion laws to the strictest constitutional scrutiny, striking down those that impose such undue burdens on women.

ARGUMENT

I. REPRODUCTIVE FREEDOM IS RECOGNIZED AS A CONSTITUTIONALLY PROTECTED RIGHT PRECISELY BECAUSE IT IS CENTRAL TO WOMEN'S LIVES AND HEALTH.

Reproductive freedom has been placed in the rubric of liberty rights variously as "privacy," *Griswold v. Connecticut*, 381 U.S. 479 (1965)(articulating right to privacy); *Roe v. Wade*, 410 U.S. 113 (1973) (applying privacy right to abortion); "bodily integrity," *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); "autonomy," *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); "self determination," *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 777 n.5 (Stevens, J., concurring) (1986); "intimate association," *see, e.g.*, Kenneth Karst, *The Right to Intimate Association*, 89 Yale L. J. 624 (1980); "personhood," *see, e.g.*, Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, 6 Phil. & Pub. Aff. 26 (1976); and "the interest in independence in making certain kinds of important decisions," *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977).

Concurrently, reproductive freedom has been framed as an equality issue, as only women are directly burdened by restrictive abortion statutes. *See Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 71 (1976) ("it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy...."). [2] Thus, to ensure

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[2] The Court has held that measures classifying on the basis of gender are unconstitutional unless the government can "carry the burden of showing an exceedingly persuasive justification for the classification." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (quoting *Personnel Administration of Mass. v. Feeney*, 442 U.S. 256, 273 (1979)). *See also Craig v. Boren*, 429 U.S. 190, 197-199 (1976). Classifications based on gender have long been subjected to searching analysis because of the substantial burdens suffered by women when gender stereotypes are imposed on them. *See Mississippi Univ. for Women*, 458 U.S. at 726;*Califano v. Goldfarb*,

(Footnote Continued)

that the constitutional guarantee of liberty "extends to women as well as to men," this Court should protect reproductive freedom lest it "protect inadequately a central part of the sphere of liberty that our law guarantees equally to all." *Thornburgh*, 476 U.S. at 772. By requiring women to sacrifice their bodies and their liberty in ways that the state never demands of men, restrictive abortion laws impermissibly reflect "traditional ... assumptions about the proper roles of men and women." *Mississippi Univ. for Women*, 458 U.S. at 726.

All of these legal frameworks, however varied, recognize and address the same core concern: the centrality of reproductive freedom to women's lives and the great harm imposed if the state strips it away. Few women are psychologically[3] or physically[4] harmed by choosing to have an abortion, but many are harmed if they are denied control over the decision in the first place. The burden is not felt by just the woman; unwanted pregnancy and childbirth carry "substantial health, psychological, social and economic implications for the child, the mother,

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(Footnote Continued)
430 U.S. 199, 211 (1977) (plurality opinion); *Stanton v. Stanton*, 421 U.S. 7, 14 (1975); *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion).

[3] A study commissioned by then Surgeon General C. Everett Koop (avowedly anti-choice) found that abortion causes very few psychological problems and that a distinct "post abortion syndrome" could not be identified. *See* C. Everett Koop, Letter to President Reagan, dated Jan. 9, 1989, reprinted as *A Measured Response: Koop on Abortion*, 21 Fam. Plan. Persp. 31, 32 (1989).

[4] "[T]he risk of death from legal induced abortion is no higher at any point in gestation than is the risk of death from childbearing." Christopher Tietze & Stanley Henshaw, *Induced Abortion, A World Review 1986* 110 (1986); *see also* Willard Cates, *Legal Abortion: The Public Health Record*, 215 Sci. 1586 (1982).

her family, and society."[5] Laws that dictate procreative matters "*take over* the lives of the persons involved: they occupy and preoccupy." Jeb Rubenfeld, *The Right to Privacy*, 102 Harv. L. Rev. 737, 784 (1989).

Loss of control over procreative matters affects every aspect of a woman's life, from her physical health, to her economic status, to her ability to educate herself. By stripping women of any sense of control over their own and their families' destiny, restrictions on reproductive freedom contribute significantly to feelings of hopelessness and in turn to apathy.[6] By intruding upon women's very sense of self, mandating life choices, and frequently harming a woman's mental and physical health, abortion restrictions thus interfere with women's ability to participate in society fully and equally with men.

In holding that the right to privacy is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy," *Roe v. Wade*, 410 U.S. at 153, this Court repeatedly emphasized its concern for the impact of state regulation of abortion upon the lives and health of pregnant women. Crucial to its holding was the recognition that:

> The detriment that the State would impose upon the woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or

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[5] Nancy Felipe Russo, *Psychological Aspects of Unwanted Pregnancy and Its Resolution*, in *Abortion, Medicine and the Law* (J. Douglas Butler & David F. Walbert, eds., 4th ed. forthcoming 1992). *See also* Henry P. David et al., *Born Unwanted: Developmental Effects of Denied Abortion* (1988).

[6] *See generally* Ellen McGrath et al., *Women and Depression* 1-2 & 10-13 (1990). Studies of the differences between women who have experienced unwanted pregnancy and those who have avoided it have consistently found that avoidance of unwanted pregnancy is correlated with a heightened sense of self-competence and control. *See, e.g.*, Nancy Adler, *Sex Roles and Unwanted Pregnancy in Adolescent and Adult Women*, 12 Prof. Psychol. 56, 57 (1981).

> additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care.

Id. at 153.[7]

The detriment that women would suffer should they be denied control over procreative choices is no less today than it was when *Roe* was decided less than twenty years ago. Nor has the centrality of reproductive freedom to women's lives changed. New York City's pre-*Roe* experiences illustrate only one of the great burdens imposed on women's health by abortion restrictions like those at issue in Pennsylvania: that is, the harm attributable to a system in which many women are forced to travel long distances, across state lines for reproductive health care. Because the burden to women's lives and health is so great, this Court, under any legal theory set forth above, should reaffirm that reproductive freedom is constitutionally protected and that regulations that interfere with this right, like any other fundamental right, are subject to strict scrutiny.

II. NEW YORK CITY'S PRE-*ROE* EXPERIENCE COMPELS THE CONCLUSION THAT RESTRICTIVE ABORTION LAWS STRAIN LARGE CITY RESOURCES AND ENDANGER WOMEN'S HEALTH.

It is no secret that the abortion restrictions of the past did not end abortions. Rather, they only forced women into back alleys and onto kitchen tabletops for unsterile, health and

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[7] And, on every occasion it has addressed the issue, this Court has unequivocally held that a pregnant woman's health cannot be sacrificed in order to protect her fetus. Striking down a Pennsylvania statute that limited women to the abortion technique that would best ensure that a fetus be aborted alive, the Court insisted that the woman must be free to choose the method of abortion that furthers her own health, regardless of its effect upon the prospects of fetal survival. "[T]he woman's life and health must always prevail over the fetus' life and health when they conflict." *Colautti v. Franklin*, 439 U.S. 379, 400 (1979).

life threatening procedures. In 1965, for example, illegal abortion accounted for 17 percent of all deaths attributed to pregnancy and childbirth in that year. National Center for Health Statistics, *Vital Statistics of the United States, 1965* Vol. II -- Mortality, Part A (1967). Because abortion was illegal at that time, the actual number of deaths owing to abortion was much greater than officially reported. With few exceptions, the only women who could afford safe, hospital abortions were white. Harriet Pipel, *The Abortion Crisis*, in *The Case for Legalized Abortion Now* 101 (Alan Guttmacher ed. 1967) (93% of New York State hospital abortions performed on white women). The women who died from illegal abortions have always been disproportionately women of color; even in the years in which abortion began to be legalized -- from 1972 to 1974 -- the mortality rate from illegal abortion for women of color was approximately 12 times the rate for white women. Willard Cates & Roger W. Rochat, *Illegal Abortions in the United States: 1972-1974*, 8 Fam. Plan. Persp. 86, 88 (1976); *see also* Steven Polgar & Ellen S. Fried, *The Bad Old Days: Clandestine Abortions Among the Poor in New York City Before Liberalization of the Abortion Law*, 8 Fam. Plan. Persp. 125, 125 (1976).

The incidence of incomplete abortions, which can cause sterility and other health complications, was also high in New York City during this time period. In 1962 alone, nearly 1,600 women were admitted to Harlem Hospital in New York City because of fragments of fetal material left in the uterus during an illegal abortion. D.T. Swartz & M.K. Paranjpe, *Abortion Services in a Municipal Hospital*, 47 Bull. N.Y. Acad. Med. 846, 846 (1971). In all New York City hospitals in the 1960s, complications resulting from illegal abortions accounted for more than 20 percent of all pregnancy-related admissions. *See* Emily C. More-Cavar, *International Inventory on Induced Abortion* (1974).

Largely in an attempt to reduce the incidence of mortality and morbidity attributable to illegal abortions, New York became one of the first states to legalize abortion in April

1970.[8] Under the new law, New York State imposed few restrictions on abortions, stating only that abortion could be performed by a physician within the first 24 weeks of pregnancy (with no gestational age limits specified) or at any time to preserve the life of the woman. N.Y. Penal Law § 125.05(3) (McKinney 1987 & Supp. 1992) (enacted in 1965 and amended in 1970). Although this law safeguarded the health of many women, it did so at great cost both to the women forced to travel across state lines for legal abortions, and to the City's ability to provide for them as well as others.

A. After Abortion Was Legalized In New York State, Large Numbers Of Women Flooded New York City In Search Of Safe And Legal Reproductive Health Care.

As soon as the liberalized abortion law took effect, New York City became a magnet for out-of-state women in search of safe and legal abortions. In the first five months of the new law, certificates of termination[9] filed in the City indicated that over half of the procedures had been performed on nonresidents. New York City Department of Health, *All Abortions Performed in New York City Since July 1, 1970* (n.d.) (hereinafter New York City Dep't of Health, Table I). *See also* Jean Pakter et al., *Surveillance of the Abortion Program in New*

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[8] As this Court has recognized, abortion had not always been criminalized. *See Roe v. Wade*, 410 U.S. 113, 132-36 & n.21 (1973). *See also* Linda Gordon, *Woman's Body, Woman's Right: A Social History of Birth Control in America* 51-52 (1976) (abortion "common" and "safe" in late 1870s). Perhaps it thus is more accurate to state that New York State was one of the first states to *once again* permit safe and legal abortions.

[9] The New York City Health Code mandated reporting of all terminations of pregnancy, induced or spontaneous. The certificates of termination included data regarding the number of abortions, weeks of gestation, reason for termination, age and legal residence of patient, mode of termination, and the facility where the termination had taken place. *See* David Harris et al., *Legal Abortion 1970-71 -- The New York City Experience*, 63 Am. J. Pub. Health 409, 409 (1973).

York City: Preliminary Report, 3 Clinical Obstetrics & Gynecology 267, 284 (Mar. 1970) (hereinafter *Surveillance of the Abortion Program*). By the end of the first year, the percentage of abortions performed on out-of-state residents had increased to over 67%,[10] dipping only slightly to approximately 65% in the months immediately preceding *Roe v. Wade*. *See* New York City Dep't of Health, Table I, *supra*; New York City Dep't of Health, *New York City Health Department Study Indicates Nearly Half Million Abortions to City Residents Since 1970 Legalization* 1 (Aug. 4, 1977) (press release) (hereinafter New York City Dep't of Health 1977 Press Release).[11]

The official figures do not begin to reflect fully the enormity of the influx of abortion patients into the City. First, they do not include many of the terminations performed at freestanding abortion clinics, which underreported, but which also treated the vast majority of out-of-state patients. *See* Abner I. Weisman, *Open legal abortion "on request" is working in New York City, but is it the answer?*, 112 Am. J. Obstetrics & Gynecology 138, 140 (1972). Second, even the reported terminations were inaccurate since a number of out-of-state women gave false New York addresses, out of the perceived but usually unfounded fear that they would not be able to obtain services if they gave their real out-of-state address.

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[10] The New York State estimate for 1971 nonresident abortions performed in New York City was slightly lower, 63.3%. *See* New York State Dep't of Health, *Report of Selected Characteristics of Induced Terminations of Pregnancy Recorded in New York State: January -- December 1971*, table 14 (Aug. 1972).

[11] *See also* Jean Pakter et al., *Two Years of Experience in New York City with the Liberalized Abortion Law - Progress and Problems*, 63 Am. J. Pub. Health 524, 524-525 (1973). Again, the New York State figure for abortions performed on out-of-state residents in New York City in 1972 was set slightly lower, 61%. *See* New York State Dep't of Health, *Report of Selected Characteristics of Induced Terminations of Pregnancy Recorded in New York State: January -- December 1972*, table 6 (Jan. 1974).

Despite these limitations in reporting, official estimates indicate that New York City became a haven for women seeking safe, legal reproductive health care.

In total, in the two and a half years preceding *Roe*, nearly 350,000 women left their own states to obtain abortions in New York. The Alan Guttmacher Institute, *Abortion and Women's Health: A Turning Point for America?* 3 (1990).[12] Nationally, of all abortions reported on out-of-state residents in 1971, 85.3% were performed in New York State, with the vast majority performed in New York City. Centers for Disease Control, *Abortion Surveillance: 1971* 5 (Dec. 1972).[13] Women came to the City for abortions from every state and from several other countries. In the years preceding *Roe*, the five most frequent areas from which women came were: New Jersey, Ohio, Michigan, Illinois and Pennsylvania -- all states with strict abortion prohibitions. David Harris et al., *Legal*

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[12] This figure is tabulated from: New York State Dep't of Health, *Report of Selected Characteristics of Induced Terminations of Pregnancy Recorded in New York State: January - December 1972*, table 6 (Jan. 1974); New York State Dep't of Health, *Report of Selected Characteristics of Induced Terminations of Pregnancy Reported in New York State*, table 5 (April 1971); New York City Dep't of Health, *New York City Health Department Study Indicates Nearly Half Million Abortions to City Residents Since 1970 Legalization* 1 (Aug. 4, 1977) (press release) (hereinafter New York City Dep't of Health 1977 Press Release).

[13] Even allowing for differences among the liberalized abortion laws, New York's 85.3% share of out-of-state patients is exceedingly large. According to the Centers for Disease Control figures, states that performed a large percent of their abortions on out-of-state residents in 1971 included: Kansas (60.8%), New York (60%), District of Columbia (36.3%), Wisconsin (32.5%) and California (11.2%). Centers for Disease Control, *Abortion Surveillance: 1971* 5 (Dec. 1972). Nationally, at least 39% of the reported, legal abortions performed in 1971 were on out-of-state residents. *Id.* But, as the CDC noted, since many states did not report residency status of patients, "the actual proportion of women obtaining out-of-state legal abortion was probably higher than the reported populations." *Id.*

Abortion 1970-1971 -- The New York City Experience, 63 Am. J. Pub. Health 409, 410 (1973).

Throughout these years, between seven and eight percent of all reported abortions in New York City were performed on Pennsylvania women. The number of reported procedures performed on Pennsylvania women totaled close to 12,000 in both 1971 and 1972, falling quickly to 4,083 in 1973. New York City Dep't of Health 1977 Press Release, *supra*, at table 5.

Although New York City treated all women who needed abortions regardless of residence and ability to pay, the expense of traveling to the City was prohibitive for many women. Women of color, disproportionately low-income and traditionally marginalized from the mainstream women's organizations that facilitated abortion arrangements, were far less able to obtain either the requisite travel funds or information to schedule such a trip. Thus, although roughly half of in-state women obtaining abortions were women of color, only about 10% of the out-of-state residents were nonwhite. New York State Dep't of Health, *Report of Selected Characteristics of Induced Terminations of Pregnancy Recorded in New York State, 1971-1975 1-2* (n.d.) (hereinafter New York State Dep't of Health, *Report of Induced Terminations*).[14] The vast majority of nonresident women of color who faced an unwanted pregnancy continued to bear unwanted children or to turn to dangerous, illegal abortionists, as if New York had not changed its law at all. *See* Cates & Rochat, *supra*, at 86.

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[14] Among the City's residents who received abortion services in July 1970 through June 1971, for example, 42.8% were recorded as "non-white" and 10% as Puerto Rican; among nonresidents who had abortions performed, 90% were white, 9.5% were "non-white" and 0.5% were Puerto Rican. Harris et al., *supra* note 9, at 413-414. We have no reason to believe that the demand for abortions by women of color who lived in the City differed much from that of other women of color.

B. The Influx Of Out-Of-State Patients Strained The City's Health Care Resources While Threatening Women's Health.

In the three months between the passage of New York State's liberalized abortion law and its implementation date, health care providers braced themselves for the large numbers of women who would now seek safe and legal abortions in City hospitals and clinics.[15] Their fears were entirely justified. Largely as a result of the influx of out-of-state women, the number of women who sought abortions after the law took effect "exceeded the capacity of the system to perform the procedures by a wide margin." Bellevue Hospital, *Some Thoughts on the Abortion Crisis in New York City* 1 (July 31, 1970) (internal memorandum). Municipal hospitals estimated that between one-quarter to one-third of their abortion patients were actually nonresidents using spurious addresses. *See id.*, at 3.[16]

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[15] For examples of speculation regarding nonresidents, *see* Lacey Fosburgh, *Abortion Law Seen Burdening State*, N.Y. Times, Apr. 27, 1970, at A28 ("The possibility that pregnant women from all over the country might inundate New York hospitals with requests for abortions has created immense organizational and financial problems...."); Jane E. Brody, *City is Planning for Abortions at a Rate of 25,000 a Year*, N.Y. Times, May 30, 1970, at A1 ("The greatest unknown -- which has made many doctors fearful that the demand will far outstrip the capacity to perform it -- is how many women living under less liberal laws will come to this state for legal termination of their unwanted pregnancies."); Jane E. Brody, *State's Liberal Abortion Law Takes Effect Today Amid Prospects For Delay*, N.Y. Times, July 1, 1970, at A36 (reporting that a number of hospitals were already fully booked for abortions through July).

[16] A residency requirement not only would have been difficult to implement, but also would have directly conflicted with the policy of City hospitals to treat all patients in need, regardless of proof of residence. *See* N.Y. Unconsol. Laws § 7382 (McKinney 1985 & Supp. 1992) (establishing HHC); The New York City Health & Hospitals Corp., *Mission Statement* (adopted May 18, 1968).

The nonresident patients taxed municipal hospitals' resources and contributed to a growing backlog of women seeking abortions and other reproductive health care.[17] Within two weeks after the new law took effect, 2,500 women registered for abortions in municipal hospitals that were equipped to handle less than a quarter of that total weekly. As a result, in some City hospitals where the demand was particularly heavy, the waiting time grew to as long as six weeks -- a prohibitive length of time for many pregnant women. *See Abortion Facilities Under Strain*, N.Y. Times, July 19, 1970, at 7; State Communities Aid Ass'n, *Minutes of the Third Meeting on Implementation of the 1970 New York State Abortion Law* 2, 4 (Aug. 12, 1970) (backlogs for abortions two to seven weeks).

The waiting time was exacerbated by the fact that, due to the time incurred in traveling to the City, out-of-state women on average received later abortions than did in-state women. New York State Dep't of Health, *Report of Induced Terminations*, *supra*, at 2. No more than 10 percent of New York City residents having an abortion in the City in 1972 did so after the first 12 weeks of pregnancy. In contrast, a quarter of the women who traveled to New York from states with restrictive abortion laws had their abortions after 12 weeks of pregnancy. Jean Pakter et al., *Legal Abortion: A Half-Decade of Experience*, 7 Fam. Plan. Persp. 248, 255 (1975); The Alan Guttmacher Institute, *supra*, at 5.

Abortion through the fifteenth week of pregnancy is tenfold safer than childbearing, and the risk of death from

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[17] Extensive City hospital plans were developed to manage these resource problems. *See, e.g.*, Joseph J. Rovinsky, *Abortion in New York City: A Consideration of the Practical Problems Which May Follow Elimination of Statutory Restrictions on Termination of Pregnancy* (July 1, 1970) (predicting demand for legal abortions and estimating difficulties in immediately meeting needs of new patients); New York City Health & Hospitals Corp., *A Program Analysis of the New York City Health and Hospital Corporation's Abortion Services* (June 1972) (proposing changes for meeting needs of abortion patients).

abortion is no higher at any point in gestation than is the risk of death from childbearing. Willard Cates et al., *Mortality From Abortion and Childbirth: Are the Statistics Biased?*, 248 J.A.M.A. 192, 196 (1982); Christopher Tietze & Stanley Henshaw, The Alan Guttmacher Institute, *Induced Abortion: A World Review* 110 (1986). Still, "for each week of delay, the risk of complications after legally induced abortions increases approximately 20%; the risk of death increases approximately 50%." American Public Health Ass'n, *APHA Recommended Program Guide for Abortion Services (Revised 1979)*, 70 Am. J. Pub. Health 652, 654 (1980). *See also* David A. Grimes, *Second Trimester Abortions in the United States*, 16 Fam. Plan. Persp. 260, 263 (1984) (terminations performed at 16 or more weeks gestation are 24 times as likely to result in fatal complications as procedures performed at eight or fewer weeks).[18] At the same time, however, complications are less likely to become fatal or result in sterility if they are monitored and treated. *See* J. Joshua Kopelman & Gordon Douglas, *Abortions by Resident Physicians in a Municipal Hospital Center*, 111 Am. J. Obstetrics & Gynecology 666, 670-71 (1971). Yet most nonresident patients returned home immediately following their procedures and thus did not have access to follow-up care.

Indeed, the most "important problem concerning nonresidents [was] the lack of follow-up with regard to possible complications." *Surveillance of the Abortion Program*, *supra*, at 294. A few women died after receiving abortions in New York City because they had returned to their home states where follow-up care either was not readily available or was available only for those who risked criminal prosecution. *See* Jean Pakter et al., *Impact of Liberalized Abortion Law in New York*

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[18] For abortions performed at seven or eight weeks of pregnancy, the risk of developing major complications is almost 0.2 per 100. At 13 or 14 weeks, that risk increases to about 0.6 per 100. And at more than 20 weeks, 1.5 per 100 patients develop major complications. The Alan Guttmacher Institute, *Abortion and Women's Health: A Turning Point for America?* 32 (1990).

City on Deaths Associated with Pregnancy: A Two-Year Experience, 49 Bull. N.Y. Acad. Med. 804, 811 (1973) (hereinafter *Impact of Liberalized Abortion Law in New York*) (summarizing cases of four nonresident City abortion patients). In this sense, the pre-*Roe* system of shuttling women across state lines for health care helped sign some women's death certificates and ensured that others suffered prolonged health complications.

City hospitals and clinics eventually were successful in addressing many of the health care problems stemming from their new patient population. The waiting time for abortions decreased, an increasingly higher proportion of terminations were performed before 13 weeks gestation, and the rate of complications from the procedures declined.[19] The new law therefore at least partially achieved its intended goal: women were provided with the right to safe and legal abortions, and the incidence of mortality and morbidity associated with abortions in New York declined as a result. *See* Jane E. Brody, *Decline in Maternal Death Rate Linked to Liberalized Abortion*, N.Y. Times, Oct. 13, 1971, at A13 (1971 maternal mortality rate lowest in City's history); *Impact of the Liberalized Abortion Law in New York City*, *supra*, at 807-808. But this success was not without a price -- both to the entire City health care system and to the health of women who were forced to travel long distances to the City. And the success was far from perfect: for the thousands of women who could not afford to travel --

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[19] For example, New York City municipal hospitals reported 23 admissions for incomplete abortion for every 100 deliveries performed in 1969; by 1971, less than a year after New York liberalized its abortion law, the number of admissions for incomplete abortions fell to 13 per 100 births. Institute of Medicine, *Legalized Abortion And The Public Health* 65 (1975); *see also* Harris et al., *supra* note 9 at 411 (abortions performed at increasingly early stages of gestation), and at 415-16 (complications decreased); John Sibley, *69,000 Abortions in 6 Months Here*, N.Y. Times, Feb. 7, 1971, at 70 (abortions performed at earlier stage of gestation; waiting periods for abortions decreased).

disproportionately women of color -- New York's law afforded no hope.

III. A SUPREME COURT RULING UPHOLDING PENNSYLVANIA'S ABORTION RESTRICTIONS WOULD USHER IN A NEW ERA OF ENDANGERMENT OF WOMEN'S HEALTH.

The number of out-of-state women forced to seek reproductive health care in the City decreased immediately following this Court's ruling in *Roe*. In one year, from 1972 to 1973, the distribution of induced terminations of pregnancy by residence was completely reversed; in 1972 over 60% of the patients were nonresidents, but in 1973, 60% were residents, although the number of residents having abortions in the City remained constant. *See* New York City Dep't of Health, Table I, *supra*; New York State Dep't of Health, *Report of Induced Terminations in New York State*, *supra*, at 1. From then on, while the number of resident abortion patients stabilized, the percent of out-of-state women seeking abortions in New York City continued to decline: to 23% in 1975, 18% in 1976, 10% in 1980, and 6.7% in 1985.[20] *See* New York City Dep't of Health 1977 Press Release, *supra*, at table I; New-York City Dep't of Health, *Report of Induced Terminations By Residence, New York City 1980-1989*, table 9 (Jan. 22, 1991).

The number of abortions performed on Pennsylvania women in New York City declined correspondingly, from nearly 12,000 in 1972, to 1,618 in 1974, to 761 in 1976, and to fewer than 300 in 1989. New York City Dep't of Health 1977 Press Release, *supra*, at 1; New York State Dep't of Health,

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[20] Today, new restrictive abortion laws passed in neighboring states have contributed to a noticeable increase in nonresident abortions. *See* New York City Dep't of Health, *Report of Induced Terminations By Residence, New York City 1980-1989*, table 9 (Jan. 22, 1991) (setting 1989 nonresident rate at 7.6%). *See generally* Virginia G. Cartoof and Lorraine V. Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 76 Am. J. Pub. Health 397, 397 (1986) (more than 1,800 minors residing in Massachusetts traveled to other states for abortions in first two years of Massachusetts' parental consent law).

Induced Abortions Recorded in New York State: 1987-1989 with Five Year Summary, table 28 (1991). Nationally, the impact of *Roe* was even more evident. In 1972, 44 percent of all abortions in the United States were obtained outside a woman's state of residence; by 1974, just one year after *Roe*, only 10 percent of women having an abortion were forced to travel out of state for the procedure. *Digest*, 8 Fam. Plan. Persp. 70, 70-71 (1976) (summary of Centers for Disease Control, *Abortion Surveillance, Annual Summary, 1974)* (hereinafter *Digest of 1974 CDC Abortion Surveillance*); *see also* Edward Weinstock et al., *Abortion and the Need for Services in the United States, 1974-1975*, 8 Fam. Plan. Persp. 58, 62-63 (1976) (state-by-state summary of redistribution of abortion services post-*Roe*).

As an immediate and direct result of legalization, the incidence of mortality from illegal abortions fell to nearly zero. *See* New York City Dep't of Health 1977 Press Release (no fatalities reported as result of illegal abortion 1973-1977); *Impact of the Liberalized Abortion Law in New York*, *supra*, at 815. The rate of complication from both legal and illegal abortions also declined, because procedures were performed both under safer conditions and at an earlier stage of gestation. *See* Christopher Tietze, *The Public Health Effects of Legal Abortions in the United States*, 16 Fam. Plan Persp. 26 (1984); Grimes, *supra*, at 263. A retreat from the principles set forth in *Roe* would only reverse this trend. Such a regression would once again endanger women's health and would now, perhaps more than ever, hamper the City's ability to meet the health care needs of residents and nonresidents alike.

A. The Influx Of Nonresident Women Seeking Abortions Will Burden An Already Overextended City Health Care System, At Great Cost To Women's Health.

The City of New York is confronting a growing health and social crisis which would be exacerbated by any new obstacles to reproductive freedom, including any changes that would increase the City's patient population. This crisis is evidenced by the following facts:

-- 2.3% of all babies born in 1990 at facilities operated by the New York City Health and Hospitals Corporation ("HHC") tested positive for HIV.

-- 5.2% of mothers who gave birth at HHC facilities in 1990 were narcotics addicts.

-- Nearly 50,000 children are currently in the City's foster care program because their parents are unable to care for them.

-- In fiscal year 1991, the City filed more than 8,000 neglect petitions against the parents or foster parents of nearly 17,000 abused and/or neglected children.

-- In 1990, nearly 16% of all births at HHC facilities were to teens.

-- At least a third of the women giving birth at HHC facilities in 1990 had sought little or no prenatal care.

-- Over a quarter of all babies born in HHC facilities in 1990 were low birth weight.

See New York City Health & Hospitals Corp., Office of Women's Health, *Selected Characteristics of Live Births: 1990* (Nov. 1991); New York State Dep't of Health, *AIDS in New York State* (1990); Memorandum of Josie Morales, Office of Women's Health, New York City Health & Hospitals Corp., to Meredith Feinman (Dec. 6, 1991).

Given its commitment to reproductive freedom, the City, through HHC, has made abortion available to all women, regardless of ability to pay.[21] Indeed, in January 1990, the City

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[21] "[N]o woman is turned away if she is unable to pay in full or in part for an abortion." Letter from Raymond J. Baxter, Acting President, New York City Health & Hospitals Corp., to Pat Maher (Feb. 26, 1990). In HHC hospitals, a down payment for abortion services

(Footnote Continued)

increased access to abortions by implementing a new policy of providing medically necessary abortions, free of charge, to women whose incomes lie between 100% and 185% of the poverty level. As HHC announced in introducing the plan: "This policy is entirely in concert with HHC's public mission -- to make health care available to all, regardless of ability to pay." New York City Health and Hospitals Corp., *Announcement of Policy to Fellow Providers* (Jan. 12, 1990).[22] Since the State of New York will not share in the cost of abortion procedures under this program, the City has borne the full expense -- nearly $1 million annually.

The inevitable influx of out-of-state patients, should restrictive abortion laws be permitted, would exacerbate the City's health care crisis and threaten the City's current efforts to meet the needs of its residents. An increased abortion patient load in New York City hospitals will increase the delay in scheduling abortion procedures. The average wait for an abortion in HHC facilities is already 11 *working* days, with a range up to 28 *working* days. Four hospitals have a backlog of more than four weeks. New York City Health & Hospitals

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(Footnote Continued)
may be requested, but not demanded, before services are rendered. Also, a deferréd payment schedule based on financial capabilities can be arranged. Still, "[u]nder no circumstances are services to be delayed, however, pending payment arrangements." *Id.*

[22] In supporting federal legislation to establish universal access to health care and to reform the health care delivery system, HHC recently reaffirmed its "mission [to] provide[] universal access to all" and its recognition that "quality appropriate health care is a human right." New York City Health & Hospitals Corp., *HHC Resolution Adopting a Corporate Policy Supporting Federal Legislation tō Establish Universal Access to Health Care and to Reform the Health Care Delivery System* 1 (Nov. 1991). *See also* Dr. James R. Dumpson, Chairman, HHC Board of Directors, HHC's Annual Public Meeting, Manhattan/Bronx Session (Nov. 6, 1991) (speech setting forth HHC's commitment to low-income New Yorkers).

Corp., *Waiting Time for Abortion Services, 1990 HHC Survey Results* (Sept. 1990). Any further increase in waiting time will preclude some women from having abortions altogether; it will subject others to later procedures, at greater danger to their health. *See* American Public Health Ass'n, *supra*, at 654.

Moreover, as in pre-*Roe* days, the health of women who live in states with restrictive laws will suffer. Many of the women who are not able to travel across state lines for reproductive health care will die or be sterilized from unsterile, illegal abortions. And the women who can travel will have more dangerous abortions, because the procedures will be performed at a later state of gestation and follow-up care will not be available. *See, e.g.*, Grimes, *supra*, at 261, 265. In these times of crisis, the City will be strained in meeting the needs of these additional patients. Pennsylvania can set forth no compelling state interest that must be advanced through imposition of such a great burden on women's lives and health.

B. Both Resident And Nonresident Women Of Color Will Be Harmed The Most If *Roe* Is Not Reaffirmed.

The burden of restrictive abortion laws will unjustly continue to rest most heavily on women of color. Nonresident women of color are still more likely to be low-income and, thus, less able than white women to travel to other states for reproductive health care. As noted previously, of the 350,000 women who traveled to New York City for abortions between 1970 and 1973, only 10% were women of color, notwithstanding that women of color constituted over a third of the population of abortion recipients. *See Digest of 1974 CDC Abortion Surveillance*, *supra*, at 70-71.[23] Since women of color remain disproportionately poor today, there is no reason to

[23] Today, although a smaller number of nonwhite, pregnant women have abortions than white women, the rate of abortions per 1,000 women is twice as high for nonwhite women than for white women. *See* Stanley K. Henshaw, *Characteristics of U.S. Women Having Abortions*, 19 Fam. Plan. Persp. 5, 7 (1987).

believe that this statistic would not repeat itself if the principles set forth in *Roe* are not reaffirmed.[24] Just as in pre-*Roe* days, then, many nonresident women of color facing unwanted pregnancies will be forced to bear unwanted children or be compelled to turn to dangerous, back alley abortionists for medical care.

Low-income communities -- which are disproportionately nonwhite -- also will be impacted the most by any further strains on the City health care system. *See* Memorandum from Josie Morales, Office of Women's Health, New York City Health & Hospitals Corp., to Meredith Feinman (Feb. 12, 1992) (City's municipal hospital population is 84% nonwhite). The shortage of physicians is already particularly acute and the backlog for abortions longer in hospitals serving low-income and minority populations. But, at the same time, these are the populations at highest risk for unwanted pregnancy. *See* Stanley Henshaw, *Characteristics of U.S. Women Having Abortions, 1987*, 23 Fam. Plan. Persp. 75, 77 (1991).

That low-income and minority New Yorkers face a dire health care crisis is illustrated by the following facts:

- -- In nine low-income minority communities in the City, only 701 non-hospital based primary care physicians are available to serve 1.7 million residents; only 28 of these physicians are able to offer their patients the minimum elements of a primary health care network.
- -- Compared to New York City as a whole, the death rate for people aged 15-44 in Harlem is 240 percent higher; for those aged 44-65 years of age, it is 128 percent higher. These are not deaths that arose from violence and drugs; the leading killers in Harlem are cancer, heart

[24] Indeed, studies confirm that women of color are more likely to be deterred from having safe, legal abortions even today if they must travel long distances for health care. *See* James D. Shelton et al., *Abortion Utilization: Does Travel Distance Matter?*, 8 Fam. Plan. Persp. 260, 262 (1976).

attack, hypertensive disease, diabetes, and bronchitis.

-- In Central Harlem, the hypertension death rate is 1,000 percent higher than in the City as a whole.

-- In low-income communities in the City, the infant mortality rate is at least double and in some cases more than triple the infant mortality rate in other New York City communities.

Christel Brellochs and Anjean B. Carter, Community Services Society, *Building Primary Health Care Services in New York City's Low Income Communities* 2, 21 (1990) (survey of health care in City's low-income communities).

The current economic recession and cuts in state and federal funding have put the City in the position of being asked to provide more services with fewer resources. The City's ongoing efforts to enhance the level of care provided by City hospitals will be hampered by any increased burden, including an influx of out-of-state abortion patients. In this sense, the overruling of *Roe* would only result in the further medical disenfranchisement of the patients who already have the least access to health care.

CONCLUSION

Should this Court sanction restrictive abortion legislation, it will allow the endangerment of *all* women's lives and health, but particularly those of low-income women and women of color. We cannot afford a retreat to the past. For the reasons stated above, this Court should reaffirm the principles set forth in *Roe v. Wade*.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *et al.*,
Petitioners,

v.

ROBERT P. CASEY, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, THE AMERICAN MEDICAL WOMEN'S ASSOCIATION, THE AMERICAN PSYCHIATRIC ASSOCIATION, THE AMERICAN PUBLIC HEALTH ASSOCIATION, THE ASSOCIATION OF REPRODUCTIVE HEALTH PROFESSIONALS, THE NATIONAL LEAGUE FOR NURSING, AND THE NATIONAL MEDICAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICI CURIAE*	1
MEDICAL BACKGROUND	1
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. THIS COURT SHOULD REAFFIRM THAT A WOMAN'S RIGHT TO CHOOSE WHETHER OR NOT TO CARRY A PREGNANCY TO TERM IS A FUNDAMENTAL RIGHT PROTECTED AGAINST STATE INTERFERENCE BY THE GUARANTEE OF LIBERTY IN THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT	6
A. A Woman's Right To Choose Whether Or Not To Carry A Pregnancy To Term Is A Fundamental Right	7
B. This Court Should Reaffirm That State Abortion Laws That Depart From Accepted Medical Practice And Increase Health Risks To Pregnant Women Are Unconstitutional	9
C. This Court Should Not Adopt The Undue Burden Analysis Employed By The Court Below	13
II. PENNSYLVANIA'S HUSBAND-NOTIFICATION, INFORMED CONSENT, PARENTAL CONSENT, MEDICAL EMERGENCY, AND DISCLOSURE REQUIREMENTS ARE UNCONSTITUTIONAL	16
A. Husband-Notification	16
1. Husband-Notification Severely Burdens A Woman's Right To Obtain An Abortion From Her Physician	17

TABLE OF CONTENTS—Continued

	Page
2. Husband-Notification Does Not Narrowly Serve A Compelling State Interest	20
B. Informed Consent Provisions	21
C. Parental Informed Consent	24
D. Exception For Medical Emergencies	25
E. Reporting And Public Disclosure Requirements	27
F. Criminal Penalties	28
CONCLUSION	30

TABLE OF AUTHORITIES

CASES	Page
In re A.C., 573 A.2d 1235 (D.C. 1990)	12
Addington v. *Texas* ,441 U.S. 418 (1979)	29
Allgeyer v. *Louisiana*, 165 U.S. 578 (1897)	8
Aptheker v. *Secretary of State*, 378 U.S. 500 (1964)	26
Bates v. *Little Rock*, 361 U.S. 516 (1960)	13
Beal v. *Doe*, 432 U.S. 438 (1977)	11
Bellotti v. *Baird*, 443 U.S. 622 (1979)	14, 17, 20
Bonner v. *Moran*, 126 F.2d 121 (D.C. Cir. 1941)	11
Bowen v. *Georgetown Univ. Hosp.*, 488 U.S. 204 (1988)	26
Brown v. *Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982)	28
Canterbury v. *Spence*, 464 F.2d 772 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972)	12, 21
Carey v. *Population Servs. Int'l*, 431 U.S. 678 (1977)	13, 14, 28
City of Akron v. *Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416 (1983)	*passim*
Cleveland Bd. of Educ. v. *LaFleur*, 414 U.S. 632 (1974)	7
Cobbs v. *Grant*, 502 P.2d 1 (Cal. 1972)	22
Colautti v. *Franklin*, 439 U.S. 379 (1979)	10, 16, 26, 27
Connecticut v. *Menillo*, 423 U.S. 9 (1975)	10
Cruzan v. *Director, Missouri Dep't of Health*, 110 S. Ct. 2841 (1990)	9
Curran v. *Bosze*, 566 N.E.2d 1319 (Ill. 1990)	11
Doe v. *Bolton*, 410 U.S. 179 (1972)	11, 28
Eisenstadt v. *Baird*, 405 U.S. 438 (1972)	8, 28
Fosmire v. *Nicoleau*, 551 N.E.2d 77 (N.Y. 1990)	12
Garcia v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)	15
Griswold v. *Connecticut*, 381 U.S. 479 (1965)	8, 20
Harris v. *McRae*, 448 U.S. 297 (1980)	11
Hodgson v. *Minnesota*, 110 S. Ct. 2926 (1990)	17
Jefferson v. *Griffen Spalding County Hosp. Auth.*, 274 S.E.2d 457 (Ga. 1981)	12
Jehovah's Witness v. *King County Hosp.*, 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968)	12

TABLE OF AUTHORITIES—Continued

	Page
Kent v. *Dulles*, 357 U.S. 116 (1958)	8
Kolender v. *Lawson*, 461 U.S. 352 (1983)	27
Little v. *Little*, 576 S.W.2d 493 (Tex. Civ. App. 1979)	11
Loving v. *Virginia*, 388 U.S. 1 (1967)	8, 13
Maher v. *Roe*, 432 U.S. 464 (1977)	11
McFall v. *Shimp*, 10 Pa. D. & C.3d 90 (County Ct. Allegheny 1978)	11, 12
Meyer v. *Nebraska*, 262 U.S. 390 (1923)	7
NAACP v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958)	28
Palko v. *Connecticut*, 302 U.S. 319 (1937)	9
Parham v. *J.R.*, 442 U.S. 584 (1979)	29
Paul v. *Davis*, 424 U.S. 693 (1976)	8
Pension Benefit Guar. Corp. v. *R.A. Gray & Co.*, 467 U.S. 717 (1984)	14
In re Pescinski, 226 N.W.2d 180 (Wis. 1975)	11
Pierce v. *Society of Sisters*, 268 U.S. 510 (1925)	7
Planned Parenthood v. *Danforth*, 428 U.S. 52 (1976)	11
Poe v. *Ullman*, 367 U.S. 497 (1961)	7, 8
Prince v. *Massachusetts*, 321 U.S. 158 (1944)	21
Public Health Trust v. *Wons*, 541 So.2d 96 (Fla. 1989)	12
Pullman-Standard v. *Swint*, 456 U.S. 273 (1982)	28
In re Richardson, 284 So.2d 185 (La. Ct. App.), *cert. denied*, 284 So.2d 338 (La. 1973)	11
Roberts v. *Wood*, 206 F. Supp. 579 (S.D. Ala. 1962)	22
Rochin v. *California*, 342 U.S. 165 (1952)	9
Roe v. *Wade*, 410 U.S. 113 (1973)	*passim*
Schloendorff v. *Society of New York Hosp.*, 105 N.E. 92 (N.Y. 1914)	12
Schmerber v. *California*, 384 U.S. 757 (1966)	9
Schware v. *Board of Bar Examiners*, 353 U.S. 232 (1957)	8
Shapiro v. *Thompson*, 394 U.S. 618 (1969)	8
Simopoulos v. *Virginia*, 462 U.S. 506 (1983)	10
Skinner v. *Oklahoma*, 316 U.S. 535 (1942)	8

TABLE OF AUTHORITIES—Continued

	Page
Snyder v. *Massachusetts*, 291 U.S. 97 (1934)	9
Stanley v. *Georgia*, 394 U.S. 557 (1969)	13
Strunk v. *Strunk*, 445 S.W.2d 145 (Ky. 1969)	11
Thornburgh v. *American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986)	*passim*
Vasquez v. *Hillery*, 474 U.S. 254 (1986)	15, 16
Webster v. *Reproductive Health Servs.*, 492 U.S. 490 (1989)	6, 11
Winston v. *Lee*, 470 U.S. 753 (1985)	9
Woolley v. *Henderson*, 418 A.2d 1123 (Me. 1980)	22

STATUTES AND RULES

18 Pa. Cons. Stat. Ann. § 3203	25
18 Pa. Cons. Stat. Ann. § 3205	21
18 Pa. Cons. Stat. Ann. § 3205(a)(2)	23
18 Pa. Cons. Stat. Ann. § 3205(a)(2)(i)-(iii)	22
18 Pa. Cons. Stat. Ann. § 3206	24
18 Pa. Cons. Stat. Ann. § 3209	17
18 Pa. Cons. Stat. Ann. § 3209(a)	20
35 Pa. Cons. Stat. Ann. § 6923	25
Fed. R. Civ. P. 52(a)	28

OTHER AUTHORITIES

Amaro et al., *Violence During Pregnancy and Substance Use*, 80 Am. J. Pub. Health 575 (1990)	18
American College of Obstetricians & Gynecologists, *The Battered Woman* (1989)	18
American College of Obstetricians & Gynecologists, *Standards For Obstetric-Gynecologic Services* (7th ed. 1989)	24
American Medical Association Council on Scientific Affairs, *Violence Against Women* (1991)	18
T. Beauchamp & J. Childress, *Principles of Biomedical Ethics* (3d ed. 1989)	21
Binkin, *Trends in Induced Legal Abortion Morbidity and Mortality*, 13 Clin. Obstet. Gynec. 83 (1986)	1
Binkin et al., *Illegal-Abortion Deaths in the United States: Why Are They Still Occurring?*, 14 Fam. Plann. Persp. 163 (1982)	2

TABLE OF AUTHORITIES—Continued

	Page
Bracken et al., *Hospitalization for Medical-Legal and Other Abortions in the United States 1970-1977*, 72 Am. J. Pub. Health 30 (1982)	3
Buehler et al., *The Risk of Serious Complications from Induced Abortion: Do Personal Characteristics Make a Difference?*, 153 Am. J. Obstet. Gynec. 14 (1985)	3
Cates & Rochat, *Illegal Abortions in the United States: 1972-74*, 8 Fam. Plann. Persp. 86 (1976)	2, 3
Cates et al., *The Effect of Delay and Method Choice on the Risk of Abortion Morbidity*, 9 Fam. Plann. Persp. 266 (1977)	3
J. Cosgriff & D. Anderson, *The Practice of Emergency Care* (2d ed. 1984)	25
D. Danforth & J. Scott, *Obstetrics & Gynecology* (5th ed. 1986)	3
Dorfman, *Maternal Mortality in New York City, 1981-1983*, 76 Obstet. & Gynec. 317 (1990)	2
R. Gold, *Abortion and Women's Health* (1990)	1, 2
Helton et al., *Battered and Pregnant: A Prevalence Study*, 77 Am. J. Pub. Health 1337 (1987)	18
W. Hern, *Abortion Practice* (1984)	2
Koonin et al., *Abortion Surveillance, United States, 1988*, 40 Morbid. & Mortal. Weekly Rep't 15 (July 1991)	4
Noronha, *Neurological Disorders During Pregnancy and the Puerperium*, 12 Clin. Perinat. 695 (1985)	4
L. Ohlin & M. Tonry, *Family Violence* (1989)	18
Polgar & Fried, *The Bad Old Days: Clandestine Abortions Among the Poor in New York City Before Liberalization of the Abortion Law*, 8 Fam. Plann. Persp. 125 (1976)	2
1 President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Making Health Care Decisions* (1982)	21

TABLE OF AUTHORITIES—Continued

	Page
Restatement (Second) of Torts §§ 314-15 (1965)	11
Rovinsky & Guttmacher's Medical, Surgical, & Gynecological Complications of Pregnancy (S. Cherry et al., 3d ed. 1985)	3
Strauss & Gelles, *Societal Change and Change in Family Violence from 1975 to 1985 as Revealed by Two National Surveys*, 48 J. Marriage & Family 465 (1986)	18
C. Tietze & S. Henshaw, *Induced Abortion: A World Review, 1986* (6th ed. 1986)	3
Williams & Bitran, *Cancer & Pregnancy*, 12 Clin. Perinat. 609 (1985)	4
Williams Obstetrics (F. Cunningham et al., 18th ed. 1989)	1, 3

INTEREST OF THE *AMICI CURIAE*

Amici curiae are seven national organizations of physicians and other health care professionals. Each *amicus* is dedicated to promoting public health by maintaining the highest professional standards and providing or ensuring the provision of quality health care.[1]

Amici's interest in this case stems from their concern about the profound impact that recently enacted state abortion laws will have on the lives and health of the female patients that their members serve. As individuals, *amici*'s members hold differing views on the religious and philosophical issues that abortion raises. They agree, however, that when a patient seeks medical care and treatment, such as abortion, state laws should not interfere with a health care provider's ability to exercise his or her best medical judgment in treating that patient. Because the Pennsylvania statute challenged here seriously interferes with a woman's ability, in consultation with her physician, to obtain an abortion, and because the standard of review adopted here will affect the constitutionality of other statutes affecting the lives and health of *amici*'s patients, *amici* wish to present their views.[2]

MEDICAL BACKGROUND

Elective abortion, defined as the termination of a pregnancy before the fetus has reached the stage of viability, is one of the most common medical procedures performed in the United States today.[3] Approximately 1.5 million American women obtain an abortion each year.[4]

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[1] *See* Appendix A for a brief description of each *amicus*.

[2] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk of the Court.

[3] *Williams Obstetrics* 501 (F. Cunningham et al., 18th ed. 1989); Binkin, *Trends in Induced Legal Abortion Morbidity and Mortality*, 13 Clin. Obstet. Gynec. 83, 83 (1986). Viability refers to the point at which the fetus would have a reasonable potential for survival if it were removed from the pregnant woman's uterus. *Williams Obstetrics* at 501.

[4] R. Gold, *Abortion and Women's Health* 11 (1990).

When performed correctly by trained and experienced physicians, abortion is a relatively safe procedure. Indeed, it is far safer than childbirth: The risk of dying from an abortion is currently about one-tenth the risk of dying during childbirth.[5] Illegal abortions, however, are substantially riskier than legal abortions. Prior to this Court's decision in *Roe* v. *Wade*, 410 U.S. 113 (1973), complications from illegal abortions constituted a "serious public health problem, especially for the poor and minorities."[6] Although precise data are unavailable, statistics from this era suggest that the overall death rate from illegal abortions was about eight times greater than that for legal abortions,[7] and that the rate was even higher among minority women.[8] The incidence of non-fatal complications from illegal abortions also was extraordinary.[9]

The high mortality rate for illegal abortions is not surprising given the techniques that many women used—and in some cases, continue to use—to abort their fetuses.[10] These include ingesting Chlorox, turpentine or massive doses of quinine, or inserting such objects as coat hangers, knitting needles, or tree bark into their uteruses.[11]

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[5] R. Gold at 28-29; Dorfman, *Maternal Mortality in New York City, 1981-1985*, 76 Obstet. & Gynec. 317, 320 (1990).

[6] W. Hern, *Abortion Practice* 21 (1984).

[7] Cates & Rochat, *Illegal Abortions in the United States: 1972-74*, 8 Fam. Plann. Persp. 86, 91-92 (1976).

[8] R. Gold at 5 (minority women twelve times more likely than white women to die from such abortions).

[9] In 1962, for example, nearly *1,600* women were admitted to one New York City hospital for treatment of non-fatal complications of abortions. *Id.* at 6.

[10] Even after *Roe* some women continue to seek illegal abortions because legal abortions are either too expensive or not readily available or because of a variety of cultural, religious or personal reasons. Binkin et al., *Illegal-Abortion Deaths in the United States: Why Are They Still Occurring?*, 14 Fam. Plann. Persp. 163 (1982).

[11] Polgar & Fried, *The Bad Old Days: Clandestine Abortions Among the Poor in New York City Before Liberalization of the Abortion Law*, 8 Fam. Plann. Persp. 125, 126 (1976).

Because legal abortions are so much safer than illegal ones, abortion-related deaths and other complications dropped sharply after the widespread legalization of abortion.[12] However, such serious medical problems as infection, hemorrhage, perforation of the uterus, or even death, still complicate about 0.5% of all abortions.[13] While the risk of such complications is relatively small, "*any* delay increases the risk of complications to a pregnant woman who wishes an abortion. Moreover, this risk appears to increase continuously . . . as the length of gestation increases."[14] After eight weeks of gestation, the risk of maternal death *doubles* with every two weeks of delay,[15] and the risk of other health complications increases at a rate of about 20% per week.[16]

Delays—and the concomitant increase in risk—are of particular concern for women with pre-existing medical conditions that may be exacerbated by pregnancy.[17] De-

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[12] For example, 39 deaths from unlawful abortions were reported nationwide in the year preceding this Court's decision in *Roe*, while only five deaths were reported in the following year. Cates & Rochat at 87. Similarly, non-fatal complications of abortion also declined after legalization. *See, e.g.*, Bracken et al., *Hospitalization for Medical-Legal and Other Abortions in the United States 1970-1977*, 72 Am. J. Pub. Health 30, 30 (1982) (hospital admissions for septic abortions in California dropped by 68-75% following liberalization of that state's abortion law in 1967).

[13] Buehler et al., *The Risk of Serious Complications from Induced Abortion: Do Personal Characteristics Make a Difference?*, 153 Am. J. Obstet. Gynec. 14, 16 (1985).

[14] Cates et al., *The Effect of Delay and Method of Choice on the Risk of Abortion Morbidity*, 9 Fam. Plann. Persp. 266, 268 (1977); Buehler et al. at 16.

[15] *Williams Obstetrics* at 506.

[16] C. Tietze & S. Henshaw, *Induced Abortion: A World Review, 1986* 103 (6th ed. 1986).

[17] These conditions include congenital malformations of the heart and its valves, cancer, chronic renal failure, multiple sclerosis, asthma, arthritis, inflammatory bowel disease and epilepsy. *See* D. Danforth & J. Scott, *Obstetrics & Gynecology* 494-97 (5th ed. 1986); *Rovinsky & Guttmacher's Medical, Surgical & Gynecological*

lays are also problematic for pregnant adolescents. Unlike older women, many teenagers—because of irregular menses, lack of experience with health care facilities, and difficulty in paying for medical care—wait until late in their pregnancies, often well into their second trimester, before seeking any medical care.[18]

SUMMARY OF ARGUMENT

I.

The threshold question in this case concerns the standard of review. In *Roe* v. *Wade*, 410 U.S. 113 (1973), *City of Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), and *Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), this Court held that strict scrutiny applies to all statutes that interfere with a woman's right, in consultation with her physician, to choose whether or not to terminate her pregnancy. The court of appeals, however, held that strict scrutiny should apply only to state regulations that severely interfere with or present absolute obstacles to a woman's right to choose an abortion. Pet. App. 14a, 30a.

This Court should put to rest the current confusion over the standard of review by reexamining and then reaffirming its prior holdings that a woman has a fundamental right to decide whether or not to have an abortion. Recognition of this right follows logically and ineluctably from this Court's decades-old recognition that the liberty protected from state interference by the Fourteenth Amendment includes the right to make personal choices regarding family life, marriage, and procreation. This

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Complications of Pregnancy 73 (S. Cherry et al., 3d ed. 1985); Williams & Bitran, *Cancer & Pregnancy*, 12 Clin. Perinat. 609 (1985); Noronha, *Neurological Disorders During Pregnancy and the Puerperium*, 12 Clin. Perinat. 695 (1985).

[18] Koonin et al., *Abortion Surveillance, United States, 1988*, 40 Morbid. & Mortal. Weekly Rep't 15, 17 (July 1991).

Court should also reaffirm that states may not regulate that right in ways that increase the health risks that pregnant women face.

None of the objections to *Roe* provides a basis for overturning two decades of constitutionally required protection for women's health. The principle that the state may not force a woman to accept increased health risks in order to further the state's interest in preserving fetal life is not arbitrary. To the contrary, that principle is fully supported by basic common law principles respecting the autonomy and bodily integrity of each individual. Nor is there any reason to think that reversing *Roe* will extricate federal courts and this Court from the need to review state abortion legislation. In fact, altering the standard of review will simply initiate another protracted legal battle over which new restrictions are constitutional.

II.

By enacting the Abortion Control Act Amendments of 1989, Pennsylvania has again passed a statute that will delay, discourage, and defeat women in their attempt to obtain a medically provided abortion. The specific provisions at issue here place a variety of obstacles—notification, consent, waiting periods and public disclosure—in the path of a woman seeking an abortion. Each will operate to increase the risks to the health of pregnant women. As was the case with Pennsylvania's previous abortion amendments, "[c]lose analysis . . . shows that they wholly subordinate constitutional privacy interests and concerns with maternal health in an effort to deter a woman from making a decision that, with her physician, is hers to make." *Thornburgh*, 476 U.S. at 759. Indeed, these provisions violate our most basic notions of liberty by subjecting individuals to significant health risks solely to further the state's interest in protecting potential life. Each therefore is unconstitutional.

ARGUMENT

I. THIS COURT SHOULD REAFFIRM THAT A WOMAN'S RIGHT TO CHOOSE WHETHER OR NOT TO CARRY A PREGNANCY TO TERM IS A FUNDAMENTAL RIGHT PROTECTED AGAINST STATE INTERFERENCE BY THE GUARANTEE OF LIBERTY IN THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

In *Roe* v. *Wade*, 410 U.S. 113, 153 (1973), this Court held that the "Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . encompass[es] a woman's decision whether or not to terminate her pregnancy." Accordingly, this Court held that state laws that interfere with this right are subject to strict scrutiny. *Id.* at 162-64. In the nearly two decades since *Roe* was decided, this Court has repeatedly reaffirmed this fundamental holding.[19]

More recently, however, members of the Court, in separate and plurality opinions, have questioned the trimester-based framework set forth in *Roe* as applied to particular state laws.[20] Relying on these opinions, the court below held that "the strict scrutiny legal standard endorsed by the Court in *Roe*, *Akron*, and *Thornburgh*" is no longer the applicable standard of review. Pet. App. 24a. Instead, the court held, the correct standard is one that applies strict scrutiny only to those state regulations that "impose an undue burden [on a woman's abortion decision] and rational basis review to those which do not." *Id.* at 30a.

This Court should reaffirm that a woman's right to decide whether or not to carry her pregnancy to term is a fundamental right protected against state interference

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[19] *E.g.*, *Thornburgh*, 476 U.S. at 747; *Akron*, 462 U.S. at 416.

[20] *See, e.g.*, *Webster* v. *Reproductive Health Servs.*, 492 U.S. 490, 517-21 (1989) (opinion of Rehnquist, C.J.); *id.* at 525-31 (opinion of O'Connor, J.); *id.* at 532-37 (opinion of Scalia, J.).

by the guarantee of liberty in the Due Process Clause of the Fourteenth Amendment. This Court also should reaffirm that states may not regulate that right in ways inconsistent with accepted medical practice. Less stringent standards that allow states to interfere with this fundamental right are inconsistent with basic constitutional principles and will only provoke a new round of constitutional line-drawing. States have no interest sufficiently compelling to deny pregnant women the personal liberty enjoyed by all other persons to obtain medical treatment and to preserve their health free from state interference.

A. A Woman's Right To Choose Whether Or Not To Carry A Pregnancy To Term Is A Fundamental Right.

Prior to *Roe*, the Court had not considered the constitutionality of abortion laws. But like any proper "decision of an apparently novel claim," *Roe* took "'its place in relation to what went before and further [cut] a channel for what [was] to come.'" *Poe* v. *Ullman*, 367 U.S. 497, 544 (1961) (Harlan, J., dissenting) (citation omitted).

Roe followed, in the first instance, "[t]his Court['s] . . . long recogni[tion] that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632, 639-40 (1974). By 1923, this Court had recognized that "the liberty thus guaranteed . . . denotes not merely freedom from bodily restraint but also the right . . . to marry, establish a home and bring up children." *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923). Over the five decades between *Meyer* and *Roe*, the Court invalidated state laws that infringed the right to choose whether to send one's children to a private school,[21] to

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[21] *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535 (1925).

marry someone of one's choice,[22] to refuse sterilization,[23] and to obtain and use contraceptives.[24]

At the core of the liberty protected from state interference, then, has been "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972).[25] The right in question in *Roe*, "a woman's decision whether or not to terminate her pregnancy," 410 U.S. at 153, is inextricably part of the web of intensely personal choices in "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education"[26] that the Court had previously protected.

The right recognized in *Roe* also has another important common law and constitutional antecedent. It follows directly from the common law tradition that protects the autonomy of each individual to decide what medical treatments to accept or to refuse. "Before the turn of the century, this Court observed that '[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or in-

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[22] *Loving* v. *Virginia*, 388 U.S. 1 (1967).

[23] *Skinner* v. *Oklahoma*, 316 U.S. 535, 536 (1942) (state law infringes on "the right to have offspring").

[24] *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) (married couples); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972) (any individual); *see also Poe* v. *Ullman*, 367 U.S. 497, 539-55 (1961) (Harlan, J., dissenting).

[25] Additional rights encompassed within the liberty protected by the Fourteenth Amendment include, *inter alia*, the right to travel, *Kent* v. *Dulles*, 357 U.S. 116, 125-27 (1958); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); and the right to pursue an occupation, *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957); *Allgeyer* v. *Louisiana*, 165 U.S. 578, 589 (1897).

[26] *Paul* v. *Davis*, 424 U.S. 693, 713 (1976).

terference of others, unless by clear and unquestionable authority of law.'"[27] This common law "notion of bodily integrity" underlies the requirement of informed consent for medical treatment.[28] Respect for bodily integrity has led state courts to refuse to order individuals to put their own health at risk or otherwise to suffer a bodily invasion (such as an operation) even when such an effort is necessary to save the life of another person.[29] It has also led this Court to invalidate state laws that would have compelled individuals to undergo physically invasive procedures in furtherance of the state's interest in investigating crime.[30] The right to have the state respect each individual's bodily integrity is "so rooted in the traditions and conscience of our people as to be ranked as fundamental,"[31] and therefore provides a second constitutional and common law antecedent to a woman's right to choose not to carry a pregnancy to term.

B. This Court Should Reaffirm That State Abortion Laws That Depart From Accepted Medical Practice And Increase Health Risks To Pregnant Women Are Unconstitutional.

In *Roe*, this Court held that courts should apply strict scrutiny to state laws regulating abortion, and provided an analytical framework based on the trimesters of preg-

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[27] *Cruzan* v. *Director, Missouri Dep't of Health*, 110 S. Ct. 2841, 2846 (1990) (quoting *Union Pac. R.R.* v. *Botsford*, 141 U.S. 250, 251 (1891)).

[28] *Cruzan*, 110 S. Ct. at 2846-47.

[29] *See infra* pp. 11-12 & nn. 37, 40.

[30] *See, e.g., Winston* v. *Lee*, 470 U.S. 753, 763-66 (1985) (state may not compel criminal defendant to undergo minor surgery to remove bullet); *Schmerber* v. *California*, 384 U.S. 757, 772 (1966); *Rochin* v. *California*, 342 U.S. 165, 173-74 (1952).

[31] *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934); *see also Palko* v. *Connecticut*, 302 U.S. 319, 324 (1937) (rights that are "implicit in the concept of ordered liberty" are immune from state interference).

nancy to assist courts in performing that analysis.[32] As the court of appeals explained, a majority of the members of the Court, through separate opinions, has taken the view that the trimester analysis is problematic. Pet. App. 24a-30a. *Amici* believe that the framework provided in *Roe* has proved useful to lower courts and that the Court should not abandon that framework.

Any dispute over the trimester framework, however, should not obscure the fundamental principle that underlies *Roe*. That principle is that states are not free to require individuals, including pregnant women, to subject themselves to increased health risks or significant intrusions of their bodily integrity in order to further the state's interest in the potential or actual life of another person.

This principle—which forbids states to "requir[e] a trade-off between the woman's health and fetal survival" —is not dependent on trimesters of pregnancy for implementation.[33] It simply looks to the impact of abortion regulation on women's health. Laws that "depart from accepted medical practice" should presumptively be unconstitutional, because such departures likely will pose a risk to the patient's health. *Akron*, 462 U.S. at 431.

This principle is consistent with the cases decided since *Roe*. Thus, this Court has upheld laws that legitimately furthered maternal health[34] or that placed no obstacles

[32] Specifically, the Court held that a state has a compelling interest in protecting maternal health beginning at the second trimester of pregnancy, and a compelling interest in preserving the potential life of the fetus beginning at the time of viability, roughly coincident with the third trimester. 410 U.S. at 162. State laws that are not reasonably related to these interests or that sweep more broadly than necessary to further those interests therefore are unconstitutional. *Id.* at 163-64.

[33] *Thornburgh*, 476 U.S. at 768; *see also Colautti* v. *Franklin*, 439 U.S. 379, 387-401 (1979); *Roe*, 410 U.S. at 164.

[34] *See, e.g., Simopoulos* v. *Virginia*, 462 U.S. 506 (1983) (per curiam); *Connecticut* v. *Menillo*, 423 U.S. 9 (1975).

in a woman's path to an abortion.[35] The Court, however, has invalidated laws that, "under the guise of protecting maternal health or potential life," have served in fact to increase the risk to maternal health by introducing needless delay into the process or otherwise by interfering with the relationship between patients and their physicians or nurses.[36]

The existence of a competing state interest in preserving fetal life is not sufficient to require departure from this basic principle. Common law principles illustrate the point. The common law imposes no general duty upon individuals to rescue others from life-threatening peril. Restatement (Second) of Torts §§ 314-15 (1965). In particular, states have not required individuals to undergo surgery, or to donate tissue, blood or organs, in order to save the actual life of another person.[37] Certainly this is true of Pennsylvania. In *McFall* v. *Shimp*, 10 Pa. D. & C.3d 90 (County Ct. Allegheny 1978), a Pennsylvania court refused to order the defendant to donate bone marrow needed to save the life of his cousin: "For our law to *compel* defendant to submit to an intrusion of his body would change every concept and principle upon which our society is founded. To do so

[35] *Webster* v. *Reproductive Health Servs.*, 492 U.S. 490 (1989); *Harris* v. *McRae*, 448 U.S. 297 (1980); *Maher* v. *Roe*, 432 U.S. 464 (1977); *Beal* v. *Doe*, 432 U.S. 438 (1977).

[36] *Thornburgh*, 476 U.S. at 759; *see, e.g., Akron*, 462 U.S. at 416; *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976); *Doe* v. *Bolton*, 410 U.S. 179 (1972).

[37] *See, e.g., Bonner* v. *Moran*, 126 F.2d 121 (D.C. Cir. 1941) (surgery upon one person without consent to save the life of another is battery); *Curran* v. *Bosze*, 566 N.E.2d 1319, 1331 (Ill. 1990) (parent may not give consent on behalf of minor for donation of bone marrow to sibling unless to do so would be in minor's best interest); *Little* v. *Little*, 576 S.W.2d 493 (Tex. Civ. App. 1979) (same); *In re Pescinski*, 226 N.W.2d 180 (Wis. 1975) (same); *In re Richardson*, 284 So.2d 185 (La. Ct. App.) (same), *cert. denied*, 284 So.2d 338 (La. 1973); *Strunk* v. *Strunk*, 445 S.W.2d 145 (Ky. 1969) (same).

would defeat the sanctity of the individual, and would impose a rule which would know no limits, and one could not imagine where the line would be drawn." *Id.* at 91.

The holding in *McFall* is consistent with the respect for individual autonomy that is a traditional element of American common law. The familiar proposition that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body"[38] is "fundamental in American jurisprudence . . . ."[39] And as *McFall* and other cases illustrate, this is a "strong right," one that is strictly enforced rather than balanced against competing interests.[40]

At common law, then, the state's interest in preserving *actual* human lives, weighty though it is, is insufficient to

[38] *Schloendorff* v. *Society of New York Hosp.*, 105 N.E. 92, 93 (N.Y. 1914) (Cardozo, J.).

[39] *Canterbury* v. *Spence*, 464 F.2d 772, 780 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).

[40] *Amici* are aware of no state that has required a healthy adult to undergo a medical procedure to protect the health or save the life of another individual; such procedures may be ordered for a minor only if they are in the minor's best interest. *See supra* p. 11 n.37 (citing cases). Some courts have required parents to accept medical treatment where, in contrast to the abortion context, the required intrusion furthers *both* the state's interest in protecting the life of the parent and the state's interest in the welfare of a minor or viable fetus. Thus, courts have required parents of minor children to accept blood transfusions, *Jehovah's Witnesses* v. *King County Hosp.*, 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968), and pregnant women at term to have cesarean sections where vaginal delivery would endanger the lives of both mother and child, *e.g.*, *Jefferson* v. *Griffin Spalding County Hosp. Auth.*, 274 S.E.2d 457, 458 (Ga. 1981). More recently, however, and correctly in *amici*'s view, courts have held that a state cannot require a woman to submit to a life-saving post-partum blood transfusion for the benefit of her minor child or other dependents, *Fosmire* v. *Nicoleau*, 551 N.E.2d 77 (N.Y. 1990); *Public Health Trust* v. *Wons*, 541 So.2d 96 (Fla. 1989), or to undergo a cesarean section if she has not (or would not have) consented to the surgery, *In re A.C.*, 573 A.2d 1235 (D.C. 1990).

justify forcing persons to endure intrusions of their bodies and concomitant health risks to save those lives. It follows, *a fortiori*, that the state's interest in protecting *potential* lives, significant though it may be, is not sufficiently compelling to justify forcing a woman to carry her fetus to term or to endure delays and obstacles to abortion that increase her health risks.

C. This Court Should Not Adopt The Undue Burden Analysis Employed By The Court Below.

In adopting what it called "the undue burden standard," the court of appeals held that strict scrutiny applies only to laws that are initially found to impose "'absolute obstacles or severe limitations'" on the freedom of a woman, in consultation with her physician, to make a decision whether or not to continue her pregnancy. Pet. App. 14a, 24a-25a (quoting *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting)). A majority of this Court has not yet adopted that undue burden standard, and it should not do so here, for three reasons.

First, such a standard is inconsistent with established constitutional principles. This Court has never required a showing of "absolute obstacles" or "severe limitations" on a fundamental right as a threshold for triggering strict scrutiny. Rather, the Court has held that fundamental personal rights and liberties are protected by the Due Process Clause of the Fourteenth Amendment from "infringement" by the States. *Stanley* v. *Georgia*, 394 U.S. 557, 564, 568 n.11 (1969). *E.g.*, *Carey* v. *Population Servs. Int'l*, 431 U.S. 678, 686 (1977) (strict scrutiny is required for "regulations *imposing a burden* on" a fundamental right) (emphasis added).[41]

[41] Even where the Court has used language qualifying the degrees of intrusion necessary, it has not required severe intrusions or absolute obstacles. *E.g.*, *Bates* v. *Little Rock*, 361 U.S. 516, 524 (1960) ("significant encroachment").

The effect of the undue burden standard, as applied below, is to subject state regulations that significantly burden a fundamental right to review under a mere "rational relationship" standard. Rational-relation review, while appropriate for "legislative Acts adjusting the burdens and benefits of economic life," [42] has never been accepted as adequate in reviewing legislation affecting "individual decisions in matters of childbearing" or other similarly private matters. *Carey*, 431 U.S. at 687.[43] In the abortion context, such an approach would lead to a subjective, unpredictable balancing in every case of the degree of health risk and the degree of burden that a particular state law imposes against the weight of the state's interest. Such a balancing approach is squarely rejected in analogous common law cases such as *McFall*, and should be rejected here.

Second, the undue burden test, by weakening protection of women's health and introducing an inherently subjective standard of evaluation, would simply increase the need for this Court's perennial monitoring of state abortion laws. As the Brief *Amici Curiae* of William J. Guste, Louisiana Attorney General, et al. in support of Robert P. Casey's petition for *certiorari* in this case illustrates, states are now passing legislation that returns state law to the pre-*Roe* era. Thus, a decision to adopt a weaker undue-burden/rational relationship standard of review will require this Court to resolve a host of new and diffi-

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[42] *Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 729 (1984).

[43] Indeed, the very label "undue burden" reflects the confusion this standard—as a threshold test—introduces into constitutional analysis. The threshold question is simply whether a "burden" has in fact been imposed; the question whether that burden is "undue" —*i.e.*, "unwarranted" or "unjustified"—logically should be answered only at the end of the analysis, after the state's interests and any overbreadth have been considered. This Court initially used the phrase "undue burden" to refer not to any threshold standard for triggering strict scrutiny but to the completed analysis. *E.g.*, *Bellotti* v. *Baird*, 443 U.S. 622, 647 (1979) (plurality).

cult questions. Must states allow abortion when necessary to preserve the health of the mother? Must they do so when necessary to preserve her life? Must abortion be available when the pregnancy results from rape or from incest? Is evidence that pregnancy may render a woman suicidal evidence that it poses a threat to her life? Can a state require clear and convincing objective evidence that an exception is met? Must there be an exception to criminal penalties for women and physicians who act in good faith? Such questions inevitably will arise so long as the abortion issue remains justiciable. The stakes for personal liberty are too high to expect otherwise.

Abandoning the principle that states may not place women's health at risk in regulating abortion therefore will not extricate this Court from the need to draw fine lines between what is permissible legislation and what is not. Reaffirming the basic principle that underlies *Roe*, however, would largely end this Court's oversight role. As discussed below, the Court has already resolved most of the issues that can arise under *Roe*, and has provided the lower courts with ample guidance to deal with any new legislation.

Third, there is no reason not to respect *stare decisis* here, because the principle that underlies *Roe* provides a workable standard that is consistent with constitutional precedent. *Roe* is therefore not a case that has proved "unsound in principle and unworkable in practice." *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985). There have been no "changes in society or in the law" since 1973 to require a reversal of *Roe*'s holding —the same concerns raised now were raised at the time *Roe* was argued (and reargued). *Vasquez* v. *Hillery*, 474 U.S. 254, 266 (1986); see *Akron*, 462 U.S. at 419 n.1. Respect for *stare decisis* is thus compelling here, because it is necessary to demonstrate "that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby [to] contribut[e] to the integrity of our constitutional system of government, both in

appearance and in fact." *Vasquez*, 474 U.S. at 265-66. This Court has never before withdrawn fundamental status from any right previously recognized as fundamental. To depart from that precedent in this or any setting would so undermine accepted notions of "ordered liberty" that it should not be undertaken at all.

In sum, it is not the division of pregnancy into trimesters that determined the standard of review adopted in *Roe*. While the trimester framework was intended to and has provided helpful guidance to lower courts, the essential holding of *Roe* was that strict scrutiny was required where a state law interfered with a woman's right to decide, in consultation with her health care providers, whether or not to continue a pregnancy. That holding is valid today, just as it was two decades ago. This Court therefore should reverse the holding below adopting an "undue burden" standard of review for abortion legislation.

II. PENNSYLVANIA'S HUSBAND-NOTIFICATION, INFORMED CONSENT, PARENTAL CONSENT, MEDICAL EMERGENCY, AND DISCLOSURE REQUIREMENTS ARE UNCONSTITUTIONAL.

Each of the challenged provisions of Pennsylvania's Abortion Control Act is unconstitutional. In upholding all but one of these provisions, the court of appeals erroneously required a high threshold showing of an undue burden and ignored uncontroverted factual findings that each provision will cause substantial harm to women's health. The state interest repeatedly asserted in defense of these provisions—preserving the life of the fetus—is inadequate, because this Court's decisions establish that the woman's life and health must always prevail over the fetus' life and health when they conflict. *Thornburgh*, 476 U.S. at 768-69; see also *Colautti* v. *Franklin*, 439 U.S. 379, 400 (1979); *Roe*, 410 U.S. at 163-64.

A. Husband-Notification.

Section 3209 of the Act makes it a crime for a married woman to obtain an abortion unless she provides her physician a signed statement that she either has notified her husband of her intention to obtain an abortion or has met one of four narrow exceptions to this requirement, and that she understands that a false statement is punishable by law. 18 Pa. Cons. Stat. Ann. § 3209 (1983 & Supp. 1991); Pet. App. 61a n.24, 191a-193a. As the court of appeals concluded, even if a showing of undue burden is required, this husband-notification requirement is unconstitutional.[44] This provision severely burdens a woman's fundamental right to choose an abortion without furthering any compelling state interest.

1. Husband-Notification Severely Burdens A Woman's Right To Obtain An Abortion From Her Physician.

The district court's extensive factual findings, none of which was or could be found to be clearly erroneous on this record, unambiguously support its conclusion that husband-notification imposes "a constitutionally significant burden on the woman's right to an abortion." Pet. App. 193a-201a, 254a. These findings also support the circuit court's finding that the provision imposes an "undue burden" because it "may effectively prevent the abortion or may severely penalize the woman in other ways" for choosing to seek an abortion. *Id.* at 63a. Indeed, the burden here is comparable to, if not more severe than, the unconstitutional burden imposed upon minors by the notification requirements at issue in *Bellotti* v. *Baird*, 443 U.S. 622, 647 (1979), and *Hodgson* v. *Minnesota*, 110 S. Ct. 2926, 2945 & n.36 (1990).

a. As both courts below noted, the vast majority of married women seeking an abortion have discussed their plans with their husbands. Pet. App. 66a. Section 3209 is thus targeted at, and will chiefly affect, women who fear that notifying their husbands will lead to physical or psychological intimidation or abuse.

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[44] *Amici* refer here to "husband-notification" rather than "spousal notice" because the Act's gender-neutral label is deceptive. It camouflages the fact that Section 3209 applies exclusively to women. Moreover, Section 3209 is unique; no other Commonwealth law imposes any intra-marital notice requirement. Pet. App. 199a.

For many women such concerns are all too real. Women in our society are at shockingly high risk for physical and psychological abuse by their husbands. According to one survey, nearly one in eight husbands had physically abused his wife during 1985, and almost one-third of the assaults involved severe aggression.[45] The medical community, recognizing the enormity of this problem, has efforts underway to educate health care professionals about the nature of this problem and its physical and psychological manifestations.[46]

The district court correctly found that requiring pregnant women to notify their husbands of their pregnancy and of their intent to seek an abortion will exacerbate the problem of violence against women because "pregnancy is frequently a flashpoint for battering and violence within the family." Pet. App. 196a. Studies demonstrate, for example, that as many as eight percent of women are physically or sexually abused during pregnancy.[47] In addition, abuse may take the form of actual or threatened violence to the couple's children, dissolution of a marriage, curtailment of financial support, psychological abuse (verbal degradation, food and sleep deprivation, isolation and monitoring), or disclosure of the wife's decision to family, friends and acquaintances. *Id.* at 194a, 196a, 199a.[48]

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[45] Strauss & Gelles, *Societal Change and Change in Family Violence From 1975 to 1985 As Revealed By Two National Surveys*, 48 J. Marriage & Family 465, 470 (1986). *See also* L. Ohlin & M. Tonry, *Family Violence* 177-80 (1989) (reviewing other empirical studies).

[46] *See* American Medical Association Council on Scientific Affairs, *Violence Against Women* (1991); American College of Obstetricians & Gynecologists, *The Battered Woman* (1989).

[47] Amaro et al., *Violence During Pregnancy and Substance Use*, 80 Am. J. Pub. Health 575 (1990); Helton et al., *Battered and Pregnant: A Prevalence Study*, 77 Am. J. Pub. Health 1337 (1987).

[48] In addition to fostering abuse, the requirement that a woman notify her husband will jeopardize the confidential nature of the relationship between the woman and her physician. *See* Pet. App. 195a. Concerns about confidentiality may cause some women to delay seeking care or perhaps forgo appropriate medical care entirely.

b. The narrow exception for wives who can claim that they fear "the infliction of bodily injury upon [them]" by their husband or someone else is insufficient to eliminate the burden imposed by husband notification. The exception simply does not cover the range of coercive actions that husbands in an abusive situation typically take. Moreover, as the district court found, the "coping strategy" that "most battered women" have developed, *i.e.*, "learned helplessness," leaves them without "the psychological ability to avail themselves of the exceptions of Section 3209." Pet. App. 200a-201a. Accordingly, such abuse serves both strongly to deter women from seeking an abortion and severely to penalize those who in fact go forward with notification.

c. The dissenting judge below argued that the husband-notification provision could not constitute an undue burden because it would affect, at most, only a small "percentage of all women desiring abortions" and "plaintiffs failed to show even roughly how many of the women in this small group would actually be adversely affected by Section 3209." Pet. App. 92a. The dissent's conception of what constitutes a burden on a fundamental right is erroneous as a matter of law.

Because a fundamental right is held by an *individual* against the state, the abridgment of such a right is significant even if only a small number of individuals are affected. In *Bellotti*, the Court invalidated a Massachusetts statute requiring that parents be notified of any judicial proceeding brought by their daughter to obtain an abortion. Justice Powell, in an opinion joined by then-Chief Justice Burger, then-Justice Rehnquist, and Justice Stewart, acknowledged that there was "no reason to believe" that parents would seek to obstruct their daughter's access to court "in the majority of cases where

consent is withheld." 443 U.S. 622, 647 (1979). Nevertheless, the Massachusetts law was declared unconstitutional because "[i]t would be unrealistic . . . to assume that the mere existence of a legal right to seek relief in superior court provides an effective avenue of relief for some of those who need it most." *Id.* Thus, this Court invalidated the statute in *Bellotti* even though it would burden only a very small proportion of the total number of women seeking abortion, and even though no precise estimate of that percentage was offered.

2. Husband-Notification Does Not Narrowly Serve A Compelling State Interest.

The Commonwealth asserts an interest in "promoting the integrity of the marital relationship." 18 Pa. Cons. Stat. Ann. § 3209(a); Pet. App. 300a. Undoubtedly, the state has an interest in the integrity of marriages; laws prohibiting bigamy or restricting the availability of divorce, for example, are constitutional. But such laws define and regulate the nature and structure of the institution; they are constitutional precisely because they do not intrude into the marital relationship itself. Marriage "is an association that promotes a way of life, not causes"; thus, state intrusions on marital relations are suspect when they promote a political agenda and particularly suspect when designed to advance the state's agenda on a matter as personal to individuals as procreation. *Griswold* v. *Connecticut*, 381 U.S. 479, 486 (1965). The state cannot intrude more deeply into a marriage than when it conditions one individual's exercise of constitutional rights on an agreement to engage in state-mandated conversations with his or her spouse.

More critically, regardless of how the state's goal of promoting marital integrity is labeled, that goal is not served by forcing a husband and wife to communicate about a particular topic. As the district court found,

"[m]arital accord arises from within the relationship not from the intervention of the state." Pet. App. 262a.[49]

B. Informed Consent Provisions.

Section 3205 of the Act makes it a crime for a physician to perform an abortion unless he or she first obtains the "informed consent" of the patient as defined by detailed procedures. 18 Pa. Cons. Stat. Ann. § 3205; Pet. App. 289a. Far from promoting true informed consent, however, Section 3205 will interfere with constructive consultation between physicians and their patients and will undermine patients' health.

1. The requirement that a physician or nurse obtain a patient's informed consent to a medical procedure is fundamental to the common law and medical ethics. The doctrine is rooted in the respect for patient autonomy and the recognition that each patient is an individual with unique beliefs and needs.[50] The point of the consultation is not to inundate a patient with predetermined details on every conceivable facet of all available medical procedures; indeed, a health care provider has an obligation to limit disclosure where necessary to avoid causing the patient anxiety and fear that could jeopardize effective

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[49] The Commonwealth's other asserted interest, in promoting the husband's interests in "having children within the marriage" and in the "prenatal life" of his child, are not compelling. The interest Pennsylvania seeks to protect is only that of married men, not of biological fathers. The Commonwealth offers no explanation, however, why it is appropriate (let alone compelling) for the state to throw its weight behind one spouse and not the other on the question whether or not the wife will bear a child. In siding with one spouse and against another, the Commonwealth impermissibly intrudes into "the private realm of family life which the state cannot enter." *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944).

[50] *See, e.g., Canterbury* v. *Spence*, 464 F.2d 772, 780 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); T. Beauchamp & J. Childress, *Principles of Biomedical Ethics*, 74-75, 91-93 (3d ed. 1989); 1 President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Making Health Care Decisions* 18-39 (1982).

treatment of the patient.[51] Rather, the requirement that a physician or nurse obtain informed consent provides an opportunity for the provider and patient to discuss the risks and benefits of potential therapies germane to that patient, so that the patient can make an informed treatment decision. The information appropriate to each consultation will differ from patient to patient, and providers therefore do and must retain discretion to determine what specific information is relevant.

2. The procedures that Pennsylvania would require under the rubric of "informed consent" are in fact antithetical to informed consent as currently understood and practiced. To begin with, Section 3205 requires that each patient be told that (1) the State Department of Health has prepared "printed materials which describe the unborn child" and that "list agencies that offer alternatives to abortion" which the physician will provide to her "free of charge"; (2) that "medical assistance benefits" may be available to her and that the state's materials contain additional information on such benefits; and (3) that the "father of the unborn child" is liable for child support. 18 Pa. Cons. Stat. Ann. § 3205(a)(2)(i)-(iii); Pet. App. 290a.

As this Court previously held in *Thornburgh*, "[t]he printed materials required by § 3205 . . . [are] nothing less than an outright attempt to wedge the Commonwealth's message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician." 476 U.S. at 762-63. Because the Commonwealth's materials "create the impression in women that the Commonwealth disapproves of the woman's decision" to seek an abortion, bringing these materials to the attention of a woman who has already decided with her physician that it is appropriate to obtain an abor-

[51] *See, e.g., Woolley* v. *Henderson*, 418 A.2d 1123, 1130 (Me. 1980); *Cobbs* v. *Grant*, 502 P.2d 1 (Cal. 1972) (en banc); *Roberts* v. *Wood*, 206 F. Supp. 579, 583 (S.D. Ala. 1962).

tion is misleading and can produce needless anxiety and emotional pain. Pet. App. 179a. There is "no legitimate medical justification" to recite such information to each patient, *id.*; indeed, much of the information relates to issues about which physicians or other health professionals have no special knowledge or expertise. Yet "[f]orcing the physician or counselor to present materials and the list [of state agencies] makes him or her in effect an agent of the State in treating the woman and places his or her imprimatur upon both the materials and the list." *Thornburgh*, 476 U.S. at 762-63. The forced disclosures of Section 3205 thus "serve only to confuse and punish [a pregnant woman] and to heighten her anxiety, contrary to accepted medical practice." *Id.* at 762.[52]

3. Section 3205 further intrudes on the physician-patient relationship by criminalizing the performance of any abortion until at least 24 hours have elapsed following the informed consent discussions between the physician or counselor and patient. 18 Pa. Cons. Stat. Ann. § 3205(a)(2); Pet. App. 290a. As the district court found, because of scheduling problems and the scarcity of abortion clinics, this waiting requirement will in fact impose on the majority of women seeking an abortion in Pennsylvania delays of two days to two weeks between the time a woman consents to the procedure and the time her physician is legally entitled to perform it. Pet. App. 172a. This waiting period will significantly increase the risk of death and other complications associated with abortions which correlate directly with gestational age. See *supra* pp. 3-4.

To be sure, where there is some reason to think that a particular woman needs time to reach a considered judg-

[52] Section 3205(a) also requires the physician, to the exclusion of other qualified counselors, to supply certain information about health risks, including risks that may be irrelevant to a particular woman's situation. This Court in *Akron* held that such a requirement is overbroad, 462 U.S. at 447-49, and the Court should invalidate Section 3205(a) for this reason as well.

ment, *amici* would agree that additional time for reflection would be appropriate and the individual physician would so advise the patient.[53] But sound medical practice requires the physician to explain to the patient that any benefit of waiting must be weighed against the demonstrated increase in the risks to a woman's health caused by delay. Because the requirements of Section 3205 serve no compelling state interest but will cause harm to women, they are unconstitutional.[54]

C. Parental Informed Consent.

Section 3206 forbids physicians from providing abortions to women under the age of 18 unless the physician first obtains the informed consent not only of the woman but also of one of her parents. 18 Pa. Cons. Stat. Ann. § 3206; Pet. App. 292a. The requirement that the parent's consent be "informed" distinguishes this statute from other state statutes restricting the abortion rights of minors reviewed by this Court. Pet. App. 250a-251a. Here, even an approving parent must visit the clinic in person and sit through the mandatory anti-abortion presentation prescribed in Section 3205 before an abortion may be performed.

Section 3206 is unconstitutional because it ensures that minors will face needless and health-threatening delay in obtaining an abortion. Those minors whose parents approve will, in many cases, be delayed because of the difficulties parents face arranging an in-person visit. Pet. App. 249a. Those minors whose parents do not approve must resort to the inherently time-consuming process of obtaining permission from a state court. The adverse effect of this built-in delay is particularly acute for minors,

[53] *See, e.g.*, American College of Obstetricians & Gynecologists, *Standards For Obstetric-Gynecologic Services* 68 (7th ed. 1989) (physician should counsel woman to take time necessary to be certain her abortion decision is the correct one).

[54] Indeed, Section 3205's waiting requirement is identical to that invalidated by this Court in *Akron*, 462 U.S. at 450-51, and should be invalidated for this reason alone.

who comprise a high percentage of women who obtain an abortion in the second trimester, where the health risks of abortion are greatest. See *supra* pp. 3-4. Because Section 3206 will impose delays on virtually all minors, and not just on those who elect to use the judicial bypass procedure, it is unconstitutional.

D. Exception For Medical Emergencies.

Section 3203 of the Act provides a definition of the term "medical emergency" applicable uniquely to abortions. The Act then incorporates this definition as an exception to the requirements of husband notification, informed consent, and parental informed consent.

As the court below recognized, *Roe* requires a medical emergency exception to any statute that regulates abortion in a way that may cause a health-threatening delay in the performance of an abortion. Pet. App. 36a. On its face, the Commonwealth's exception is inadequate. It makes it a crime for a physician to perform an abortion sooner than 24 hours after initially evaluating a patient unless the physician, in good faith, believes that an abortion is necessary "to avert [the patient's] death" or that "delay will create serious risk of substantial and irreversible impairment of major bodily function." 18 Pa. Cons. Stat. Ann. § 3203; Pet. App. 289a.

The Act's definition is notably narrow when compared to Pennsylvania's general definition of medical emergency and to sound medical practice.[55] The Act precludes phy-

[55] For all procedures besides abortion, Pennsylvania defines a medical emergency as "[a] combination of circumstances resulting in a need for immediate medical intervention." 35 Pa. Cons. Stat. Ann. § 6923 (1977 & Supp. 1991). This is consistent with the definition generally accepted by the health care community. *See, e.g.*, J. Cosgriff & D. Anderson, *The Practice of Emergency Care* 20 (2d ed. 1984) ("An emergency is an unforeseen combination of circumstances creating a condition which in the professional judgment of a physician and surgeon of good standing acting under the same or similar circumstances requires immediate care, treatment, or surgery in order to protect a person's life or health").

sicians from responding in a medically appropriate manner to women for whom pregnancy poses a health risk that, while significant, does not amount to a "*serious* risk of *substantial and irreversible* impairment of *major* bodily function." It therefore requires physicians to place the health of a woman at risk in order to further the state's interest in protecting fetal life, a "trade-off" this Court has repeatedly disapproved. *Thornburgh*, 476 U.S. at 768-69; *Colautti* v. *Franklin*, 439 U.S. 379, 400 (1979); *Roe*, 410 U.S. at 163-64.

The court of appeals upheld the definition of emergency by interpreting it liberally to include all circumstances that "*in any way* pose a *significant* threat to the life *or health* of a woman." Pet. App. 40a (emphasis added). But it is impossible to reconcile the court of appeals' interpretation with the statute's plain language. Courts, in attempting to save a statute from constitutional attack, may not engage in "judicially rewriting it." *Aptheker* v. *Secretary of State*, 378 U.S. 500, 515 (1964).

The court of appeals also suggested that the statute was constitutional because the Commonwealth conceded on appeal that three common medical emergencies—inevitable abortions, premature rupture of the membranes, and preeclampsia—that do not appear to meet the statute's requirements for an emergency would in fact be considered by the Commonwealth as emergencies. Pet. App. 37a. This concession cannot save the statute.[56] First, the district court found as a matter of fact that no reasonable physician reading the plain language of the statute would believe that these medical conditions would be covered.

[56] This concession—and this interpretation of the statutory language—is no more than a "convenient litigating position" which is entitled to no deference. *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988). The Commonwealth's position in this case is not binding on the Pennsylvania courts which are free to, and likely will, interpret the statute in exactly the way it is written, *i.e.*, to criminalize the medically appropriate treatment of several of the most common complications of pregnancy.

Pet. App. 162a-163a. Second, the three examples were only illustrative of a broader category of conditions that most physicians would conclude do not meet the plain language of the statute. For example, Section 3203 may prevent physicians from appropriately treating various cardiovascular, renal, pulmonary or neurologic disorders that are exacerbated by pregnancy, see *supra* p. 3 n.17, but that do not necessarily present an immediate and serious risk of irreversible impairment. These points are dispositive, because a criminal statute that is asserted to mean what no reasonable person subject to the statute would interpret it to mean is unconstitutionally vague. *Colautti*, 439 U.S. at 390-97; *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983).

Finally, the court of appeals erred in holding that the statute was constitutional because a physician can be criminally liable only if he or she "violate[s] his or her own good faith clinical judgment." Pet. App. 42a. The court's reliance on the subjective standard built into the statute simply misses the critical point that the grounds available to the physician for invoking his or her judgment are unduly narrow. Thus, a physician may, in good faith, believe that delay will cause significant risk to the patient, but not a risk of irreversible impairment to a major bodily function. The statute places that physician in an intolerable dilemma: The physician cannot, in good faith, authorize the performance of an abortion under the law, yet the physician cannot, in good conscience, and consistent with the ethical standards of the medical profession, force the woman to wait out the many delays imposed by the statute.

E. Reporting And Public Disclosure Requirements.

Physicians, nurses, and counselors who provide abortion services, and women who seek their services, regularly face picketing and verbal harassment both at their offices and their homes, harassment of their families, and periodic threats of death, bombing, and kidnapping. Pet. App. 211a-213a, 267a. The effect of such constant harassment

has been to reduce the number of health care providers willing to assist women in obtaining abortions, and to force others to take steps to preserve their anonymity. *Id.* at 219a-221a. By requiring public disclosure of the names and addresses of abortion facilities and affiliated organizations and of the number of abortions performed (total and by trimester) each quarter, and by requiring confidential reports of the names of referring physicians, Sections 3207(b), 3214(f), and 3214(a)(1) will facilitate and exacerbate this harassment, and make it difficult, if not impossible, for "indigent . . . victims of rape or incest or who suffer from a life-threatening condition . . . to obtain abortion services." Pet. App. 213a-214a, 220a-21a; see *id.* at 298a, 302a-304a.

In reversing, the court of appeals simply disagreed with the district court's factual findings. Pet. App. 79a, 82a-83a. The district court's findings are not clearly erroneous, however, and the court of appeals plainly erred in substituting its own assessment of the record for that of the district court.[57] Moreover, quite apart from *Roe*, where, as here, it is plain that state-mandated disclosure requirements can only exacerbate private threats, harassment and reprisals, those disclosure requirements cannot stand. *E.g.*, *Brown* v. *Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 92-94 (1982); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 462-63 (1958).

F. Criminal Penalties.

The Due Process Clause limits the degree to which states may criminally punish health care providers for assisting individuals in matters of personal choice. See generally *Doe* v. *Bolton*, 410 U.S. 179, 199-200 (1972); *Carey* v. *Population Servs. Int'l*, 431 U.S. 678, 686-91 (1977); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972). The imposition of criminal penalties upon physicians who perform abortions in circumstances where continued pregnancy poses a significant risk to a woman's health (but not a defined

[57] *See Pullman-Standard* v. *Swint*, 456 U.S. 273, 287 (1982); Fed. R. Civ. P. 52(a).

"emergency") is unconstitutional. Uncertainty is an inescapable element of medicine. *Parham* v. *J.R.*, 442 U.S. 584, 604 (1979); *Addington* v. *Texas*, 441 U.S. 418, 429 (1979). When physicians are uncertain about the degree of risk that delay may present to a patient, they should choose to err on the side of protecting the health of the patient. Yet, Pennsylvania would make it a crime to do so. Such a law serves no legitimate purpose. The criminal law exists to protect the public safety, health, and welfare; where, as here, its only effect is to subvert public health, the Fourteenth Amendment precludes its enforcement.

* * * *

Each of the Pennsylvania Abortion Control Act's challenged provisions, considered individually, unconstitutionally burdens the right of pregnant women to choose whether or not to terminate their pregnancies. Viewed as a whole, however, a clearer picture emerges. This is not a statute designed to protect maternal health. Nor is it a statute intended, through good faith efforts at education and social change, to minimize the need for abortion by getting at the root causes of unwanted pregnancy. Rather, it is a statute that seeks to discourage, deter, and defeat women in their attempts to obtain abortions by replacing the provider-patient relationship and medical judgment with a procedural obstacle course fraught with criminal and civil penalties.

The most bitter irony for those among *amici*'s members who practiced medicine or nursing prior to 1973 is that restrictive abortion laws in the end will do little to reduce the number of abortions. Rather, they will shift many abortions out of the sterile confines of licensed clinics and into the back rooms of those who are willing, for a price and without regard for patient health, to defy state law. Thus, the health care provider's role in referring or performing an abortion will be replaced by their role in repairing and treating the consequences of illegal abortions. This Court rightly concluded in 1973 that the Fourteenth Amendment protects women from state laws

that compel recourse to such desperate and destructive measures, and it should reaffirm that conclusion.

CONCLUSION

The judgment challenged in No. 91-744 should be reversed and the judgment challenged in No. 91-902 should be affirmed.

Respectfully submitted,

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APPENDIX

AMICI CURIAE

Amicus American College of Obstetricians and Gynecologists (ACOG) is a private, voluntary, non-profit organization of physicians who specialize in obstetric and gynecologic care. ACOG is the leading group of professionals providing health care to women: its 25,000 members represent approximately ninety percent of all obstetricians and gynecologists practicing in the United States.

Amicus American Medical Women's Association, Inc. (AMWA) is a non-profit organization of 12,000 women physicians and medical students. One of AMWA's primary missions is to promote quality health care for women. AMWA strongly opposes laws which adversely affect the health of women, or impose constraints on the right of the pregnant patient, in consultation with her physician, to make a personal and medically informed decision whether or not to continue a pregnancy.

Amicus American Psychiatric Association (APA) is the nation's largest professional association specializing in psychiatry, with a membership exceeding 30,000 physicians. APA's purposes include promoting the welfare of patients who require psychiatric services.

Amicus the American Public Health Association (APHA) is a national organization devoted to the promotion and protection of personal and environmental health and to disease prevention. Founded in 1872, APHA is the largest public health organization in the world with over 50,000 members. It represents all disciplines and specialties in public health, including patients and health professionals such as physicians, nurses, health educators and family planning specialists.

Amicus Association of Reproductive Health Professionals (ARHP) is an interdisciplinary professional or-

ganization comprised of over 1,500 obstetricians/gynecologists and other physicians, researchers, educators, administrators, and other professionals in reproductive health. ARHP's mission is to educate health care professionals and the public on family planning, contraception and other reproductive health issues including sexually transmitted diseases and urogenital infections, HIV, abortion, menopause, cancer prevention/detection, sexual health, and infertility.

Amicus National League for Nursing is an organization of 12,000 individuals and 2,000 agencies. It represents nurses from all settings of education and practice, as well as other health professionals and health policy makers. The league is the accrediting body for all levels of nursing schools. It works to promote access to affordable, high quality health care.

Amicus National Medical Association (NMA), founded in 1895, is a professional organization representing 16,000 Black physicians and medical students in the United States. The NMA actively addresses all issues affecting the ability of its members to deliver quality health care. It has aggressively sought to ensure equal access and availability to health care services.

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in upholding the constitutionality of the following provisions of the Pennsylvania Abortion Control Act:

   a. 18 Pa. Cons. Stat. Ann. § 3203 (definition of medical emergency)

   b. 18 Pa. Cons. Stat. Ann. § 3205 (informed consent)

   c. 18 Pa. Cons. Stat. Ann. § 3206 (parental consent)

   d. 18 Pa. Cons. Stat. Ann. §§ 3207, 3214 (reporting requirements)?

2. Did the Court of Appeals err in holding 18 Pa. Cons. Stat. Ann. § 3209 (spousal notice) unconstitutional?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Authorities v

Interests of *Amici Curiae* 1

Summary of Argument 2

Argument

I. This Court Should Not Withdraw, for the First Time in Our Constitutional History, a Fundamental Individual Right 4

A. The Principle of Stare Decisis Applies Most Strongly to Cases Recognizing the Existence of Fundamental Rights 5

1. Our Constitution Protects Fundamental Rights Because They Provide *Permanent* Barriers to Governmental Oppression 6

2. The Ninth Amendment Counsels Strict Adherence to Precedent in Cases Recognizing Fundamental Rights 8

B. The Withdrawal of a Fundamental Right Widely Exercised by Americans after a Generation of Recognition Will Result in Unprecedented Strain on the Institution of the Court 10

II. *Roe* Provides the Essential Underpinning for the Broad Constitutional Principle that State Interference in Critical Medical and Reproductive Decision-Making Is Subject to Heightened Scrutiny 12

A. The Lower Courts Have Relied on *Roe* Both to Identify, and to Afford Heightened Protection to, a Range of Liberty Interests 13

B. Coherence in the Treatment of these Liberty Interests in Both Abortion and Non-Abortion Contexts Requires the Reaffirmation of *Roe* 15

III. The Destructive Repercussions of Giving States a Free Hand in Regulating Abortion Should Dissuade the Court from Abandoning *Roe's* Requirement of Heightened Scrutiny 16

A. *Roe*'s Central Holdings--That a Fetus is *Not* a Person and that States Have No Compelling Interest in Non-Viable Potential Life--Are Correct, and Prohibit States from Depriving Women of Their Fundamental Freedoms 17

B. To Abandon Heightened Scrutiny of Abortion-Related Restrictions Would Be Impossible as Well as Unwise 20

1. This Court Will Be Faced With a Number of Serious Interstate Conflicts 20

2. This Court Will Have to Continue to Apply Heightened Scrutiny to Abortion-Related Restrictions Because of their Impingement on a Variety of Constitutional Rights 21

a. Eighth Amendment Problems 22

b. The Scope of Federal Criminal Statutes . . . 22

c. Fourth Amendment Problems 23

d. The Right to Travel 24

e. First Amendment Issues 24

f. The Right to Vote 26

g. Other Substantive and Procedural Due Process Problems 26

Conclusion 29

Appendix A-1

TABLE OF AUTHORITIES

Pages

Cases

Arizona v. Rumsey, 467 U.S. 203 (1984) 5

Arnold v. Board of Education of Escambia County, 880 F.2d 305 (11th Cir. 1989) 13

Avery v. County of Burke, 660 F.2d 111 (4th Cir. 1981) 13

Ballurio v. Castellini, 102 A.2d 662 (N.J. App. Div. 1954) 27

Beard v. United States, 158 U.S. 550 (1895) 19

Bigelow v. Virginia, 421 U.S. 809 (1975) 24

Blanton v. City of North Las Vegas, 489 U.S. 538 (1989) 22

Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1932) 5

In re A.C., 573 A.2d 1235 (D.C. 1990) 14

Califano v. Aznavorian, 439 U.S. 170 (1978) 24

Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) 18

Coker v. Georgia, 433 U.S. 584 (1977) 19, 22

Cruzan v. Director, Missouri Department of Health, 110 S.Ct. 2841 (1990) 14, 15

Davis v. Beason, 133 U.S. 333 (1890) 26

Dred Scott v. Sandford, 19 How. 393 (1857) 10

Edwards v. California, 314 U.S. 160 (1941) 6, 8, 24

Eisenstadt v. Baird, 405 U.S. 438 (1972) 12

Fosmire v. Nicoleau, 551 N.Y.S.2d 876 (N.Y. 1990) 14

In re Frankel, 35 N.Y.S.2d 214 (App. Div. 1942) 27

Mary Beth G. v. City of Chicago, 723 F.2d 1263 (7th Cir. 1983) 23

Glidden Co. v. Zdanok, 370 U.S. 530 (1962) 5

In re Grady, 426 A.2d 467 (N.J. 1981) 13

Griswold v. Connecticut, 381 U.S. 479 (1965) 8, 23

Harmelin v. Michigan, 111 S.Ct. 2680 (1991) 22

Heath v. Alabama, 474 U.S. 82 (1985) 24

Hilton v. South Carolina Public Railways Comm'n, 112 S.Ct. 560 (1991) 5

Hodgson v. Minnesota, 110 S.Ct. 2926 (1990) 16

Hondroulis v. Schumacher, 546 So.2d 466 (La. 1989) 14

International Union, UAW v. Johnson Controls, Inc., 111 S.Ct. 1196 (1991) 18

Kramer v. Union Free School District, 395 U.S. 621 (1969) 6, 8

Loving v. Virginia, 388 U.S. 1 (1967) 8, 12

McClesky v. Kemp, 481 U.S. 279 (1987) 19

In re Meyerson, 59 A.2d 489 (Md. Ct. App. 1948) 27

Muller v. Oregon, 208 U.S. 412 (1908) 18

In re Conservatorship of Valerie N., 707 P.2d 760 (Cal. 1985) 13

Norwood Hospital v. Munoz, 564 N.E.2d 1017 (Mass. 1991) 14

Palko v. Connecticut, 302 U.S. 319 (1937) 11

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 5

Paul v. Davis, 424 U.S. 693 (1976) 26

Payne v. Tennessee, 111 S.Ct. 2597 (1991) 5

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 12

Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico, 478 U.S. 328 (1986) 24, 25

Rasmussen v. Fleming, 741 P.2d 674 (Ariz. 1987) 14

Richardson v. Ramirez, 418 U.S. 24 (1974) 26

Rivas v. United States, 368 F.2d 703 (9th Cir. 1966) *cert. denied*, 386 U.S. 945 (1967) 23

Roe v. Wade, 410 U.S. 113 (1973) ..... 1, *passim*

Rust v. Sullivan, 111 S.Ct. 1759 (1991) 26, 28

Shapiro v. Thompson, 394 U.S. 618 (1969) 24

Skinner v. Oklahoma, 316 U.S. 535 (1942) 12

Stallman v. Youngquist, 531 N.E.2d 355 (Ill. 1988) 18

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) ..... 2, *passim*

United States v. Guest, 383 U.S. 745 (1966) 24

United States v. Holte, 236 U.S. 140 (1915) 22

Vasquez v. Hillery, 474 U.S. 254 (1986) 5, 6

In re A.W., 637 P.2d 366 (Colo. 1981) 13

In re T.W., 551 So.2d 1186 (Fla. 1989) 20

Webster v. Reproductive Health Services, 492 U.S. 490 (1989) 16, 28

Wons v. Public Health Trust of Dade County, 500 So.2d 679 (Fla. Dist. Ct. App. 1987), *aff'd*, 541 So.2d 96 (Fla. 1989) 14

Constitutions, Statutes and Regulations

U.S. Const., art. I, § 2 17

U.S. Const., amend. I 25

U.S. Const., amend. IV 23

U.S. Const., amend. VIII 22

U.S. Const., amend. IX 8, 9

U.S. Const., amend. XIV ..... 3, *passim*

The Assimilative Crimes Act, 18 U.S.C. § 13(a) (1988) 22

18 U.S.C. § 371 (1988) 23

18 U.S.C. § 1461 (1988) 25

The Mann Act, 18 U.S.C. §§ 2421-22 22

Guam Public Law 20-134 (1990) 20

1991 La. Act No. 26, § 2 (to be codified at La. Rev. Stat. § 14:87(E)(2)) 20, 23

New Jersey Assembly Bill 4703 (1991) 27

18 Pa. Cons. Stat. Ann. §§ 3207, 3214 27

Other Materials

Randy E. Barnett. *Foreword: The Ninth Amendment and Constitutional Legitimacy*, 64 Chi.-Kent L. Rev. 37 (1988) 9

Bernstein, *Germany Still Divided on Abortion; A Woman's Ordeal at Border*, Newsday, Mar. 11, 1991, at 5 23

Charles Black, *On Reading and Using the Ninth Amendment* in Power and Policy in the Quest of Law 187 (M. McDougal & W.M. Reisman eds 1985) 9

Clarity, *Irish Court Says Girl Can Leave to Obtain Abortion in Britain*, N.Y. Times, Feb. 27, 1992, at 1 24

O.W. Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457 (1897) 11

Charles Evans Hughes, The Supreme Court of the United States (1927) 11

Larry Hugick, *Abortion: Public Support Grows for* Roe v. Wade, Gallup Poll News Service, Jan. 18, 1992 (Vol. 56, No. 34a) 10

The Antifederalists (C. Kenyon ed. 1966) 9

N.Y. Times, Aug. 26, 1989, at A25, col. 5 21

Anna Quindlen, *Public and Private*, N.Y. Times, Mar. 28, 1991, at A25 19

John Phillip Reid, The Constitutional History of the American Revolution: The Authority of Rights (1986) 7

Deborah Rhode, *Moral Character as a Professional Credential*, 94 Yale L.J. 491 (1985) 27

1 Letters of Delegates to Congress: 1774-1789 (P. Smith ed. 1976) 7

U.S. Dept. of Health, Education & Welfare, Center for Disease Control, Abortion Surveillance: Annual Summary 1972 (1974) *reprinted in Abortion--Part 2: Hearings Before the Subcomm. on Constitutional Amendments of the Sen. Judiciary Comm.*, 93d Cong., 2d Sess. 137 (1976) 21

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INTEREST OF *AMICI CURIAE*

This brief is filed on behalf of 178 organizations who support this Court's holding, in *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny, that women have a fundamental right to decide whether to terminate their pregnancies and that restrictions on this fundamental right are subject to strict scrutiny.

The parties have consented to the filing of this brief; their letters to that effect have been filed separately in this Court. A complete list of *amici* and their statements of interest are set forth in the appendix to this brief.

SUMMARY OF ARGUMENT

"[T]he Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government. That promise extends to women as well as men. Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision -- with the guidance of her physician and within the limits specified in *Roe* -- whether to end her pregnancy." *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 772 (1986). This case presents the question whether the Court should break that solemn promise.

For nearly two decades, this Court has told American women that their right to decide for themselves when and whether to bear children is a fundamental liberty interest protected by the due process clause of the Fourteenth Amendment. Never before has this Court entirely stripped millions of Americans of a right that has long been characterized as fundamental. Never before has it empowered the states to brand millions of Americans as criminals for making and acting upon a decision that it repeatedly assured them was theirs to make.

The conception of rights embraced by the Framers of the Constitution saw rights as *permanent* barriers to governmental invasion of fundamental liberties. To hold that they can be extinguished by judicial fiat thus flies in the face of the very meaning of "rights" embodied in our Constitution. For this Court to deprive women of the freedom they now possess

involves precisely the sort of denial or disparagment of rights retained by the people that the Ninth Amendment forbids.

The consequences of reversing *Roe* would be disastrous, for the millions of women who will be stripped of the most basic freedom to determine how to lead their lives and for this Court. The self-inflicted wound to this Court's credibility that would follow upon the reversal of *Roe* will only be exacerbated by the morass of constitutional problems this Court will subsequently face. The impossibility of surgically excising freedom of choice from the constitutional fabric powerfully demonstrates two things: the important prudential reasons for retaining *Roe* and *Roe*'s location squarely within the mainstream of constitutional law.

First, *Roe* provides an essential underpinning for the broader constitutional principle that state interference in critical medical and reproductive decisionmaking demands heightened scrutiny. The lower courts have drawn from *Roe* a set of principles that has enabled them to answer questions regarding an individual's right to accept or reject life-saving medical treatment, to refuse to have an abortion as well as to elect one, and to choose or decline sterilization, to name just a few. Without *Roe*, this emerging body of law risks serious incoherence. Moreover, unless this Court is prepared to revisit the entire question of individual autonomy in these intensely personal decisions, there is no defensible way of abandoning *Roe*.

Second, this Court should not be fooled into thinking that by overruling *Roe* it can free itself from facing a continuing series of challenges to state abortion regulations. To begin with, this Court cannot delegate to the states control over the constitutional meaning of personhood. *Roe* was right: a fetus is not a "person" for Fourteenth Amendment purposes. Moreover, if this Court implies to the states that it will no longer subject abortion regulations to heightened scrutiny because they limit the exercise of fundamental rights, it is likely to confront a range of both straightforward and ingenious attempts by states to deter

or penalize abortions. These schemes will raise serious constitutional problems under the First, Fourth, Fifth, Eighth and Fourteenth Amendments. Problems of interstate travel, conspiracy, limits on punishment and advertising, denial of public benefits, civil rights, and occupational privileges will all inevitably come before this Court as a consequence of the constitutional destabilization resulting from overruling *Roe*. The upshot, unless this Court is prepared to distort virtually all of constitutional law to give states a free hand in regulating abortion, will be a doctrinal crazy quilt replacing *Roe*'s approach. The hope that abortion regulation can be painlessly returned to state political processes, free of federal court intervention, is a mere illusion. This hallucination, if too confidently pursued, threatens to plunge the Court, and the Nation, into the most serious constitutional crisis since the New Deal.

ARGUMENT

I. THIS COURT SHOULD NOT WITHDRAW, FOR THE FIRST TIME IN OUR CONSTITUTIONAL HISTORY, A FUNDAMENTAL INDIVIDUAL RIGHT

Since 1973, an entire generation of Americans, both men and women, has grown to maturity in a society that told all its citizens, in the most solemn possible fashion, that decisions about when and how to have children were fundamentally protected from state interference. *Roe*'s recognition of the centrality of choice to women's lives reflects this simple truth: if women can be forced to endure unwanted pregnancies, they are not truly free.

Opponents of *Roe* have repeatedly urged this Court to strip women of this essential freedom, and return control over this most personal and intimate decision to state legislatures. Such a decision would commit the Court, and the Constitution of the United States itself, to a dangerous departure from its traditions. Never before has a fundamental right, widely exercised by a

generation of Americans who have known no other law, been removed by judicial fiat. Wisdom in the guidance of our constitutional culture, and respect for the very idea of a society committed to individual rights, counsels the Court not to entertain such a radical departure from the traditions of our people and our law.

A. *The Principle of Stare Decisis Applies Most Strongly to Cases Recognizing the Existence of Fundamental Rights*

One of the central problems of American jurisprudence is the reach of the principle of stare decisis. Certainly, the power to reconsider past holdings is central to the creation of a flexible, progressive, and vital legal order. But it is equally accepted, by all parties to the jurisprudential discussion, that respect for prior decisions under all but the most exigent circumstances is necessary in order to create the social stability promised by our commitment to the rule of law.

The balance between stability and flexibility is of particular concern in the area of constitutional law. It has been said many times that the principle of stare decisis is less strong in constitutional cases than in other contexts. *See, e.g., Payne v. Tennessee*, 111 S.Ct. 2597, 2610 (1991); *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-173 (1989); *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962). Nonetheless, as the Court has repeatedly made clear, adherence to prior decisions is always required in the absence of "special justification." *See, e.g., Hilton v. South Carolina Public Railways Comm'n*, 112 S.Ct. 560, 564 (1991); *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). The requirement of special justification is of critical importance in the class of constitutional cases concerning fundamental rights, where abandonment of precedent should not occur merely because "the Court has felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained,'" *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986) (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)), or because of the "proclivities" of the Court's

changed membrship, *id.* at 265. This recognition that stare decisis is of greatest importance where fundamental rights are involved rests on two pillars: the very meaning of rights as permanent barriers to governmental invasion of individual autonomy except under the most compelling circumstances; and the inevitable distrust, in a democratic society, of the power of appointed judges to vitiate the rights of citizens by judicial "interpretation." Both of these considerations are of the utmost relevance to the present case.

1. *Our Constitution Protects Fundamental Rights Because They Provide* Permanent *Barriers to Governmental Oppression*

This Court held in *Roe* that the "right of privacy ... is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153. This right of privacy, like the right to vote in state elections and the right of interstate travel, *see Kramer v. Union Free School District*, 395 U.S. 621 (1969); *Edwards v. California*, 314 U.S. 160 (1941), has been recognized and invoked by the Court in a variety of factual settings, despite the absence of express words in the Constitution granting the right or requiring its protection by state and federal courts. In describing as a right the privilege to be free of state intervention in decisionmaking about the termination of pregnancy, the Court associated with that freedom all the attributes of "rights" as that word is used in our constitutional tradition. Opponents of the outcome in *Roe* now once again urge that this was a decision merely for a day, to be cast aside an instant later in the interest of the achievement of other social goals.

Such urgings are based on a conception of the meaning of the word "right" entirely inconsistent with our constitutional tradition. For the statesmen and lawyers who made that Constitution, rights were *permanent* limitations on government. The frame of government which they devised, and for which they believed Revolutionary armies fought and died, was intended precisely to ensure the permanence of rights, by

establishing barriers against future governmental decisions, no matter how nobly inspired, that would nullify the freedoms of the people. Security for rights -- protection against changes of opinion by the executive, the legislature, or the courts -- was a primary goal of those whose civic courage founded our Nation and its commitment to a free society. Constantly in the language of the Revolutionary generation one encounters the recognition that rights are forever, and that a just government must so treat them. As the conservative New York lawyer James Duane put it at the first Continental Congress:

> It is now essential to place our Rights on a broader & firmer Basis to advance and adhere to some solid and Constitutional Principle which will preserve Us from future Violations -- a principle clear & explicite and which is above the Reach of Cunning, & the Arts of oppression.

See 1 Letters of Delegates to Congress: 1774-1789, at 52-53 (P. Smith ed. 1976). Recent scholarship has demonstrated more clearly than ever before the enormous importance the Founders accorded this precise issue of "security of rights," and the primary significance of the uncertainty of rights in a period of parliamentary colonial legislation in bringing on the American Revolution. *See* 1 John Phillip Reid, The Constitutional History of the American Revolution: The Authority of Rights 227-37 (1986).

Thus, the Founders perceived permanence as the essential attribute of rights, and recognition of that permanence as the essential feature of a just constitution. To refuse recognition to rights once known and exercised by the people was the most basic act by which a government lost its legitimacy. Stare decisis in the context of cases that recognize the application of fundamental rights is not merely a prudential principle, nor is it solely a policy arising from a desire for predictability in the legal system. In the present context, when those who disapprove of the exercise of a constitutional right request this Court to withdraw recognition by overruling precedents more deferential

to freedom, stare decisis is the essence of the constitutional order. To accept the invitation to overrule *Roe v. Wade* is to accept an invitation to change the very meaning of the word "rights" in our constitutional tradition -- the most profound and dangerous constitutional deviation in the last two centuries. The Court should decline the invitation; indeed, the Constitution explicitly commands the Court to do so.

2. *The Ninth Amendment Counsels Strict Adherence to Precedent in Cases Recognizing Fundamental Rights*

The constitutional right to privacy in reproductive decisionmaking, like the rights to vote in state elections, to travel between states, or to marry, *see Kramer v. Union Free School District*, 395 U.S. 621 (1969); *Edwards v. California*, 314 U.S. 160 (1941); *Loving v. Virginia*, 388 U.S. 1 (1967), is not explicitly recognized in the wording of the Bill of Rights. The Court has found that right to emanate in concert from several of the Constitution's provisions, including "the Fourteenth Amendment's concept of personal liberty," and "the Ninth Amendment's reservation of rights to the people." *Roe*, 410 U.S. at 153; *see also Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring). *Amici* agree with the Court's position in *Roe* that the Ninth Amendment may provide substantive support for the recognition of the privacy right. But in the unique circumstances of the case at bar, in which the Court is asked to overrule precedents recognizing a fundamental right, the role of the Ninth Amendment is both more direct and more imperative.

Opponents of *Roe* have repeatedly argued that the judicial recognition of a right of privacy somehow constitutes "judicial legislation" inappropriate to a democratic society. This position has been staunchly maintained despite the Ninth Amendment: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." The Amendment clearly states that there are rights requiring governmental recognition and judicial enforcement that are not enumerated anywhere in the Constitution. The

plain words of the amendment, as scholars have recognized, *see, e.g.*, Charles Black, *On Reading and Using the Ninth Amendment* in Power and Policy in Question of Law 187 (M. McDougal & W.M. Reisman eds. 1985); Randy E. Barnett, *Foreword: The Ninth Amendment and Constitutional Legitimacy*, 64 Chi.-Kent L. Rev. 37, 56 (1988), counsel the Court against any principle of constitutional adjudication that ranks unenumerated rights below the status of enumerated rights, or that denies such rights any constitutional status.

This reminder of the value of unenumerated rights is the primary function of the Ninth Amendment under ordinary circumstances. But the Amendment has more than a hortatory purpose, as its expression in mandatory language shows. Construction of the Constitution "shall not ... deny or disparage" rights possessed or "retained" by the people. This prohibitory phrasing again reminds us how strongly the Founders sought to entrench rights as permanent barriers to governmental interference in the lives of the people. Moreover, and in the context of this case even more importantly, it reminds us that the Framers sought to quiet the reservations of anti-Federalists who feared that an independent federal judiciary would construe the rights of the people out of existence at its own convenience. *See, e.g.*, Robert Yates, Letter from Brutus No. XI, *The New York Journal and Weekly Register*, Jan. 31, 1788, *reprinted in* The Antifederalists 334-42 (C. Kenyon ed. 1966) (objecting to giving a federal supreme court unfettered discretion to interpret the Constitution). Unlike *Roe*'s detractors, who have speciously argued that judicial recognition of unenumerated rights violated the spirit of the Constitution, the Ninth Amendment's authors were concerned with the much more serious problem of insufficient judicial respect for rights actually exercised by the citizenry of the nation.

The case at bar presents precisely the situation the Founders feared. The right to decide whether to terminate a pregnancy has been exercised by an entire generation of Americans, with the support and protection of this and other courts. The most recent Gallup Poll showed that 64 percent of

the respondents support the decision in *Roe*. Larry Hugick, *Abortion: Public Support Grows for* Roe v. Wade, Gallup Poll News Service, Jan. 18, 1992, at 2 (Vol. 56, No. 34a). Millions of American women have ordered their lives around their understanding that they have a fundamental constitutional right to terminate unwanted pregnancies. The State now urges this Court to reinterpret the Constitution so as to deny or disparage this right. But the Ninth Amendment admonishes us that the people, not the courts, retain and exercise rights. The role in which this Court is cast by the Constitution, as the ultimate arbiter of constitutional meaning, is powerful indeed. But that power, the Amendment tells us, must be exercised by way of a stewardship over all our rights, whether or not enumerated in the document itself. It is not for appointed judges, in the democracy our Founders made, to interpret rights out of existence by overruling the precedents that support them.

The principle of stare decisis has many functions, and the strength of the principle on any particular occasion is no doubt proportional to the importance of the purpose that it serves. Adherence to precedent in the present case serves the purpose of the Ninth Amendment -- to make Americans eternally secure in the conception of a society under law, with a government limited by its recognition of permanent fundamental barriers, protecting its citizens alike against the reach of cunning and the arts of oppression. This Court should reaffirm the principle of the Ninth Amendment, that rights, once recognized, must be cherished and protected, lest the entire edifice of constitutional freedom crumble away forever.

B. *The Withdrawal of a Fundamental Right Widely Exercised by Americans after a Generation of Recognition Will Result in Unprecedented Strain on the Institution of the Court*

The history of this Court reveals the close connection between the influence of the Court as an institution and the public acceptance of its holdings in critical constitutional cases. The Court's decision in *Dred Scott v. Sandford*, 19 How. 393

(1857), and the line of decisions invalidating economic recovery legislation between 1934 and 1937 brought the influence of the Supreme Court in American life to its historical minima. Charles Evans Hughes, who was to guide the Court through the second of these crises, looked back on the first as the most serious of the Court's self-inflicted wounds. *See* Charles Evans Hughes, The Supreme Court of the United States 50 (1927). Both episodes resulted primarily in damage to the prestige of the institution; each created the impression for the generation of Americans who looked on that the Court was prepared to wager and lose its legitimacy in pursuit of a controversial substantive program. But none of these cases went so far as to deprive the majority of American citizens of a widely recognized and exercised constitutional right. The consequences of such a decision, and the resulting change in the role of the Court in the American democracy, are grave indeed. Never before in our history has the Court set out on such a profound and perilous undertaking.

The social forces likely to be unleashed by such a decision, however incalculable their effect, are easily described, and nowhere better than by Justice Holmes himself. "A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man." O.W. Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 477 (1897). The explicit withdrawal or vitiation of a recognized fundamental personal right, exercised by an entire generation of Americans for whom it was as integral to the "concept of ordered liberty," *cf. Palko v. Connecticut*, 302 U.S. 319, 325 (1937), as freedom of speech or the free exercise of religious observance, will provide an eloquent demonstration of the truth of Holmes' observation. Sadly, the object of rage will be the institution of the Court itself.

Nor can the Court hope to lessen the consequences of this fateful gamble in constitutional law-making by returning to the

states the primary responsibility for delimiting the scope and limitations of the right to choose for oneself when and how to bear children. The right originally recognized in *Roe v. Wade* has become so deeply embedded in our constitutional law during the past generation, and the ancillary legal consequences of its withdrawal raise so many vexing questions of federal constitutional dimension, that the Court must expect to face intractable problems by accepting the State's dangerous invitation to this novel constitutional experiment.

II. *ROE* PROVIDES THE ESSENTIAL UNDERPINNING FOR THE BROAD CONSTITUTIONAL PRINCIPLE THAT STATE INTERFERENCE IN CRITICAL MEDICAL AND REPRODUCTIVE DECISIONMAKING IS SUBJECT TO HEIGHTENED SCRUTINY

This Court has repeatedly recognized that "the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government," *Thornburgh*, 476 U.S. at 772, and that state intrusion into this sphere demands strict scrutiny. *Roe* held that this domain is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153. *Roe* enabled millions of American women to enter the work force, continue their education, fulfill their responsibilities to their families, and escape the devastating consequences of illegal abortions or forced pregnancies that had threatened the lives of countless women before them.

As this Court has repeatedly recognized, *Roe* was a logical and appropriate outgrowth of a long line of cases recognizing a fundamental right to privacy and autonomy in matters of childbearing and family life. *See, e.g., Eisenstadt v. Baird*, 405 U.S. 438 (1972) (contraception); *Loving v. Virginia*, 388 U.S. 1 (1967) (marriage); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (procreation); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (childrearing). And, since *Roe*, this Court and the lower courts, both state and federal, have relied on *Roe* and its progeny to

identify other intimate, personal choices that lie within the protected ambit of the Fourteenth Amendment's liberty interest. The breadth of the reliance on *Roe*'s analytic framework means that *Roe* cannot be surgically excised from the jurisprudence of liberty and privacy interests. Moreover, its centrality offers a powerful defense of its correctness.

A. *The Lower Courts Have Relied on* Roe *Both to Identify and to Afford Heightened Protection to a Range of Liberty Interests*

Just as *Roe* relied on a variety of precedents -- involving such areas as marriage, procreation, contraception, and child rearing, *see Roe*, 410 U.S. at 152-53 -- so, too, in the wake of *Roe* courts have relied on its analysis to address a range of other critical choices. Some of these choices involve other reproductive decisionmaking. In *Arnold v. Board of Education of Escambia County*, 880 F.2d 305, 311 (11th Cir. 1989), for example, the court of appeals reasoned from *Roe* that "[r]esolution of the childbearing decision embraces two alternatives," abortion and carrying a pregnancy to term. "*Both* alternatives enjoy constitutional protection from unwarranted governmental interference," and thus state coercion of abortion gave rise to a cause of action under 42 U.S.C. § 1983. *Id.* (emphasis added). More broadly, in *Avery v. County of Burke*, 660 F.2d 111, 115 (4th Cir. 1981), the court of appeals relied on *Roe*'s vesting of reproductive control in the individual to permit a section 1983 lawsuit to proceed against a county agency that had erroneously induced the plaintiff to undergo an unwarranted sterilization. In short, courts have rested both the right to choose abortion or sterilization and the right *not* to choose those procedures atop *Roe*. And they have also relied on *Roe* to explain why protection of these complementary sets of rights requires strict scrutiny of state interference, in *either* direction. *See, e.g., In re Conservatorship of Valerie N.*, 707 P.2d 760, 772-74 (Cal. 1985); *In re A.W.*, 637 P.2d 366, 369 (Colo. 1981); *In re Grady*, 426 A.2d 467, 473-74 (N.J. 1981).

Other choices involve the issue of autonomy in medical decisionmaking more generally, and here too, *Roe*'s analytical framework has proved critical to fleshing out the contours of the rights involved. In *Cruzan v. Director, Missouri Department of Health*, 110 S.Ct. 2841, 2851 (1990), this Court recognized that "a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment"; although the Court's opinion did not resolve the level of scrutiny to be used in reviewing governmental restrictions on that interest, five justices recognized that interest to be fundamental, *see id.* at 2857 (O'Connor, J., concurring), 2864 (Brennan, J., joined by Marshall and Blackmun, JJ., dissenting), and 2885 (Stevens, J., dissenting). *Cruzan*, however, did not really delineate the contours of this liberty interest. That task has been accomplished to a significant degree by state courts, many of which relied expressly on *Roe* to justify their conclusions. *See, e.g., Norwood Hospital v. Munoz*, 564 N.E.2d 1017, 1021, 1024 (Mass. 1991); *Hondroulis v. Schumacher*, 546 So.2d 466, 472 (La. 1989); *Rasmussen v. Fleming*, 741 P.2d 674, 681-82 (Ariz. 1987); *cf. In re A.C.*, 573 A.2d 1235, 1243 (D.C. 1990).

Of special salience to this case, a number of courts have held that competent adults have the fundamental right to refuse life-saving treatment for themselves despite the impact of their death on already-born children. *See, e.g., Munoz*, 564 N.E.2d at 1019, 1021, 1024; *Fosmire v. Nicoleau*, 551 N.Y.S.2d 876, 882-83 (N.Y. 1990); *Wons v. Public Health Trust of Dade County*, 500 So.2d 679, 685, 687 (Fla. Dist. Ct. App. 1987), *aff'd*, 541 So.2d 96 (Fla. 1989). In these cases, courts have held that an *individual*'s core autonomy with regard to medical treatment trumps the competing interests both of the state and of identifiable third parties in prolonging that individual's life against her will. *Cf. Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. at 777 n. 5 (Stevens, J., concurring) ("the concept of privacy embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole'") (quoting Charles Fried, *Correspondence*, 6 Phil. & Pub. Affairs 288-89 (1977)). In short, *Roe* has provided the foundation for understanding the fundamental, albeit not

unlimited, right to bodily integrity in a variety of life-and-death decisions.

B. *Coherence in the Treatment of these Liberty Interests in Both Abortion and Non-Abortion Contexts Requires the Reaffirmation of* Roe

The only way of achieving a coherent treatment of the various liberty interests involved is to apply heightened scrutiny to all restrictions burdening those interest. If this Court is determined to abandon the narrow holding of *Roe* -- that decisions whether to terminate a pregnancy lie within the protected sphere -- it must rationalize the protection of the remaining liberty interests.

To describe this as a deeply problematic operation would be an understatement. To say that "the liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment," *Cruzan*, 110 S.Ct. at 2857 (O'Connor, J., concurring), without endorsing its corollary -- that the Due Process Clause also protects an individual's deeply personal decision to obtain medical treatment, including an abortion -- risks serious incoherence. On what grounds could a court say that a state needs more than a rational basis (founded on its interest in preserving life) to forbid women to refuse life-sustaining medical treatment if this Court holds that it needs only that to forbid an abortion? Similarly, on what grounds can the courts rein in governmental pressure on vulnerable women *to* have abortions if decisional autonomy over the abortion decision is not a fundamental liberty interest vested in the individual?

Nothing in this Court's decisions, or the applications of *Roe* and its progeny in the lower courts, provides any principled way of maintaining the heightened protection of these other liberty interests if *Roe* is abandoned. That *Roe* assists in providing a framework for answering so many vexing questions of the relationship among individuals, their families, their doctors, and the government counsels strongly against forsaking it.

III. THE DESTRUCTIVE REPERCUSSIONS OF GIVING STATES A FREE HAND IN REGULATING ABORTION SHOULD DISSUADE THE COURT FROM ABANDONING *ROE'S* REQUIREMENT OF HEIGHTENED SCRUTINY

Roe's critics are quite seriously mistaken in assuming that, if *Roe* is repudiated, questions regarding abortion can be returned entirely to the states and this Court can avoid articulating "detailed," "intricate" rules regarding the constitutionality of abortion regulations. *See, e.g., Webster v. Reproductive Health Services*, 492 U.S. 490, 518 (1989) (opinion of Rehnquist, C.J.); *id.* at 535 (Scalia, J., concurring in part and concurring in the judgment); *Thornburgh*, 476 U.S. at 789 (White, J., dissenting). Short of this Court's completely abdicating its constitutional responsibilities, it will remain embroiled in policing state regulation of abortion-related activities. Existing state and federal statutes will present the Court with a variety of unpalatable choices. Other readily foreseeable state restrictions will pose even more intractable problems. Quite simply, abortion will remain deeply enmeshed in questions of federal constitutional law.

Now is the time to resolve some of these questions. First, the Court should reaffirm one of *Roe*'s central premises: because the fetus is not a "person" within the meaning of the Constitution, states cannot subordinate women's freedom to the preservation of non-viable fetuses. *Roe*, 410 U.S. at 156-59. Second, the Court should acknowledge that as long as a woman's decision to end her pregnancy is an "indisputable" liberty interest protected by the due process clause, *Thornburgh*, 476 U.S. at 790 (White, J., dissenting, joined by Justice Rehnquist); *see also, e.g., Hodgson v. Minnesota*, 110 S.Ct. 2926, 2949 (1990) (O'Connor, J., concurring in part and concurring in the judgment in part); *Webster*, 492 U.S. at 520 (opinion of Rehnquist, C.J., joined by White and Kennedy, JJ.), the Court must be prepared to prevent states from essentially regulating

that liberty out of existence. Careful consideration shows the enormous dangers of abandoning *Roe*.

A. Roe*'s Central Holdings--that a Fetus is Not a Person and that States Have No Compelling Interest in Protecting Non-Viable Potential Life--Are Correct, and Prohibit States from Depriving Women of Their Fundamental Freedoms*

Roe squarely held that a fetus is not a "person" within the meaning of the Fourteenth Amendment. *Roe*, 410 U.S. at 156-59. That holding represents the only plausible reading of the constitutional text.[1] *Roe* also held that states have no compelling interest in non-viable potential life, and therefore cannot override women's constitutional liberty interest in making this decision for themselves. To overturn either holding would permit entirely unpalatable interference in women's lives. And to hold that a fetus is a "person" within the meaning of the Fourteenth Amendment would both require such interference and dramatically destabilize existing law.

To permit states to define their interest in fertilized ova as compelling from the moment of conception would allow state regulation of pregnant women that extends far beyond prohibiting abortion. The Court must be prepared, in fact, to

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1 To permit individual states to define the boundaries of personhood would essentially repeal the Fourteenth Amendment. The due process and equal protection clauses cannot perform their intended function if a state is free to evade their commands by determining that the entity against which it seeks to act is not a "person." Moreover, that the Constitution never contemplated giving states the power to define constitutional personhood can also be seen from the apportionment clauses (Art. I, § 2 and section 2 of the Fourteenth Amendment): if each state were free to determine for itself what should be counted as a "person," the allocation of congressional seats among the states would be susceptible to improper manipulation.

return to the discredited mindset of *Muller v. Oregon*, 208 U.S. 412, 422 (1908), that the "proper discharge of [a woman's] maternal functions -- having in view not merely her own health, but the well-being of the race -- justify legislation" limiting her rights in a way that men's rights cannot be limited. Only last Term, in *International Union, UAW v. Johnson Controls, Inc.*, 111 S.Ct. 1196, 1207 (1991), this Court held that "[d]ecisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents." But if states can assert a compelling interest in protecting such fetuses, then states must be allowed to pass laws banning pregnant women from hazardous workplaces. Indeed, such a framework could even cast serious doubt on this Court's holding in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), that a mandatory four-month leave of absence for pregnant teachers violated the Fourteenth Amendment.

Treating states' interests in non-viable fetuses as compelling would sweep even further than merely state regulation of women's economic and career opportunities. It could subject women to restrictions on virtually every aspect of their everyday lives, on the grounds that the state's interest in the fetus outweighs a woman's general interest in controlling her own life. Does a pregnant woman, for example, have the same privilege as every other qualified adult to drive an automobile? *Cf. Stallman v. Youngquist*, 125 Ill. 2d 267, 531 N.E.2d 355 (1988) (child sued her mother for injuries sustained *in utero* as a result of an automobile accident). In short, if states are permitted to treat their interest in fetuses throughout pregnancy as a "compelling" one, they can completely subordinate women to the fetuses they carry.

Reversal of *Roe*'s holding that a fetus is not a "person" within the meaning of the Constitution would go even further, and could *require* the kinds of interference already described. But the radical consequences would not stop there. States would even be commanded to outlaw abortion, and to treat abortions on a par with homicide generally. Today, no state

punishes abortions as severely as it punishes murder.[2] *See Roe*, 410 U.S. at 157 n. 54. But if this Court were to hold that fetuses are "persons," then any state which punishes their intentional destruction (and it is hard to imagine a therapeutic abortion that is performed unintentionally) less harshly than the premeditated homicide of an already-born human being has violated the equal protection clause. *Cf. McClesky v. Kemp*, 481 U.S. 279, 329-30 (1987) (Brennan, J., dissenting) (noting that in antebellum Georgia "a person who willfully murdered a slave was not punished until the second offense," although the murder of a white person was punished either by death or by life imprisonment and that the penalties for raping black women were dramatically lower than the penalties for raping white women). Moreover, statutes permitting elective abortions for any reason other than to save the life of the mother[3] would deny due process of law by delegating life-and-death decisions to private persons. If rape itself cannot be punished by death, *see Coker v. Georgia*, 433 U.S. 584 (1977), then surely a state which criminalizes abortion in general cannot delegate to an individual woman the decision to kill an unborn person simply because his father was a rapist. Nor, since the state itself could not execute children with severe physical or mental abnormalities, could it permit private parties to do so as long as the destruction was accomplished before birth rather than after.

Indeed, the fact that no state punishes abortion as harshly as murder, and that even such draconian statutes as Louisiana's

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2 In 1991, however, Utah passed an anti-abortion statute which, due to a loophole, could have permitted the prosecution, conviction, and execution by firing squad of a woman having an illegal abortion. *See* Anna Quindlen, *Public and Private*, N.Y. Times, Mar. 28, 1991, at A25. The law was swiftly amended to eliminate this possibility.

3 A state might be constitutionally required to permit such abortions. *Cf. Beard v. United States*, 158 U.S. 550, 559-62 (1895) (suggesting that the right of self-defense may be a fundamental aspect of Anglo-American law).

recently enacted criminalization of virtually all abortions, 1991 La. Act No. 26, § 2 (to be codified at La. Rev. Stat. § 14:87(E)(2)), exempt women who have abortions from the statute's criminal penalties, strongly suggests the abiding correctness of *Roe*'s holding: whatever the fetus' status and whatever the states' interest in potential human life, a fetus is quite simply not a person, and society does not regard it as such. And this common-sense understanding of the meaning of "person" as including only already-born human beings is further reinforced by the medical and scientific consensus.

B. *To Abandon Heightened Scrutiny of Abortion-Related Restrictions Would Be Impossible as Well as Unwise*

The premise that if *Roe* is overruled the states will be free to regulate abortion as they see fit is hopelessly naive. It ignores two central facts.

1. *This Court Will Be Faced With a Number of Serious Interstate Conflicts*

The varying responses of states over the past nineteen years show that, if *Roe* is overruled, different states can be expected to take vastly different positions regarding the contours of a woman's right to abortion. Some states may ban all abortions except those necessary to save the life or health of the mother. *See, e.g.*, Guam Public Law 20-134 (1990). Others may also permit exceptions for pregnancies resulting from rape or incest. *See, e.g.*, 1991 La. Act. No. 26. At the other end of the spectrum, some states may continue to identify a state constitutional right to abortion as broad as that delineated by this Court in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986). *See, e.g., In re T.W.*, 551 So.2d 1186 (Fla. 1989) (locating such a right in Florida's constitutional guarantee of privacy). And others may continue to fund even elective abortions by indigent women. *See, e.g.*,

N.Y. Times, Aug. 26, 1989, at A25, col. 5 (discussing New York City's policy of funding elective abortions).

The interests of these states are bound to come into conflict, especially given the probability that substantial numbers of women will cross state lines to seek abortions denied them in their home states. *See* U.S. Dept. of Health, Education & Welfare, Center for Disease Control, Abortion Surveillance: Annual Summary 1972, Table 4 (1974) (in 1972, over 43 percent of the 510,000 legal abortions performed in the United States were performed on women who had traveled across state lines to obtain the procedure), *reprinted in Abortion--Part 2: Hearings Before the Subcomm. on Constitutional Amendments of the Sen. Judiciary Comm.*, 93d Cong., 2d Sess. 137, 151 (1976). What one state views as its compelling interest in protecting potential human life from the moment of conception may be completely trumped in another state by the value of reproductive autonomy. And this Court will be called upon to referee that conflict in a variety of guises.

2. *This Court Will Have to Continue to Apply Heightened Scrutiny to Abortion-Related Restrictions Because of their Impingement on a Variety of Constitutional Rights*

To suppose that states seeking to lower their abortion rates will rely solely on criminalization of abortion itself is to ignore political reality: few legislators are likely to vote for measures that pose the specter of an army of women being led off to jail. Instead, states are likely to rely on an array of techniques that either deprive women of information and access to abortion, deter women from seeking abortion through the threat of non-criminal sanctions, or act upon the providers of abortion services rather than the women who seek them. Many of these techniques are likely to raise serious constitutional questions.

a. *Eighth Amendment Problems*

No state currently authorizes capital punishment for women who have abortions, and because a fetus is not a "person," any attempt to do so would clearly run afoul of *Coker v. Georgia,* 433 U.S. 584 (1977), which limits the availability of capital punishment to murder.[4] But does the Eighth Amendment impose any other limits on the degree or kind of punishment a state could mete out to doctors who perform, or women who undergo, abortions? *Cf. Harmelin v. Michigan,* 111 S.Ct. 2680 (1991) (upholding mandatory life sentence for cocaine conviction).

In *Blanton v. City of North Las Vegas,* 489 U.S. 538 (1989), this Court permitted a city to sentence someone convicted of driving while under the influence (DUI) to perform 48 hours of community service "dressed in clothing identifying him as a DUI offender." *Id.* at 544. The Court concluded that even if "the outfit is the source of some embarrassment during the 48-hour period, such a penalty will be less embarrassing and less onerous than six months in jail," *id.*, and thus this punishment could be meted out without trial by jury. Could a state require that all women who undergo abortions wear distinctive clothing (say, with a scarlet "A" across their chests) identifying themselves while performing community service?

b. *The Scope of Federal Criminal Statutes*

In *United States v. Holte,* 236 U.S. 140, 145 (1915), this Court held that a woman who willingly traveled across state lines for purposes of prostitution could be guilty of conspiracy to violate the Mann Act, 18 U.S.C. §§ 2421-22, even though she could neither commit the substantive crime nor be an accomplice. Under the Assimilative Crimes Act, 18 U.S.C. § 13(a) (1988), any person who commits an act that would be

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4 *But see supra* note 2.

punishable under state law while on federal land within the state "shall be guilty of a like offense and subject to a like punishment." Louisiana has passed a statute criminalizing most abortions but providing that its penalties shall not apply to the woman who has had the abortion. 1991 La. Act No. 26, § 2 (to be codified at La. Rev. Stat. § 14:87(E)(2)). Can the wife of an army officer stationed at Fort Polk, in Leesville, be prosecuted under 18 U.S.C. § 371 (1988) (the federal conspiracy statute) if she makes arrangements while on the base to obtain an abortion?

c. *Fourth Amendment Problems*

If states can constitutionally criminalize abortion, what restrictions, if any, will be imposed on the scope and nature of searches and seizures to obtain evidence of the "telltale signs," *Griswold v. Connecticut,* 381 U.S. 479, 485 (1965), that a woman has recently obtained an abortion? *See, e.g.,* Bernstein, *Germany Still Divided on Abortion; A Woman's Ordeal at Border,* Newsday, Mar. 11, 1991, at 5 (reporting on German women re-entering the country from the Netherlands who have been subject to vaginal searches to determine whether they have obtained abortions, which are generally illegal in Germany); *cf., e.g., Mary Beth G. v. City of Chicago,* 723 F.2d 1263 (7th Cir. 1983) (visual and vaginal cavity searches); *Rivas v. United States,* 368 F.2d 703 (9th Cir. 1966) (rectal search for contraband), *cert. denied,* 386 U.S. 945 (1967). Would the hundreds of thousands of miscarriages that occur each year also be subject to police investigation? If we cannot tolerate in a free society the prospect of police searches of the marital bed, will the Court tolerate the invasion of still more intimate precincts by states zealous to prohibit abortions?

d. *The Right to Travel*

The case law has recognized a "virtually unqualified" right to engage in interstate travel. *Califano v. Aznavorian*, 439 U.S. 170, 176 (1978); *see, e.g., Shapiro v. Thompson*, 394 U.S. 618 (1969); *United States v. Guest*, 383 U.S. 745 (1966); *Edwards v. California*, 314 U.S. 160 (1941). At the same time, however, this Court has recognized that states have a significant interest in punishing crimes that have begun within their borders regardless of where those crimes are actually consummated. *See, e.g., Heath v. Alabama*, 474 U.S. 82 (1985) (permitting Alabama to find a defendant guilty of capital murder who kidnaped the victim in Alabama and took her across the state line to Georgia before killing her). Assume Alabama criminalizes abortion except to save the life of the mother and Florida continues to recognize a state constitutional right to freedom of choice. Could Alabama prosecute one of its citizens who traveled across the state line to have an abortion in Florida? Could it restrain a citizen from leaving the state to have an abortion? *Cf.* Clarity, *Irish Court Says Girl Can Leave to Obtain Abortion in Britain*, N.Y. Times, Feb. 27, 1992, at 1 (reporting on the legal controversy surrounding the attempt by a teenage rape victim to travel from Ireland, where abortion is illegal, to England to have an abortion).

e. *First Amendment Issues*

In *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 328 (1986), this Court upheld a Puerto Rican law that forbade casinos legally doing business within the Commonwealth from advertising the availability of their services to Commonwealth residents. The Court distinguished *Bigelow v. Virginia*, 421 U.S. 809 (1975) -- which had struck down a Virginia statute criminalizing the publication of advertisements regarding abortion services -- on the ground that in *Bigelow*,

> "the underlying conduct that was the subject of the advertising restrictions was constitutionally protected and could not have been prohibited by the State. Here, on the other hand, the Puerto Rico Legislature surely could have prohibited casino gambling by the residents of Puerto Rico altogether. In our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling ...."

478 U.S. at 345-46. Can states that choose not to criminalize abortion nonetheless ban all advertising providing information about where and how to obtain abortions?[5]

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[5] It is worth noting that the federal criminal code currently contains the following provision:

> "Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, ... where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means abortion may be produced, whether sealed or unsealed ....
>
> "Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier."

18 U.S.C. § 1461 (1988). Anyone who knowingly uses the mails to send such information or who "knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof" faces, for the first offense, a fine of $5,000 and a five-year prison term, with a possible $10,000 fine or ten- year sentence for each subsequent offense. Can this statute withstand First Amendment challenge?

In *Rust v. Sullivan*, 111 S.Ct. 1759 (1991), this Court upheld restrictions on what doctors in Title X programs could tell their patients about abortion. If the informed-consent provisions at issue in this case were upheld, would the First Amendment provide any constraint on what a state could compel doctors to tell their patients before performing abortions?

f. *The Right to Vote*

In *Richardson v. Ramirez*, 418 U.S. 24 (1974), this Court upheld the lifetime disenfranchisement of felons against a constitutional challenge. In upholding such disenfranchisement, the Court expressly relied on *Davis v. Beason*, 133 U.S. 333 (1890). *Id.* at 39. *Davis* upheld a territorial statute that provided, among other things, that "No person ... who teaches, advises, counsels, or encourages any person or persons to become bigamists or polygamists, or to commit any other crime defined by law, ... is permitted to vote at any election, or to hold any position or office of honor, trust, or profit within this Territory." Idaho Rev. Stats. § 501. In order to cast a ballot, a voter had to swear that he or she "do[es] not and will not, publicly or privately, or in any manner whatever teach, advise, counsel or encourage any person to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a religious duty or otherwise ...." Can a state disenfranchise for life all women who have abortions? And can it require all voters to take an oath that they will not advise, counsel, or encourage anyone else to have an illegal abortion?

g. *Other Substantive and Procedural Due Process Problems*

In *Paul v. Davis*, 424 U.S. 693 (1976), the Court rejected a claim that an individual has a privacy interest in the "record of an official act such as an arrest." *Id.* at 713. If *Thornburgh*'s restrictions on the gathering and dissemination of

abortion-related information are overturned, and statutes such as the reporting requirements imposed by the statute currently before this Court, *see* 18 Pa. Cons. Stat. Ann. §§ 3207, 3214, are permissible, could a state decide to publicize the names of women who have abortions?

This Court has repeatedly recognized with regard to professional licensure, including permission to practice medicine and admission to the bar, that good character requirements can be imposed. *See generally* Deborah Rhode, *Moral Character as a Professional Credential*, 94 Yale L.J. 491 (1985). Prior to *Roe*, states in fact did deny the right to practice law to persons involved in abortion-related activities. *See, e.g., In re Meyerson*, 59 A.2d 489, 495 (Md. Ct. App. 1948) (assisting in procuring an abortion is a "crime of moral turpitude" justifying a finding that an applicant lacks the good moral character required for bar admission); *In re Frankel*, 35 N.Y.S.2d 214, 215 (App. Div. 1942) (mandatory disbarment of attorney convicted of felony abortion). Can the state refuse bar admission to women who have had abortions for which they are not criminally liable under state law?

Could a state condition its granting of other public benefits upon the agreement by a recipient that she will not seek an abortion? Could a state revoke such benefits if that condition was violated? If deferential rational relationship scrutiny is applied, the answer would seem to be yes, since the prospect of losing such benefits would surely deter at least some women from having abortions. Would this Court approve denial of public-assistance benefits or pensions as a consequence of a woman's obtaining an abortion? *See, e.g., Ballurio v. Castellini*, 102 A.2d 662, 666 (N.J. App. Div. 1954) (because abortion is a crime of "moral turpitude" it justified for-cause termination of municipal street department employee and subsequent denial of his pension). And could a state put women to a Hobson's choice by denying them some public benefits for having an abortion while denying them AFDC benefits if they have additional children while on welfare? *Cf.* New Jersey Assembly Bill 4703.

In *Webster v. Reproductive Health Services,* 492 U.S. 490 (1989), the Court upheld a Missouri statute that banned the use of public facilities for performing non life-saving abortions. But the Court suggested that the situation "*might* be different" if "the State barred doctors who performed abortions in private facilities from the use of public facilities for any purpose." *Id.* at 510 n. 8 (emphasis added). If, however, neither a woman nor her doctor has any fundamental liberty interest in making abortion-related decisions, would a state be entitled to enact such a ban in order to deter doctors from performing abortions? And could a state bar doctors from its facilities for performing legal abortions in other states?

Similarly, in *Rust v. Sullivan,* 111 S.Ct. 1759 (1991), this Court upheld Title X regulations that conditioned the grant of family-planning funds upon an agreement by grantees not to engage in abortion counseling or referral. Suppose a state were to condition medical licensure or a hospital or clinic's tax exemption upon its agreement not to perform abortions or even to provide information about how to obtain legal abortions out of state. Is there any constitutional limit on the scope of conditions or gag rules?

The preceding examples show why this Court cannot abdicate its responsibility to scrutinize abortion-related legislation with extreme care. For this Court to hold that the constitutional liberty interest involved in decisions about abortion is not fundamental solves no problem: it just creates new constitutional difficulties that *Roe* had already solved. And to permit the states to deter and punish women from exercising their full panoply of constitutional rights breaks faith with the women who took to heart this Court's solemn guarantees.

CONCLUSION

The rights recognized in *Roe* and exercised since 1973 have become a defining freedom for millions of Americans. The enlightened understanding of personal dignity, autonomy, and liberty embodied in *Roe* has given modern shape to our constitutional tradition of permanent fundamental rights. To abandon *Roe* threatens serious damage to this Court's credibility, doctrinal chaos on a variety of issues, and the settled expectation of American women that the Constitution protects them in the most important decisions they may ever make. Accordingly, this Court should reverse the decision in No. 91-744 and affirm the decision in No. 91-902.

Respectfully submitted,

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Appendix A

Appendix

A-1

Abortion Rights Mobilization

Abortion Rights Mobilization is a national organization (tax exempt), dedicated to the fullest guarantee of women's right of choice. Since the Casey case represents a critical challenge to choice and privacy, ARM would like to add its voice to any amicus effect in support of the plaintiffs.

ACCORD

Accord, the Provider's Assurance and Patient Security Group, provides a variety of support services for out-patient health care professionals, many of whom are abortion providers. We view the 1988 amendments to the Pennsylvania Abortion Control Act of 1982, contained in Planned Parenthood of Southeastern Pennsylvania v. Casey, as cumbersome, unnecessary to protect the health and safety of women, and probably purely politically motivated. We urge the Court to permit health care professionals to go about the business of practicing medicine unencumbered by political restrictions designed to dissuade and/or discourage women from seeking abortion services. And finally, we strongly urge the court to enhance its protection of the right of women to choose abortion.

Action Alliance for Reproductive Rights

The Action Alliance for Reproductive Rights (AARR) is a volunteer organization of over 500 persons in Santa Cruz

County committed to defending clinics in our community which provide abortion and to protect the dignity and privacy of women seeking abortion and family planning services. The AARR has published Let Me Tell You Why, a collection of testimonies from women documenting the importance of reproductive choice is their lives.

ActionAids, Inc.

ActionAIDS in Philadelphia, Pennsylvania, provides ongoing direct services to approximately 400 of the men, women and children with symptoms of HIV disease in the Greater Philadelphia area. Additionally, we provide support and assistance to their spouses, lovers, family members and care givers. Access to comprehensive reproductive health information-including information about abortion and abortion services--can be crucially important to women who have tested positive for the AIDS virus. These women need access to such equitable medical coverage in order to have a true moral choice with regards to one of the most heartbreaking and difficult decisions--that of whether or not to bear a child who may be born with AIDS. Because women at high risk of AIDS frequently discover their own HIV-positive status as a result of giving birth to a child with AIDS, access to comprehensive reproductive health care, including abortion, becomes a matter of paramount importance. For medical, moral and emotional reasons, these women cannot reasonably be required to carry future, inadvertent pregnancies to term. Low income and adolescent women, many of whom are people of color, are in particular need of access to the federally funded family clinics that provide

comprehensive reproductive health information--including abortion services--as one of their services. Without such access, we can expect a marked increase in both unsafe, illegal abortions and AIDS infection in women and their children.

Ad Hoc Committee of American Law Professors

This brief is submitted on behalf of 299 American law professors (see Appendix B) who believe that the right of a woman to choose whether or not to bear a child, as delineated by this Court in Roe v. Wade, 410 U.S. 113 (1973), is an essential component of constitutional liberty and privacy commanding reaffirmation by this Court.

Advocates for Abortion Rights & Reproductive Freedom

The Advocates for Abortion Rights and Reproductive Freedom has been in existence for four years in northwest Essex County, New Jersey. We do grass roots organizing and educating on reproductive rights issues. We would like to participate as amicus curiae in the case of Planned Parenthood of Southeastern Pennsylvania v. Casey because we believe that the basic constitutional right to abortion must be preserved from any attempts to either restrict it or take it away.

Afrikan/American Advancement Corporation

The Afrikan/American Advancement Corporation was created to engage in activities designed to advance the efforts of African Americans to achieve justice, equality of

opportunity and parity, including lobbying local, state and national government. In keeping with its commitment to advocate equal rights for African American women, it has supported the rights of all women to exercise control over their bodies, and for full protection of the law in choosing reproductive alternatives.

Alabama Citizens for Choice

Alabama Citizens for Choice, a broad-based, statewide coalition, was formed in November of 1989 with the purpose of protecting reproductive rights in Alabama. This organization represents 17 mainstream Alabama organizations comprising about 25,000 members and still growing. We are working toward educating both the public and our elected officials about the importance of choice and reproductive freedom for all of our citizens.

Alachua County Democratic Women's Club

The Democratic Women's Club of Alachua County, Florida, consisting of approximately ninety active men and women, surveyed its membership using a scientifically designed instrument to determine the membership's position on the right to choose an abortion for an unwanted pregnancy. The response was unanimously in favor of choice. At a recent meeting the membership voted unanimously to add its name to the brief being filed by the Planned Parenthood to protect this very basic American freedom.

American Association of University Women

The American Association of University Women (AAUW), a network of 135,000 college-educated women and men promotes equity for women and girls, education and self-development to over the life-span and positive social change. The AAUW supports the right to every woman and girl to safe and comprehensive reproductive health care and believes that decisions concerning reproductive health care are personal ones that the right to make informed decisions should be available to all women.

American Ethical Union

The American Ethical Union affirms its continuing endorsement of the right of all women to choose to have an abortion. It vigorously opposes all attempts to curtail, restrict or in any way limit that right to choose, whether by act of Congress (including the denial of federal funds for medicaid abortions) or by constitutional amendment. Accordingly, the American Ethical Union reaffirms Resolutions adopted by it in 1973 and 1979 which express disapproval of efforts to amend or circumvent the Constitution so as to nullify or impede the right to choose.
American Federation of State, County and Municipal Employees

American Federation of State, County and Municipal Employees

The American Federation of State, County and Municipal Employees (AFSCME) is a labor union with 1.3 million members over half of whom are women. AFSCME represents employees in state and local government and the private non-profit sector including over 300,000 health care workers and 150,000 social service workers. AFSCME has over 101,6000 members in the Commonwealth of Pennsylvania.

American Foundation for AIDS Research (AMFAR)

The American Foundation for AIDS Research (AmFAR) is a private, not-for-profit organization dedicated to mobilizing the good will, energy and generosity of caring Americans and people throughout the world to end the AIDS/HIV epidemic. Founded in 1985, AmFAR is the leading national non-profit organization devoted to AIDS research, education and public policy projects. AmFAR serves as a catalyst by providing start-up funds for innovative projects to fight AIDS/HIV. Since its founding, AmFAR has awarded $39 million to more than 620 research teams. AmFAR's volunteer advisory committees review and select applications for funding. AmFAR-funded projects have already produced significant results. AmFar also operates a Public Policy Program, to help bring about sound legislation and government policies for combating the epidemic and protecting the rights of people with AIDS/HIV.

American Friends Service Committee

The American Friends Service Committee carries out its work as a social justice arm of the Religious Society of Friends in America. AFSC has a vital interest in this litigation because of Friends' belief in the infinite worth of each human being and in the rights of individual conscience. More than two decades ago, AFSC enunciated a position, based on these beliefs and on our many years of program work, in support of women's rights to make their own choices concerning child-bearing, abortion and sterilization. AFSC is deeply aware that the decision of whether or not to terminate a pregnancy is seldom an easy one. We believe that the women must make the choice, free of coercion, including the coercion of poverty and unavailability of services to those who cannot pay.

American Humanist Association

The American Humanist Association (AHA) is a nationwide educational-philosophical organization, founded in 1941, which places the highest priority on the rights of conscience, intellectual and religious freedom, women's rights, and the principle of separation of church and state. The AHA joins this brief out its conviction that legal restrictions on reproductive rights violate the fundamental rights of women and are an improper extension of government authority.

American Jewish Committee

The American Jewish Committee (AJC) is a national organization of 40,000 members, founded in 1906, for the purpose of protecting the civil and religious rights of Jews. The AJC believes that this goal can best be accomplished by helping to preserve the constitutional rights of all Americans, including the fundamental right of access to abortion on a voluntary basis as set forth in Roe v. Wade.

American Jewish Congress

The American Jewish Congress, an organization of American Jews founded in 1918, is dedicated to the protection of the civil liberties and civil rights of Jews and of all Americans and the promotion of the principles of constitutional democracy. Among the many activities directed to these ends, the American Jewish Congress has in the past filed amicus curiae briefs in many of the reproductive freedom cases before this Court. The American Jewish Congress believes that, in the face of the great moral and religious diversity in American society over abortion and in the light of Jewish traditions which in some cases command abortion, and in many others permit it, the existing constitutional rules, set down by Roe v. Wade, should be maintained so that the different traditions may advocate their respective views and the decision left to the individual woman, answering to God and to her conscience.

American Veterans' Committee, Inc.

The American Veterans Committee, Inc. (AVC), founded in 1943, is a national organization of veterans who served honorably in the Armed Forces of the United States in World War I, World War II, the Korean War, or the Vietnam War. AVC has filed amicus curiae briefs in many court cases expressing AVC's strong belief that discrimination based on race, color, religion, gender, or national origin is detrimental to our Nation. AVC believes that the United States Constitution entitles a pregnant woman, in light of her unique burden of pregnancy, to determine whether to terminate her pregnancy, and protects her from being subjected to discrimination when doing so.

Americans for Democratic Action

The Americans for Democratic Action (ADA) is an independent political organization which brings together civil rights and feminist leaders, academicians, business people and trade unionists, grass roots activists, elected officials, church leaders, professionals, members of Congress and many others. ADA is dedicated to the achievement of freedom, equality of opportunity, economic security and peace for all people through education and political action.

Americans for Religious Liberty

Americans for Religious Liberty (ARL) is a non-profit, nationwide educational organization whose members

represent the whole religious spectrum. ARL is dedicated to defending religious liberty, freedom of conscience, and the constitutional principle of separation of church and state. ARL joins this amicus curiae brief out of the conviction that laws limiting freedom of conscience on abortion violate fundamental individual liberties and constitutional principles.

Anti-Defamation League

The Anti-Defamation League (ADL) is a national Jewish human relations organization dedicated to principles of religious liberty and constitutional privacy. ADL views reproductive choice as an issue of fundamental personal and religious freedom. Accordingly, ADL believes that a woman's decision whether or not terminate a pregnancy should be made in accordance with her own religious and moral convictions, without government interference.

Asian Pacific Islanders for Choice

As the only organization in the country representing Asian Pacific Islanders advocating reproductive health freedom, we are extremely concerned about the potential effects which would result from an unfavorable decision on this case. Any infringement upon the right to choose may have a particularly harmful consequence on Asian Pacific Islanders, many of whom are also faced with income, language, religious and cultural barriers to complete reproductive health freedom.

Bar Association of San Francisco

The Bar Association of San Francisco is a voluntary local bar association composed of over 8500 attorneys. Among its principle purposes is ensuring the integrity of the judicial process and the orderly administration of the system of justice. To this end, the Association seeks to actively oppose attempts to effect the abandonment of longstanding constitutional precedent in areas affecting fundamental rights.

Beverly Hills Bar Association

The Beverly Hills Bar Association (BHBA) is a voluntary bar association formed on December 2, 1931 which currently has in excess of 3000 members. The members of BHBA practice primarily in the West Los Angeles area including in the City of Beverly Hills, California. BHBA is committed to the protection of individual liberties and to the promotion of respect for the legal system. BHBA believes that a reversal of the landmark decision in Roe v. Wade would impinge on individual liberties, religious freedom, the establishment clause of the First Amendment and undermine public confidence in the legal system.

B'nai B'rith Women

B'nai B'rith Women is an organization of 120,000 Jewish women who, since 1968, have advocated the right of women to choose for themselves on matters of reproduction. As members of a minority religion, BBW members are especially sensitive to keeping the state from

restricting religious freedom and, as women, BBW members have particular concerns about preserving their rights. Basic to the right of every woman is deciding when and whether to have children, and so BBW firmly support upholding these rights as outlined in Roe v. Wade.

Boston Women's Health Book Collective, Inc.

Boston Women's Health Book Collective, Inc. (BWHBC), is a non-profit women's health education and advocacy organization which seeks to empower individuals and groups to make informed personal and political decisions affecting health and medical care, especially as they relate to women. Founded in 1970, BWHBC operates a Women's Health Information Center near Boston and serves approximately 10,000 people each year. We have had a longstanding interest in reproductive rights, including access to safe, legal, affordable abortion services. Our 20 years of contact with thousands of women and their families has only reinforced our belief in the importance of contraception and abortion services for those who need and want them.

Business & Professional Women/USA

Business and Professional Women/USA (BPW/USA) is the bi-partisan voice of working women. With more than 100,000 members in 3,000 local organizations across the counter, BPW/USA promotes full participation, equity, and economic self-sufficiency for working women. We are represented in every congressional district in the county and include among our members women, men of every

age, religion, race, political party, and socioeconomic background.

California Physicians for Choice

California Physicians for Choice is an organization of physicians which is dedicated to informing the public that abortion is an option that should not be abandoned and that outlawing or restricting access to abortion would seriously interfere with the rights and duties of physicians to provide patients with the best possible health care.

California Women Lawyers

California Women Lawyers (CWL) is an organization of several thousand women lawyers founded in 1973 for the primary purpose of improving the situation of women in the State of California. CWL is committed to all issues affecting a woman's right to choice, lobbying against various parental consent bills and working with a broad-based coalition to encourage funding and support for programs supportive of choice.

California Women's Law Center

The California Women's Law Center was established in 1989 as the first Law Center in California devoted solely to addressing the civil rights of women and girls. The Women's Law Center has identified the following priorities for its work: Reproductive Rights, Sex Discrimination, Family Law, Violence Against Women and Child Care. The Women's Law Center's primary efforts in addressing

these priorities emphasize support and technical and legal assistance to legal services agencies, community based organizations, attorneys and policymakers. Protection of the right to reproductive freedom contained in the federal Constitution is one of the most significant legal issues facing women in California as well as the rest of the country. As such, it is clearly within the priority concerns of this Women's Law Center. Therefore, the California Women's Law Center not only has a significant interest in the current appeal, but brings extensive background and expertise to the issues presented to the court in this appeal.

Canadian Abortion Rights Action League

In 1974 the Canadian Abortion Rights Action League -- then called the Canadian Association for Repeal of the Abortion Law -- was formed to support Dr. Henry Morgentaler's challenge of the old abortion law. CARAL supported Dr. Morgentaler's battle politically and financially, and at the same time educated Canadians about the abortion issue so that his challenge to the law would be met by an informed and sympathetic public. We supported clinics operating outside the strict confines of the law as necessary to open up access to abortion services. CARAL grew from a group of 100 people to become a national organization with 35 chapters, thousands of individual members and 100 member organizations. Until January 28, 1988 (when the Supreme Court of Canada declared the law unconstitutional) CARAL lobbied the government to repeal the abortion law. Now we are working to keep abortion out of the

Criminal Code and to improve access to medically-insured abortion services across the country. Through education and information we seek to convince Canadian and their elected representatives that Canada does not need a new abortion law. CARAL is the only organization working full-time to keep abortion out of the Criminal Code and to protect access to abortion.

Catholics for a Free Choice

Catholics for a Free Choice (CFFC), established in 1973, is an international educational organization that supports the right to legal reproductive health care, especially family planning and abortion. CFFC also works to reduce the incidence of abortion and to increase women's choices in childbearing and childrearing through advocacy of social programs for women, families and children. CFFC believes that women from all economic levels are to be respected as moral agents who can be trusted to make decisions which support the well-being of their families, children and society and enhance their own integrity and health.

Center for Medical Consumers

The Center for Medical Consumers is an independent, non-profit organization, dedicated to helping consumers make informed choices about medical care. We believe that informed choice is the right of every citizen and that reproductive choices are no exception. We also believe that right to health care includes the right to safe and legal abortion. We therefore oppose any and all efforts to

reverse Roe v. Wade by the passage of restrictive laws by individual states that have a negative effect on a woman's right to choose.

Center for Population Options

The Center for Population Options (CPO) is a nonprofit, educational organization dedicated to improving the quality of life for adolescents by preventing unintended teenage pregnancies and too-early childbearing. CPO's domestic and international programs seek to improve adolescent decision-making through life-planning and other educational programs, to improve access to reproductive health care, to promote the development of school-based clinics, and to prevent the spread among adolescents of HIV and other sexually transmitted diseases.

Center for Women's Policy Studies

The Center for Women's Policy Studies (CWPS) is a nonprofit feminist organization founded in 1972, that is dedicated to research and advocacy to further women's rights. One of the Center's priorities is the achievement of equity n the workplace and the elimination of the glass ceiling for women. To that end, CWPS supports a broad and effective interpretation of Title VII of the Civil Rights Act of 1964, as amended.

Centre County Women's Resource Center

The Centre County Women's Resource Center is a non-profit community organization located in State

College, Pennsylvania. The Center provides shelter, legal advocacy, individual counseling and support groups for the survivors of sexual assault and domestic violence and their children. Other services include a 24-hour hotline, community education, child assault prevention programs, and a transitional housing program. In the 1990/91 fiscal year the center served approximately 979 new clients.

Chicago Catholic Women

Our goal is to work toward structural change within church and society in order to promote the full giftedness and personhood of women and a world of justice for all. We know that choice is a major part of women's rights.

CHOICE

CHOICE (Concern for Health Options: Information, Care and Education). For almost twenty years, CHOICE has been an educator, consumer advocate, counselor and information resource in the areas of reproductive health, sexuality and maternity care. Because of its background and experience in public education and counseling, CHOICE was selected by the City of Philadelphia to operate its city-wide hotline for information on AIDS. CHOICE, through its information hotlines, teen improvisational theater company, training center and publications, has pursued an organizational philosophy that decisions regarding sexuality and reproduction are highly personal, and that those very private choices should not be constrained by private or public intimidation, economic or social status, lack of relevant information or unwarranted

governmental interference.

Choice Network of Tarrant County, Tx

The Choice Network of Tarrant County, Texas, is a coalition of many different organizations and individuals who have a pro-choice position and are concerned with reproductive rights and health issues. We represent over 1000 Tarrant County Citizens, including community business and spiritual leaders. The Choice network is working to protect some very basic and important rights in are country, state and county. Our stateed purpose is to advocate for, and broaden understanding of the principal of "choice" in reproductive decision-making.

Citizens For Choice

Citizens for Choice is organized to improve the health and the educational, economic, social, cultural and political self-determination of women and girls and, in this connection, to provide information in support of women's rights and reproductive choice to women, political leaders and the general public through letters, advertisements and educational programs; to arrange, conduct, and endorse educational workshops on women's rights and women's issues; and to identify and fund women with specific health needs which cannot be met because of the more restrictive legal and political environmental illustrated by the 1989 Webster decision.

Civil Liberties and Public Policy Program at Hampshire College

The Civil Liberties and Public Policy Program is a resource for and a link between the academic community and the reproductive rights movement. The goals of the program are: to study and analyze legal, philosophical and political issues about abortion, contraception, and related concerns; to increase understanding and awareness on college campuses about reproductive rights and challenges to reproductive freedom; and to support and coordinate student participation in activist campaigns. The program maintains an interest in educating people about legislative or judicial actions which would limit or curtail the right to abortion.

Cleveland Surgi-Center, Inc.

The Cleveland Surgi-Center is an abortion clinic serving women in the States of Ohio and Pennsylvania. We are strongly in support of the plaintiffs in this action.

Coalition of Citizens for Choice

The Coalition of Citizens for Choice is a group dedicated to assuring the protection of the right of all women to choice through public awareness, advocacy, and the legislative and electoral process.

Coalition of Labor Union Women

The Coalition of Labor Union Women is America's only national organization for union women, with 75 chapters across the country and over 20,000 members representing 60 unions. By convention resolution CLUW has held that restrictions on access to the full range of family planning services and safe, legal abortion has a serious impact on the family and working lives of all women. CLUW calls for access to the full range of reproductive health care, including abortion, without restrictions based upon economic status or ability to pay.

Colorado Coalition For Choice

The Colorado Coalition for Choice is a nonpartisan organization working to affirm, promote and protect the constitutional right of privacy of the individual to make reproductive choices.

Colorado Women's Bar Association

The Colorado Women's Bar Association (CWBA) is a nonprofit professional association of more than 600 Colorado lawyers and law students. Open to all attorneys regardless of sex, the CWBA was founded in 1977 to promote the highest standards of the legal profession; to advance justice; to promote, advance, and protect the interests and welfare of women; and to pursue these goals through appropriate legal, social, and political action. The CWBA supports reproductive freedom and opposes any effort to restrict the access of women to information

necessary to make fully informed decisions about their health and their lives.

Committee to Defend Reproductive Rights

Founded in 1977, the Committee to Defend Reproductive Rights (CDRR) is a San Francisco-based non-profit organization with 1500 members. Through educational and organizing campaigns focused on such issues as the provider shortage, public funding for abortion, and parental involvement legislation, CDRR works to expand access to reproductive health care for all women.

Committee of Interns and Residents

The Committee of Interns and Residents (CIR) is the nation's oldest and largest house staff union, representing over 5000 interns, residents and fellows employed in public and voluntary health care facilities in New York, New Jersey, Maryland and Washington, D.C. As mandated by its constitution, CIR's struggle to improve residents' working conditions has been inseparable from its fight for quality patient care. The CIR strongly supports the legal right of every woman to safe birth control and abortion. The physician-patient relationship must not be impeded by regulations which interfere with the delivery of quality health care.

Connecticut Women's Education and Legal Fund

The Connecticut Women's Education and Legal Fund, Inc. was incorporated in 1973 as a non-profit public interest

law firm advocating for women's legal rights. We have over 700 members and serve thousands of people in New England each year through our community education, information and referral, public policy and advocacy programs. We choose to join this amicus curiae brief because we believe it is essential to protect the fundamental rights of women to privacy, and to the right to choose safe and legal abortion. As an organization working for equality, we believe that every woman, without regard to religious belief, income, marital status, race, age or disability must have an equal opportunity to control her own health and reproduction.

Crist Clinic for Women

The Crist Clinic for women has been concerned about women's reproductive health care for the past 20 years. The physicians at the Crist Clinic for Women lived through the era where coathangers and illegal abortions maimed young women, particularly at the college level. The sound practice of reproductive health care requires that there be available a full range of modern medical services which include safe and legal abortion. Delaying the availability of safe, legal abortion will only increase and severely impair women's health and will result in serious injury or death to many women, particularly the young teenager who is on welfare. Making choices which involves the health and welfare of women with regard to safe, legal abortion is a fundamental right for all women not only in the United States but in the world. The Crist Clinic for Women actively supports reproductive freedom.

Democratic Socialists of America (DSA)

Democratic Socialists of America is committed to building a more just and equitable society through struggles for economic democracy, equal access to the necessities of life, the equality of all people, democratic participation and protection of the environment. We work for a national health insurance program and access to health care for all; reproductive freedom; and end to racism, sexism and homophobia; a barrier-free world for the disabled; the right of working people to organize trade unions; and quality housing, food and education for all. DSA believes that reproductive freedom for women is essential to women's full and equal participation in society.

Durango OB-GYN Associates, P.C.

Durango Ob-Gyn Associates, P.C. wants to keep abortion legal. The alternative of unsafe, illegal abortions, with resulting infertility and maternal deaths, is too frightening to consider.

Everywoman Opportunity Center, Inc.

Everywoman Opportunity Center, Inc. helps women become economically self-sufficient. To be this, women must make and suffer the consequences of all their decisions. All choices must be their own without governmental or spousal interference.

Federation of Feminist Women's Health Centers

The Federation of Feminist Women's Health Centers is a nonprofit association of women's health projects and supporters. The network of women-controlled health clinics share staff, training, and resources to advocate, promote and protect reproductive rights for all women. Approximately 15,000 women, at least ten to twenty percent of whom are minors, receive abortion services at our health clinics yearly. The Federation's goal is to enable women to make informed choices about their health care and reproduction through the provision of self-help health education and gynecological services, including abortion, well-women care and birth-control. We work together and with others to ensure that all women have the information and power to control their bodies and their lives.

Federation of Reconstruction Congregations & Havurot

Although the Jewish tradition regards children as a blessing, the tradition permits the abortion of an unborn child to safeguard the life and physical and mental health of the mother. The rabbis did not take a consistent stand on the question of whether a fetus resembles a person. They did not think it possible to arrive at a final theoretical answer to the question of abortion, for that would mean nothing less than to be able to define convincingly what it means to be human. We recognize that abortion is a tragic choice. Any prospective parent must make an agonizing decision between competing claims--the fetus, health, the need to support oneself and

one's family, the need for time for a marriage to stabilize, responsibility for other children and the like. Some of us consider abortion to be immoral except under the most extraordinary circumstances. Yet we sympathize with the anguish of those who must make the decision to abort or not to abort.

Feminist Institute

The Feminist Institute promotes social change that ensures women's autonomy and independence. Our women's health policy and pro-choice projects promote public policies that ensure women's control over their own bodies. We are concerned that, as women become free from subjugation to patriarchal control within the family, they in turn not become subject to state control of their reproduction. Control over one's own body is fundamental to the exercise of personal autonomy without intervention or restriction by the government.

Feminist Women's Health Center

The Feminist Women's Health Center is a non-profit organization established by women in 1977 to advocate, promote and protect reproductive rights for all women. Our goal is to enable women to make informed choices about their health care and reproduction through the provision of self-help health education and gynecological services. We work with others locally, nationally and internationally to ensure that women have the information and power to control their bodies and their lives.

Florida Abortion Council

The Florida Abortion Council is an association of abortion providers whose purpose is to assure and protect access to reproductive health care for all women; to educate the public concerning the availability of reproductive services; and to promote safe, humane, high quality abortion services. As abortion providers, the Council knows firsthand the difficulties that waiting periods, forced parental involvement and anti-abortion lectures present for women seeking timely, confidential medical care. If the Court upholds any part of the Pennsylvania law, the privacy rights of all women all across the country will be in jeopardy.

Florida Women's Consortium

The Florida Women's Consortium is an advocacy network of organizations and individuals committed to achieving full equality and empowerment for women. We represent over 40,000 women through our 31 affiliated organizations. One of our primary goals is to achieve reproductive freedom for all women. We believe that the government should not interfere with that right. We are therefore in full support of overturning the Pennsylvania statute which places obstacles to women's freedom of choice.

Freedom of Choice, Allen County

Freedom of Choice, Allen County (FOCAL) is a group of Allen County, Ohio, residents who wish to protect reproductive rights. Members of FOCAL believe that the

real issue in abortion is not whether an individual will have an abortion, but who will make the choice. Abortion rights are related to religious freedom. Our country was build on a plurality of beliefs and this freedom must be protected. No matter how strongly some individuals hold a religious belief which is anti-abortion, they have no right to dictate this belief to other groups with differing religious values. Abortion rights are related to legal rights. The majority of Americans agree with this and believe that safe and legal abortions should continue to be available. Abortion rights are related to the empowerment of women. The decision to abort a pregnancy is a painful and very personal experience. To imply that others can better make this decision for the women affected denies these women their rights as full and independent citizens. FOCAL works to increase public awareness, build a pro-choice network of concerned voters, promote pro-choice candidates for election to public office, and preserve the reproductive right of women.

Fresno Free College Foundation

The Fresno Free College Foundation is a community organization with offices in Fresno, California. Its origin in 1968 is connected to an academic freedom case and, since that time, it has, in various ways, been supportive of academic freedom and the civil liberties of students, professors, and citizens. It owns and operates a listener-sponsored radio station which, on a daily basis, provides citizens with alternative news and public affairs programming required for a viable democratic society. Since 1968 the Fresno Free College Foundation has been

dedicated to a free and open society through the support of free inquiry and the free expression of ideas.

Gay Men's Health Crisis

Gay Men's Health Crisis (GMHC), is the nation's oldest and largest HIV/AIDS education, advocacy and service organization, providing HIV prevention education, medical information, legal services, hot meals, recreation and support services to thousands of men, women and children each year. GMHC also advocates for effective public policies and practices concerning HIV and AIDS at the city, state, and federal levels. GMHC opposes all restrictions on individuals' access to information regarding medical procedures. In addition, GMHC has advocated vigorously to protect individuals' rights to made decisions about medical risks and procedures.

Georgia Association for Women Lawyers

The Georgia Association for Women Lawyers (GAWL) represents the interests of over 400 women attorneys in the State of Georgia. GAWL has taken a public position in favor of the unfettered access of all women to safe and legal abortions.

Georgians For Choice

The purpose of Georgians for Choice is: 1.Assure access to safe, legal abortion in Georgia; 2.Assure access to safe, affordable family planning and prenatal service for women of all ages in Georgia; 3.Assure access to straightforward,

age appropriate sexuality education; 4.Assure statewide support for reproductive rights

Girls Incorporated

Girls Incorporated is a national non-profit organization that provides programs for 250,000 young people every year through 120 affiliates across the country. It is dedicated to helping girls and young women develop their capacity to be self-sufficient, responsible, economically independent citizens. Reproductive freedom is essential for girls and young women to attain independence and self sufficiency.

Hadassah, the Women's Zionist Organization of America, Inc.

Founded eighty years ago, Hadassah, the Women's Zionist Organization of America, Inc. is America's largest women's membership organization. Hadassah's mandate includes the support and strengthening of women's rights, the American Jewish community and the State of Israel. Hadassah believes that becoming a signatory to an amicus brief arguing for the reaffirmation of Roe v. Wade and its progeny is consistent with Hadassah's long-standing public commitment to women's issues, including freedom of choice.

Hard Hatted Women

Hard Hatted Women is a support and education organization for women in or seeking blue collar

nontraditional jobs. Services provided are monthly meetings, bimonthly newsletter, 24 hour phone Hotline which disperses job referrals and training program information, Speakers Bureau, and Education Services to the schools, grades K-12.

Hawaii Women Lawyers

Hawaii Women Lawyers promotes the advancement of women's equal rights. In our 15 year history, our more than 300 members have won equal access to private club memberships in Hawaii, published an award winning handbook on women rights, Our Rights, Our Lives, helped pass the nation's first parental leave law, published a brochure on parental leave, and instituted a domestic violence clearinghouse and legal hotline funded by the state judiciary to provide legal services to victims of domestic abuse.

Hollywood Policy Center

The Hollywood Policy Center (HPC) is a non-profit, tax-exempt organization whose founders and supporters represent a broad range of men and women within the entertainment industry, including actors, writers, directors, producers, musicians, studio executives, and attorneys. The HPC's agenda includes a commitment toward promoting peace, equality, human rights, freedom of expression and freedom of choice. The HPC was created to serve as a unique bridge between the entertainment industry and policy advocates by bringing the talent, commitment, and skills of our community together with

grassroots organizers and activist organizations. The HPC is committed to the belief that reproductive choice is a basic fundamental right guaranteed to all women and any restriction placed on that right is unconstitutional. The HPC and its sister organization, the Hollywood Women's Political Committee, have taken a leading role in organizing the entertainment community's contribution to securing a woman's right to choice.

Hollywood Women's Political Committee

Comprised of politically active women from film, television, and the arts, the Hollywood Women's Political Committee (HWPC) is dedicated to supporting issues, candidates, and legislation which promotes peace, equality, conservation of the environment and freedom of choice. During its brief six-year existence, the HWPC has raised over $4 million for Democratic candidates and issues in over 32 states, and has grown from 70 to 200 members. The HWPC is committed to the belief that reproductive choice is a basic fundamental right guaranteed to all women and any restrictions placed on that right are unconstitutional. The HWPC and its sister organization, the Hollywood Policy Center, have taken a leading role in organizing the entertainment community's contribution to securing a woman's right to choice.

Hope Clinic for Women, Ltd.

The Hope Clinic for Women, Ltd. is a state licensed, out-patient surgical treatment center that has specialized in abortion procedures since its establishment in 1974.

Since that time, the clinic has provided counseling and safe abortions to hundreds of thousands of women. The clinic's physicians are members of county, state and federal medical associations and societies, as well as members of the American College of Obstetrics and Gynecology and the Association of Reproductive Health Professionals.

International Ladies' Garment Workers' Union

International Ladies' Garment Workers' Union (ILGWU) is an international labor organization of approximately 175,000 members headquartered in New York and located in New York and 32 other states of the United States. More than 85% of its members are women, many of whom are minorities, and a substantial majority of whom are of child-bearing age. Many of its women members live at a low-income level. ILGWU is dedicated to, among other principles, the elimination of gender discrimination, the promotion of women in the workplace, and the constitutional guarantees declared in Roe v. Wade.

International Planned Parenthood Federation

Founded forty years ago, the International Planned Parenthood Federation (IPPF) is the world's leading voluntary family planning organization. It works to promote and support family planning as a basic human right, and to create awareness among people and governments about the benefits for the whole family of the spacing and planning of births. It also believes in the importance of balancing population and natural resources worldwide. IPPF was founded in 1952 in Bombay, India,

by eight national organizations dedicated to family planning. It is today a Federation of 107 member Family Planning Associations (FPAs) in over 130 countries.

International Projects Assistance Services

IPAS is an international non-profit organization that addresses a global issue critical to women's health -- the problem of unsafe abortion. We believe that safe voluntary abortion care should be available and accessible to every woman. Many complex factors form the context of the abortion issue, including women's sexual development, health, and childbearing patterns. Within this context, IPAS' primary mission is to promote safe, respectful abortion care, defined as: appropriate and timely treatment for abortion complications; options for safe, voluntary abortion; and comprehensive family planning counseling and services to reduce the need for abortion.

Jessie Smith Noyes Foundation

The Jessie Smith Noyes Foundation is a private foundation committed to preventing irreversible damage to the natural systems upon which all life depends, and strengthens individuals and institutions committed to building a sustainable future. To achieve these goals the Foundation makes grants in the area of Environment, and Reproductive Rights. The Foundation believes reproductive rights are essential to the dignity and equality of women, and to their role as builders of a sustainable future.

Judson Memorial Church

Judson Memorial Church is affiliated with the American Baptist Churches/USA and United Church of Christ. In the late 1960's it founded and coordinated the National Clergy Consultation Service on Abortion, an organization of some 3,000 ministers and rabbis in 30 states who counseled and referred women for what were then illegal abortions. Following the U.S. Supreme Court decision in Roe v. Wade, it functioned as a watchdog organization to ensure that all women in the United States had equal access to abortion services. Judson Memorial Church has an ongoing concern that the privacy rights of American women and their ability to make procreative choice not be further restricted by the Supreme Court.

Junior League of Brooklyn

The Junior League of Brooklyn recognizes the critical need for a just and humane environment which enables each woman to achieve her personal, professional and community goals. Specifically, we support: legislation for the equal rights of women including the ratification of the Equal Rights Amendment to the Constitution of the United States; Reproductive freedom, family planning and other health care issues pertaining to women; equal opportunities for employment and advancement; economic security and training options for homemaker; adequate child care availability; equal access to credit.

Juvenile Law Center

Juvenile Law Center (JLC) is a Pennsylvania-based public interest law firm that advocates for children who are in state custody or in need of public sector assistance. Through individual case advocacy, class litigation, legislative advocacy, training and education, JLC has achieved significant accomplishments in improving Pennsylvania's juvenile justice, children's health, child welfare, and children's mental health systems. Founded in 1975, JLC has represented hundreds of teenage women -- including teenage parents -- in foster care, mental health facilities, and delinquency placements.

Kansas State Voices for Choice

Kansas State Voices for Choice wishes to affirm our support for reproductive freedom. Kansas State Voices for Choice was started nearly two years ago at Kansas State University. We have since gained more than 130 members who are dedicated to preserving and protecting a woman's right to choose abortion. Together we have lobbied at the state capital, held rallies and marches, organized vigils commemorating the anniversary of Roe, provided information petition campaigns. We are also involved in voter registration and identification programs and local and state election campaigns for pro-choice candidates. This year we formed a pro-choice coalition with other groups in our area to produce the Flint Hills Coalition for Choice. Together with other groups in Kansas we defended our clinics in Wichita this summer against Operation Rescue.

Lambda Legal Defense and Education Fund

Lambda Legal Defense and Education fund is a national public interest law organization which advocates for the rights of lesbians and gay men through impact litigation and education. Lambda has been particularly involved in constitutional litigation to ensure that the guarantees of equal protection, due process and privacy include gay and lesbian citizens, and has a special interest in the development of independent interpretations of state constitutions. The broad guarantees of state constitutions regarding individual rights are crucial to the continued legal right of women to control their own bodies and the right of each individual to engage in intimate associations without governmental interference.

League of Women Voters of the U.S.

The League of Women Voters of the United States (LWVUS) is a nonpartisan, nonprofit, membership organization with members in all 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands. The LWVUS strongly believes that public policy in a pluralistic society must affirm the constitutional right of privacy of the individual to make reproductive choices. The LWVUS has adopted the protection of the right of privacy in reproductive choices as one of its issue for emphasis during its 1990-1992 national program.

Louise Wise Services

Louise Wise Services is a voluntary, not-for-profit, New York child welfare agency. Its mission is to protect and encourage the healthy growth and development of children and their families without regard to race, religion or ethnicity. We care for children who are essentially public charges, whose parents are ill-prepared to care for them. Many of these children are early adolescents who are sexually active, and who are neither emotionally nor financially equipped to parent children of their own. Accordingly, if we are to be of help to these children, they must be able to have unrestricted access to adequate abortion services.

Lower East Side Women's Center

The Lower East Side Women's Center (LESWC) is a mutual aid organization run by and for neighborhood women. Our purpose is to exchange non-judgmental support and information from neighbor to neighbor on a wide range of issues of concern to Lower East Side women: Health care, immigration, employment, education, AIDS prevention, housing, and much more. Our goal is to empower women with access to information, resources, and mutual support in order to be their own advocates. This empowerment will lead women to recognizing their individual and collective power to effect systemic change and taking action to improve the quality of life for themselves, their families, and the community.

Lymphoma Foundation of America

The Lymphoma Foundation of America is a nonprofit charitable organization that assists cancer patients and their families. Lymphoma is a form of cancer which afflicts 25,000 new people each year. We believe that it is critical that all individuals seeking medical care and counseling have direct access to those services without roadblocks and constraints. In our experience working with families we have found that the best decisions are made in an atmosphere that is not coercive or burdensome for the individual at risk. That is why we oppose the law at issue in this case.

Management Sciences for Health, Inc.

Management Sciences for Health, Inc. is an organization committed to the promotion of maternal and child health. MSH's work includes analysis of obstacles to access to health care and of the harmful effects of such impediments. The statute at issue in this case places obstacles in the way of women seeking important health care and puts their health at risk for no health-related reason. MSH opposes such efforts to coerce women to make different health and life choices.

Marie Stopes International

Marie Stopes International, founded in 1973, is the largest non-governmental provider of family planning services in Britain, and supports full-service birth control programs in fifteen other countries, including India, Sri Lanka,

Indonesia, the Philippines, Bangladesh and Kenya. In all countries in which it works, the organization is deeply concerned with the administrative, legislative and judicial issues that restrict the fundamental human right of the individual to all forms of birth control.

Massachusetts Judicial Consent for Minors Lawyer Referral Panel

The Massachusetts Judicial Consent for Minors Lawyer Referral Panel is a volunteer association of over two hundred Massachusetts lawyers who for the last eight years have represented more than 9000 pregnant minors seeking judicial consent for an abortion (in lieu of parental consent) under Mass. Gen. Laws ch. 112.

Minnesota Women Lawyers, Inc.

Minnesota Women Lawyers, Inc. is over 900 lawyers, judges, law students and law firms committed to enhancing the status, influence and effectiveness of women lawyers and promoting social issues of concern to women lawyers. The mission of Minnesota Women Lawyers is to assist women in the legal profession to further their careers and to balance their professional and personal lives. The organization provides a forum for discussion and identification of the unique, changing needs of women lawyers and provides the means to advocate changes in the profession which are responsive to these unique needs. MWL's Statement of Positions states that: MWL supports a woman's right to choose in all areas of her reproductive life, including abortion.

Missouri Women's Network

The Missouri Women's Network supports the right of every woman to choose what happens to her body. This should not be denied to any woman regardless of where she resides, the color of her skin, her age, or anything else. The denial of rights of any kind to women will only increase the probability that, in the future, women will have no rights.

Ms. Foundation For Women

The Ms. Foundation For Women is the nation's only public, multi-issue, women's fund. The Foundation has long recognized that the extent to which women can control their reproductive capacities is a principal factor in determining the quality and character of their lives; this is especially true for poor women and women of color, who are often the first victims of anti-choice legislation. The Ms. Foundation for Women has been responding to attacks on reproductive freedom with a combination of grantmaking, technical assistance, and advocacy since its founding almost 15 years ago.

Multicultural Alliance for Reproductive Freedom

The Multicultural Alliance for Reproductive Freedom is a network of individuals and organizations of all colors who believe in the fundamental right of all women to all aspects of reproductive freedom. This idea of freedom is inclusive of unrestricted access to full medical care including the right to choose to have an abortion. It is

toward this idea of freedom that we lend our support in filing this friend of the court brief, in the hope that this right to choose is never restricted in any way.

Na'amat/USA

Na'amat is an international organization with over 750,000 members supporting the rights of women and children, including a woman's right to choose abortion. Na'amat/USA advocates a progressive legislative agenda for women in the United States.

National Abortion Federation

National Abortion Federation (NAF), founded in 1977, is a not-for-profit professional association of abortion service providers. NAF members include more than 260 abortion clinics operating in 45 states, the District of Columbia, and Puerto Rico, as well as some individual physicians who provide abortion services in their offices. Many NAF members provide, in addition to abortions, a variety of other reproductive health services, including fertility counseling, prenatal care, contraception, and sterilization. NAF has a vital interest in promoting high quality reproductive health services that are safe, accessible, and affordable. For example, NAF offers post-graduate medical seminars, accredited by the Accreditation Council for Continuing Medical Education, on the prevention and management of abortion-related complications. In addition, NAF has promulgated standards applicable to its members to promote the safety and quality of all standards in consultation with a standing committee of recognized

experts on the medical, nursing, counseling, ethical, and administrative aspects of reproductive health services. This standing committee periodically reviews the standards and modifies them when appropriate in light of changes in medical science and technology. On occasion, NAF has consulted with health departments and legislative bodies to promote awareness of its standards for quality care.

National Abortion Rights Action League (NARAL)

The National Abortion Rights Action League (NARAL) has over 500,000 members nationwide. Founded in 1969, NARAL is the largest organization dedicated primarily to keeping abortion safe, legal and accessible to all women. NARAL recognizes that constitutional protection for the right to choose abortion, and access to a full range of reproductive heal care is critical to women's ability to participate fully and equally in society.

National Association of Women Lawyers

The National Association of Women Lawyers (NAWL), founded in 1899, is a voluntary national membership organization of the legal profession, having official representation in various organizations, commissions and governmental agencies, both national and international. It is comprised of approximately 1200 individual members and numerous women's bar association affiliate members (encompassing several thousand additional members) across the country. Its individual members, from each state and the District of Columbia, include prosecutors, public defenders, private attorneys, trial and appellate

judges from the state and federal courts, legislators, law professors, and law students. Although the members of the NAWL hold a broad spectrum of views, they share a common concern that the law be administered justly, fairly and predictably. As an organization made up primarily of women, it is a supporter of women's rights. As an organization of attorneys, it supports the integrity of the justice system.

National Clearinghouse on Marital and Date Rape

The National Clearinghouse on Marital and Date Rape is a fee-based phone consultation, research, document delivery and speaker service. We consider ourselves the heirs of the Movement for Voluntary Motherhood of the nineteenth century. The date and marital rape survivors we see are rarely experiencing their first assaults and many of them are pregnant as the result of rape, including rape by husbands, boyfriends, and fathers. Our work in the area of marital rape is based on a belief in the importance of a woman's bodily integrity and we are against the ownership by anyone of a woman's body, including ownership by her husband.

National Coalition of American Nuns

The National Coalition of American Nuns is dedicated to studying, working on, and speaking out on issues related to human rights and social justice. We believe that reproductive choice is a right for all women.

National Conference of Women Bar Associations

National Conference of Women's Bar Associations (NCWBA) is a nonprofit, incorporated network of 50,000 female and male attorneys, with an emphasis on grass-roots, local organizations. NCWBA membership is open to state, regional and local women's bar associations, sections of establishment bars, associations of women law students, and individuals who are admitted to the practice of law. Since its inception in 1981, NCWBA has taken legal, social and political action to promote and protect the interests of women, to improve the status of women within the legal community, to advance justice and to promote the highest standards of the legal profession.

National Council for Research on Women

The National Council for Research on Women is an independent association of established centers and organizations that provide institutional resources for feminist research, policy analysis, and educational programs for women and girls. The Council also works to strengthen ties with other national and international organizations and coalitions. Through its member centers and affiliates, the Council links over 2000 women and men scholars and practitioners in this country and abroad and serves constituencies that include government, the media, business and industry, and the nonprofit sector, as well as the academic community and the general public.

National Council of Jewish Women

National Council of Jewish Women, founded in 1893 and numbering 100,000 members across the United States, is dedicated, in the spirit of Judaism, to advancing human welfare and the democratic way of life through a combination of social action, education and community service. It has adopted a National Resolution to work for the "protection of every female's right to choose abortion, and the elimination of obstacles that limit reproductive freedom."

National Education Association

The National Education Association (NEA) is a nationwide employee organization with a current membership of over 2 million members, the vast majority of whom are employed by public education institutions. One of the principal purposes of NEA is to protect the constitutional rights of its members, approximately 60% of whom are female. By action of its Representative Assembly, which is NEA's highest governing body, NEA supports the right to reproductive freedom, which is implicated in this case.

National Lawyers Guild

The National Lawyers Guild is a legal organization of over 10,000 lawyers, legal workers and law students in the United States. Since its founding in 1937, the Guild has provided legal support to virtually every struggle in this country for economic, social and political justice. The

Guild is firmly committed to and works actively to protect the rights of all peoples, specifically the fundamental right of privacy for all women in choosing whether or not to bear children.

National Republican Coalition for Choice

The National Republican Coalition for Choice (NRCC), founded in 1989 in the wake of the Webster decision, is a nonprofit, political organization dedicated to the promotion of pro-choice candidates within the Republican party and the furtherance of a pro-choice platform.

National Women's Conference Committee

The National Women's Conference Committee is the authority constitute under Public Law 94-167 as guardians and monitors of the 1977 National Plan of Action of Women. It fully supports a woman's right to choose abortion. This position was affirmed overwhelmingly by demographically proportionate elected delegates to the only federally-sponsored National Women's Conference.

National Women's Health Network

The National Women's Health Network (NWHN) in Washington, D.C. represents over 8,000 individual and 300 institutional members. The membership is composed of women, including providers, consumers, physicians, professional women, older women and women of color. The Network is a resource on health issues, providing information to members of congress involved in health

issues and testimony to the Food and Drug Administration on issues affecting women's health. It is also an advocacy organization representing the needs of its members for access to and information about abortion.

National Women's Law Center

The National Women's Law Center is a Washington-based legal organization which has been working since 1972 to advance and protect women's legal rights. The Center's primary goal is to ensure that public and private sector practices and policies better reflect the needs and rights of women. The fundamental right to abortion recognized in Roe v. Wade is of profound importance to the lives, health, and safety of women throughout the country. Because of the tremendous significance to women of the freedom to choose whether to bear children, the National Women's Law Center seeks to preserve women's right to abortion.

National Women's Political Caucus

The National Women's Political Caucus is a membership based organization committed to getting more women elected and appointed to public office -- pro-choice women who support and promote issues of concern to all women and their families. NWPC also provides a strong advocacy voice for women's issues in Washington, DC and state capitals across the county.

New England Health Care Employees Union

The New England Health Care Employees Union, District 1199/SEIU represents 18,000 health care professionals, paraprofessionals, and service and maintenance workers in Connecticut and Rhode Island. The fight for decent working standards and the struggle to guarantee health care for all are both integral parts of 1199's mission. 1199 opposes any efforts which would effectively deny abortion to women of color, and to young women, and supports the rights of patients and practitioners to determine the course of reproductive care.

New Hampshire Women's Lobby

The New Hampshire Women's Lobby is a non-partisan, state-wide membership organization whose purpose is to promote public policy which improves the economic and social status of New Hampshire women and families.

New Jewish Agenda

The New Jewish Agenda (NJA) is a national organization headquartered in New York City committed to progressive human values and the building of a shared vision of Jewish life. We affirm the value of life and the right of all children to be born into a loving and caring environment. Women should be free to choose when and under what conditions they bring life into the world. The question of a woman's right to have an abortion involves complex moral and religious issues. In the case of Jewish law, abortion is not only permitted but mandated in certain

circumstances. NJA will fight to retain safe, legal abortions and opposes depriving poor people of choices available to others.

New York Federation of Reform Synagogues/UAHC

The New York Federation of Reform Synagogues representing 104 Reform Synagogues in the greater New York area including the five boroughs, Long Island, Westchester, Putnam and Dutchess counties, and Fairfield County in Southern Connecticut, has long championed the right of a woman to choose in all matters that concern her health and mental well-being. Included in this right is her freedom to have an abortion. We are concerned that in the case of Planned Parenthood of Southeastern Pennsylvania v. Casey, this right will be endangered, therefore we join as an Amicus.

Northwest Indiana Pro-Choice Alliance

Northwest Indiana Pro-Choice Alliance was founded in 1989 after the Webster decision. It was felt at that time that more emphasis be place on protecting reproductive freedom and educating the public about abortion/abortion rights. We have the continuing support of organizations such as PPNENWI, (Planned Parenthood) ICLU (Calumet chapter) Indiana NOW (Porter Co. Chapter and State) and various pro-choice groups on area campuses. We are in this for the long haul! We continue to be diligent watchdogs for choice in Indiana and nationwide.

Northwest Women's Law Center

The Northwest Women's Law Center is a non-profit, public interest law organization in Seattle, Washington, that works to advance legal rights for women. It does this through litigation, legislative advocacy, education, and providing legal information and referrals. Since its inception in 1978, the Law Center has worked extensively in the area of reproductive rights and has joined briefs in numerous reproductive rights cases before the U.S. Supreme Court.

National Organization for Women

National Organization for Women (NOW) is the largest feminist organization in the United States. NOW's purpose is to bring full equality to women. Fundamental to NOW's purpose is the right of women to control their own bodies and to determine if and when to bear children. Women's right to reproductive freedom impacts not only their right to privacy, but also their health and safety. NOW has a strong interest in any case such as this one that involves women's basic rights and liberties. As a defender of women's rights, NOW believes that it has an absolute need and right to address the fundamental issue in the case of Planned Parenthood of Southeastern Pennsylvania v. Casey: whether women will continue to make fundamental decisions regarding reproduction or whether that role will be usurped by the state.

New York City Commission on the Status of Women

The New York City Commission on the Status of Women is an advisory board to the Mayor on issues concerning women. We are strongly committed to ensuring the equitable treatment of women in all areas, and oppose any activities that limit the ability of women to act in their own best interests, or infringe on their civil rights. We are supportive of all aspects of the Pro-Choice movement, and strongly favor the Plaintiffs' position in the case of Planned Parenthood of Southeastern Pennsylvania v. Casey.

New York State Coalition on Women's Legal Issues

New York State Coalition on Women's Legal Issues (COWLI) is a statewide organization established to identify and eradicate gender bias, which is pervasive in our society. Among its other purposes, COWLI offers practical and substantive expertise and commentary on the effects on women of existing laws and of proposed legislation. COWLI also provides special assistance to the courts by drawing attention to the deleterious effects on women of biased implementation of laws. COWLI is committed to ensuring reproductive freedom for all, as well as gender equality in the courts.

Oakhurst Presbyterian Church

Oakhurst Presbyterian Church is a bi-racial community of faith which also crosses class barriers. We are strongly in support of a woman's right to choose an abortion. We believe that abortion is never a good option, but it is

sometimes a necessary option. We believe that the issue of reproductive rights is central to the fundamental truth that women must be seen as equal under the law. Our belief grows out of our Christian faith because God has created all people with equal dignity. We have great concern that Planned Parenthood of Southeastern Pennsylvania v. Casey and the federal appeals court ruling challenging Roe v. Wade are a threat to the equal dignity of women. We urge the U.S. Supreme Court to re-establish Roe v. Wade as the law of the land.

Pathfinder International

Pathfinder International, founded in 1957, is dedicated to ensuring the availability of family planning services for those in need throughout the developing world. Its activities include exploring new service delivery mechanisms, local institution building, training family planning providers, and providing contraceptive supplies. In both the United States and overseas Pathfinder addresses public policy issues that affect the availability of safe and effective family planning services.

People for the American Way

People for the American Way (PFAW), is a nonpartisan, education-oriented citizen's organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to the nation's heritage of tolerance and pluralism, PFAW now has 300,000 members nationwide. The organization's primary mission is to

educate the public on the vital importance of the democratic tradition and to defend it against attacks from those who would seek to limit our constitutional and civil liberties enshrined in the Bill of Rights, particularly our First Amendment and privacy rights.

Planned Parenthood Federation of America, Inc.

Planned Parenthood Federation of America, Inc. (PPFA) a not-for-profit corporation organized in 1922, is the leading national voluntary public health organization in the field of family planning. Currently, PPFA has 174 affiliates in 47 states, operating approximately 879 family planning clinics. PPFA affiliates offer a wide range of services relating to reproductive health, including abortion, contraception, sterilization, infertility care, diagnosis and treatment of sexually transmitted diseases, prenatal care, and counseling on all aspects of reproductive health. Eighty-five PPFA clinics offer abortion services as part of their program. All PPFA affiliates that do not perform abortions themselves offer counseling and referral for such services.

Population Communication

Population Communication is an international, nonprofit organization which communicates population and environmental messages to world leaders through books, reports, mailings, news releases, and motion pictures. During the last twelve years it has obtained the support of forty-eight world leaders for a Statement of Population Stabilization.

Population Council

The Population Council, an international, nonprofit organization established in 1952, undertakes social and health science programs and research relevant to developing countries and conducts biomedical research to develop and improve contraceptive technology. The Council provides advice and technical assistance to governments, international agencies, and nongovernmental organizations; and it disseminates information on population issues through publications, conferences, seminars, and workshops. The issues in Planned Parenthood of Southeastern Pennsylvania v. Carey affect the work of the Population Council vitally.

Population Crisis Committee

Population Crisis Committee (PCC), based in Washington, D.C., seeks to increase public awareness of the need for the reduction of population growth rates through voluntary family planning. PCC supports privately funded projects in developing countries that provide medical training in the treatment of abortion complications and menstrual regulation procedures. PCC conducts authoritative analyses of United States population assistance programs, one of which has been a comprehensive study of the impact of current United States abortion restrictions on family planning programs overseas.

Population Services International

Population Services International (PSI) is a non-profit organization that delivers contraception to the poor in twenty developing countries in Asia, Africa, and Latin America.

Population-Environment Balance

Population-Environment Balance is a nonprofit membership organization dedicated to safeguarding the "carrying capacity" of the United States -- the number of individuals that can be supported without reducing the ability of the environment to sustain our quality of life over the long term -- by stabilizing population size and protecting the environment.

Preterm Cleveland

Preterm is a non-profit, tax exempt clinic focusing on humanized and individualized reproductive health care for women. Preterm opened in 1974. It has a staff of 60 and performs over 7,000 abortions per year. Foundation grants and private donations make it possible to subsidize those unable to pay the full fee. 35% of patients are on welfare. Over 49% of patients receive some subsidy in order to have an abortion at Preterm. The provisions in the Pennsylvania law would be punitive and abusive for patients seeking care at Preterm.

Program for the Introduction and Adaptation of Contraceptive Technology

The Program for the Introduction and Adaptation of Contraceptive Technology (PIACT) is a nonprofit, nongovernmental, international organization whose mission is to improve health, especially the health of women and children in developing countries. PIACT focuses on the availability, effectiveness, safety, and appropriateness of technologies for health and family planning.

Queens Bench

Queen's Bench is a non-profit professional organization of approximately 450 lawyers and judges in and around the San Francisco Bay Area. Established in 1921, Queen's Bench is one of the oldest organizations dedicated to serving the needs of women lawyers and judges. Our membership strongly supports a woman's right to abortion, and opposes any coercive effort by the government to interfere with that fundamental right.

Radical Women

Radical Women is a feminist organization dedicated to the complete social, political, and economic equality of women. We believe that this cannot be achieved without the full right to control our bodies. We furthermore believe that this right should be guaranteed by the Constitution and that no restrictions must be permitted to encroach on it.

Religious Coalition for Abortion Rights

The Religious Coalition for Abortion Rights is a non-profit, non-partisan coalition of 35 national protestant, Jewish, and other faith groups committed to preserving reproductive rights as an integral component of religious liberty. Each denomination and faith group represented among us approaches the issue of abortion from the unique perspective of its own theology with members holding widely varying viewpoints as when abortion is morally justified. It is exactly this plurality of religious beliefs which leads us to the conviction that the abortion decision must remain with the woman, to be made on the basis of conscience and personal religious principles and free from government interference.

Reproductive Health Services

Reproductive Health Services (RHS) is a Missouri nonprofit, federal tax exempt corporation with its principal office in St. Louis, Missouri. RHS offers to its patients a broad range of counseling, gynecological and family planning services, including the provision of contraceptive and abortion services. RHS provides abortion services up to twenty-one weeks gestational age up to one-third of which are offered at a reduced fee, and is the largest abortion provider within the State of Missouri.

Reproductive Rights Education Project

The Reproductive Rights Education Project at Hunter College is a joint project of the Women's Studies and

Community Health Education Programs established in 1990. Its goals are: to develop academic and community-based strategies for promoting women's access to vital reproductive health services; to provide education, career and leadership opportunities for students interested in reproductive health issues; to create working links between academics, professionals, and policy and advocacy organizations who seek to secure women's reproductive rights and health; and to participate in international research and advocacy initiatives to define women's reproductive rights and health as basic human rights across lines of class, race, and nationality. As a project that particularly serves young women, we are greatly concerned that the Supreme Court uphold the right of all women to safe, legal abortion and that restrictions -- legal, political and financial -- on women's access to abortion services be eliminated.

Reproductive Rights Task Force of the Wisconsin Women's Network

The Reproductive Rights Task Force (RRTF) of the Wisconsin Women's Network wishes to be listed on an amicus curiae brief to Planned Parenthood of Southeastern Pennsylvania v. Casey. The RRTF is a statewide coalition of pro-choice groups working to promote public policy that assures women a full range of choices regarding reproductive rights and an atmosphere in which those rights can be exercised. It is our belief that the restrictions in question in this case directly conflict with the stated mission of the RRTF. For this reason, we wish to be included on the amicus curiae brief.

San Francisco Women Lawyers Alliance

The San Francisco Women Lawyers' Alliance is a progressive, activist bar organization founded in 1983 to provide a vehicle through which lawyers can address women's issues and enhance the position of women in our society. One of the issues of particular concern to the Alliance is freedom of choice and the protection of reproductive rights for all women.

Santa Cruz County Board of Supervisors

The State of California is divided into counties which are legal subdivisions of the state (California Constitution Article 11, Section 1). Santa Cruz County is one of the counties within the State of California (California Government Code Section 23012). The elected governing body for the County of Santa Cruz is the board of supervisors, and only the board is authorized to exercise the powers of the county (California Government Code Section 23005). Any decision by the United States Supreme Court which eliminates the right of women to make their own decisions concerning reproductive health matters could have serious consequences on the County of Santa Cruz as a provider of public health services.

Sex Information and Education Council of the U.S.

SIECUS, the Sex Information and Education Council of the U.S., is a twenty five year old national not-for-profit organization headquartered in New York. SIECUS affirms that sexuality is a natural and healthy part of living and

advocates the right of individuals to make responsible sexual choices. SIECUS provides information services to professionals, students, and members of the general public across the United States. SIECUS deplores any attempts to undermine women's reproductive health rights. The SIECUS Board of Directors has passed a position statement supporting the right to choose abortion, which states in part, "SIECUS believes a woman is entitled to have full knowledge of alternatives available to her and to have complete and unbiased information and counseling concerning the nature, the consequences, and the risks, both of the abortion procedure, and of pregnancy and childbirth."

Sierra Club

The Sierra Club, founded in 1892, is a nonprofit conservation organization with approximately 580,000 members nationwide. The goals of the Sierra Club are, among others, to practice and promote responsible uses of the earth's ecosystems and resources, and to educate and enlist all people to protect and restore the quality of the natural and human environment. Voluntary efforts to slow population growth are an essential part of any effort to protect the environment, sustain the ability of the earth to support life, and enhance the quality of life for human beings. The Sierra Club supports giving all individuals the widest possible choice in how to make the best decision for themselves on how to regulate their own fertility, based on their own conscience and conditions. The withdrawal of a woman's fundamental right to choose to have an abortion will not only set back family planning in this country, it will

also discourage efforts in other countries, particularly developing countries that may view the United States as a model, to improve women's and children's health and to promote sustainable development through balancing population with natural resources.

South Mountain Women's Health Alliance

South Mountain Women's Health Alliance (SMWHA) is a non-profit tax-exempt corporation organized for charitable purposes to provide counseling, education, referral, follow-up and direct aid, either financial or transportation to assure women access to all options regarding reproductive health choices, particularly abortion services. SMWHA performs educational outreach programs to groups to raise awareness of the need to keep abortion a legal and safe alternative to unwanted pregnancy; but also to teach citizens skills which raise self-esteem and feelings of worth and capability deemed essential to the prevention of unwanted pregnancy and escalation of serious life crises. SMWHA monitors and advocates public policies which promote freedom of choice and responsibility in health care decisions especially in the areas of reproductive health and sexually transmitted diseases. SMWHA establishes liaisons with other health care providers including public health, mental health, social services and other community groups and private practitioners to insure both practical and legal aspects of a woman's freedom of choice in health care matters in general and abortion services in particular are maintained.

Southern Students for Choice

Southern Students for Choice (SSC) is an all-volunteer, student-run, Florida-chartered nonprofit corporation, organized in 1989 with the mission of advancing the accessibility and provision of comprehensive reproductive health care and family planning services by student service projects. SSC believes that legal restrictions on provision and accessibility of abortion services, and related information and referral services, pose an especially great threat to young women and they and their significant others will be among the people most threatened by the rapid rate of change in reproductive health care and family planning service quality following enactment of laws restricting provision and accessibility of abortion-related services.

Staten Island Medical Group

The Staten Island Medical Group is a multi-specialty prepaid group practice HMO of approximately 60 physician providers. We are committed to women's reproductive rights as articulated in the United States Supreme Court decision in the case of Roe v. Wade. We wish to lend our voice in opposition to any effort which might encumber those rights, including the Pennsylvania Abortion Statute which restricts a women's constitutional guarantee to bear or not to bear a child.

Summit Women's Center West

Summit Women's Center West is a health care facility providing a range of routine gynecologic services to women in an environment which respects their dignity, intelligence, and privacy. We affirm the right of all women to make non-coerced, informed decisions regarding their reproductive health.

Transnational Family Research Institute

Transnational Family Research Institute (TFRI) is a multidisclipinary, nongovernmental, and nonprofit research organization in the behavioral sciences. TFRI develops and conducts research in reproductive behavior, often in cooperation with colleagues abroad. Research interest focus is on the behavioral regulation of fertility, motivations for pregnancy resolution, and the decision making process. TFRI currently has offices in Palo Alto, California; Copenhagen, Denmark; Mexico City, Mexico; and Bangkok, Thailand. Since 1972, the Institute has published Abortion Research Notes, reviewing scientific literature related to pregnancy termination.

Tucson Women's Commission

The Tucson Women's Commission was founded in late 1975 by the Mayor and Council of the City of Tucson to assist women in attaining full equality of opportunity in all aspects of life. The Tucson Women's Commission also maintains that public policy in the best interest of women will support a full range of options, information, and

services so that every woman has the ability to make her own decision about when, whether, and under what conditions to bear a child.

Unitarian Universalist Association

Unitarian Universalist Association (UUA) is a voluntary religious association of 1000 congregations in the United States and abroad dedicated to the principles of free faith, the right to an individual conscience and to the promotion of the inherent worth and dignity of every person. UUA has long advocated the right of every woman to decide whether she should bear a child. We believe that the issue of abortion is morally complex and thus must be decided by each individual and remain a legal option. UUA firmly believes that circumscription or prohibition of the right to terminate a pregnancy by qualified medical practitioners is an affront to human life and dignity. In the last two decades, UUA has repeatedly affirmed its belief that women of any age or marital or economic status have the right to have an abortion upon medical/social consultation of her choosing.

United Church of Christ Coordinating Center for Women in Church and Society

The United Church of Christ Coordinating Center for Women in Church and Society is mandated to be an advocate for women in seeking to achieve a society and a Church that empower, respect, and nurture women. The Coordinating Center for Women and the General Synod of the United Church of Christ have historically affirmed

respect for human life in all its forms; have recognized a diversity of religious viewpoints regarding access to abortion; have affirmed women as competent agents of moral decision-making; and have recognized the pregnant woman as the person finally responsible for decisions regarding carrying her pregnancy to term.

United States Student Association

United States Student Association (USSA) is a nationwide nonprofit membership organization which represents approximately two million students at approximately 200 colleges and universities throughout the United States. USSA has a strong commitment to ensuring access to higher education and the right to self-determination for all individuals regardless of age, gender, economic status, race, disability, sexual/affectional orientation, or veteran status.

United Synagogue of Conservative Judaism

The United Synagogue of Conservative Judaism, founded in 1913, is the association of Conservative Jewish congregations in North American, today consisting of over 800 affiliated synagogues and over one-and-a-half-million members. It is an international policy-making organization working to formulate a religious response to pressing social, religious and educational issues relating to such subjects as homelessness, substance abuse, AIDS, and access for people with disabilities.

UU's for Choice

The Assembly accepted a perfecting-session recommendation to substitute for the proposal title, in the Final Agenda, Against Mandatory Motherhood, a new version, which was amended as follows and passed by voice vote. Whereas, every female should be accorded the right to decide whether or not she should bear a child, whereas, contraceptive methods are not perfect and do not absolutely protect against pregnancy, and whereas, abortion can be a relatively simple and safe way to terminate a pregnancy, therefore be it resolved, that the delegates at the 1975 General Assembly of the Unitarian Universalist Association reaffirm the right of any female of any age or marital or economic status to have an abortion at her own request upon medical/social consultation of her own choosing; and urge all Unitarian Universalists in the Unites States to resist through their elected representatives the efforts now under way by some members of the Congress of the United States and State legislatures to curtail that right by constitutional amendment or other means. And be it further resolved that we urge all Unitarian Universalists and all Unitarian Universalist societies in Canada through the Canadian Unitarian Council to continue to strive for making these rights available in Canada.

Voters for Choice

Voters For Choice is a national, independent, bipartisan, and pro-choice political action committee. In order to preserve access to safe and legal abortion for all women,

Voters For Choice works to elect pro-choice candidates to federal and state-level offices.

Washington Women United

Washington Women United (WWU), founded in 1978, is a private nonprofit organization whose purpose is to lobby the Washington State Legislature on issues of concern to women. Reproductive choice is WWU's first legislative priority. The organization has opposed state legislation that would limit a woman's reproductive choice. WWU is also active in a state coalition that has worked to maintain Medicaid funds for abortion.

Westchester People's Action Coalition

WESPAC lobbies, pickets, rallies and joins in whatever legal efforts have come to our attention to protect a woman's constitutional right to choose abortion and to reproductive freedom.

Women Employed

Women Employed is a national organization of working women, based in Chicago, with a membership of 2000. Since 1973, the organization has assisted thousands of working women with problems of sex discrimination. Women Employed works to empower women to improve their economic status and to remove barriers to economic equity through advocacy, direct service and public education. Women Employed strongly believes that any limitation on women's reproductive rights will have a

profoundly negative impact on women's opportunities to achieve economic equity.

Women Lawyers' Association of Los Angeles

The Women Lawyers' Association of Los Angeles (hereinafter referred to as WLALA) is a 72 year old local voluntary Bar Association that has as members over 1200 female and male lawyers, judges, and law students who are personally and professionally concerned with the importance of preserving a woman's right to choose for herself whether to terminate a pregnancy.

Women Lawyers Association of Michigan

The Women Lawyers Association of Michigan is a state-wide 1,100 member professional association, founded in 1919 for the purposes of securing the rights of women in society, advancing the interests of women lawyers, improving the administration of justice, and promoting equality and social justice for all people. It adopted a pro-choice policy many years ago, believing it fundamental that constitutional privacy rights protect individuals from governmental intrusion into reproductive decision-making.

Women U.S.A.

Women U.S.A., Inc. is a non-profit information and educational organization dedicated to promoting equal rights, equal opportunities and freedom of choice in reproductive rights for women.

Women's Alliance For Theology, Ethics and Ritual

The Women's Alliance for Theology, Ethics and Ritual (WATER): is a nonprofit educational center that empowers women and men to be religious agents. The cofounders/co-directors work with an interfaith team of ministers, activists and professors to bring about change and move toward inclusivity in church and society. Through programs, projects and publications, WATER provides women and men with resources to foster equality and create a discipleship of equals. WATER is committed to equality and choice for all women, especially for poor women. WATER constituents come from a variety of backgrounds and sets of beliefs on reproductive rights. But the values of free discussion, legal options and religious pluralism are prized among us. We urge this for society as a whole.

Women's American ORT

Women's American ORT has long held a pro-choice position on the issue of reproductive freedom, and believes that any erosion of the rights articulated in Roe v. Wade will be corrosive to fundamental individual liberties. Women's American ORT, and its more than 1000 chapters throughout the United States believe that when and whether to bear a child is a woman's private decision, and oppose any attempts to narrow the opportunity for women to control their lives and be free from all levels of government intervention in arriving at this decision.

Women's Bar Association of Massachusetts

The Women's Bar Association of Massachusetts (WBA) has over 1,000 members. The WBA is committed to the advancement of women attorneys and to the protection of all women in the legal system. Since its foundling in 1978, the WBA has been particularly concerned with the protection of a woman's right to choice. It has filed amicus briefs in cases concerning public funding of abortion, restrictions on family planning agencies, and the rights of minors to abortion. The WBA also sponsors a panel of attorneys who represents minors seeking judicial consent for abortion and is a member of the Massachusetts Coalition for Choice.

Women's Bar Association of Illinois

The Women's Bar Association of Illinois (WBAI) was founded in 1914 for the purpose of promoting and fostering the interests and welfare of women and women attorneys and to maintain the honor and dignity of the legal profession. WBAI's 1000 members have long campaigned for individual rights and liberties, including the right of women to make reproductive decisions free from governmental interference. WBAI has filed briefs amicus curiae before this Court on behalf of parties whose rights were in jeopardy.

Women's Bar Association of the State of New York

The Women's Bar Association of the State of New York (WBASNY) (which includes: the women's bar associations

of Bronx County, Brooklyn, Capital District, Central New York, Mid-Hudson, Nassau, Orange/Sullivan, Queens, Greater Rochester, Rockland, Staten Island, Westchester, and Western New York) is an organization of over 3000 attorneys throughout the state. Founded in 1980, its stated purposes include the following: to cooperate with, aid and support organizations and causes which advance the status and progress of women in the society; to facilitate the administration of justice; and to cultivate the science of jurisprudence. The members of WBASNY support the principles enunciated in Roe v. Wade, including the recognition of a constitutionally guaranteed right to privacy.

Women's Business Development Center

Women's Business Development Center provides services and programs that support and accelerate women's business ownership and strengthen the impact of women on the economy. The Center is an advocate for women's economic and business development.

Women's Center at the University of Connecticut

The mission of the Women's Center at the University of Connecticut is to educate members of the university community about women's and gender issues, advocate for women's concerns on campus and through the state, be a catalyst for changes which result in greater gender equity in education, conduct institutional research and advocacy which promotes equity for women, and be a liaison to the administration, faculty, staff, student body, and community.

Because certain groups of women (women of color, women with disabilities, lesbians, poor women, older women) face particular challenges in educational, political, economic, and social settings, the Center focuses special attention on achieving equity for these groups. The Women's Center services include: ongoing discussion and support groups, workshops, cultural events, speakers, conferences and films, advocacy, a rape education program, and an extensive library.

Women's City Club of New York

The Women's City Club of New York, a nonpartisan, civic organization formed in 1916, has long held the position that the right to a legal abortion be available to all women regardless of income and without condition.

Women's Health Action and Mobilization

Women's Health Action and Mobilization (WHAM!) is a direct action group committed to demanding, securing and defending absolute reproductive freedom and quality health care for ALL women. Founded in 1989 after the Webster decision, WHAM! coordinates clinic defense in the New York metropolitan area and organizes demonstrations, civil disobedience, workshops, trainings and educational forums to call attention to and confront a variety of women's health issues, including Title X restrictions, parental consent laws, access to drug trials and experimental treatments for women with AIDS/HIV, and the Catholic Church's increased attacks on abortion rights. WHAM! believes that access to quality health care is a

fundamental human right.

Women's Health Education Project

Women's Health Education Project is a non-profit organization dedicated to providing access to self help and preventive health care information for low income women, especially for women living in homeless and battered women's shelters. In this capacity, we support low income women in advocating on their own behalf to get adequate medical care and to gain access to services. We are particularly interested in participating as amicus curiae in the case of Planned Parenthood v. Casey because it potentially impacts most severely on low income women. Low income women traditionally are the ones who suffer the most from any restrictions placed on access to abortion. It is lack of economic means which deny women the flexibility to gain access to safe abortions regardless of restrictions, for example, to be able to travel out of state, or to be free from work and to be able to travel freely to and from clinics for multiple appointment.

Women's International League for Peace and Freedom

The Women's International League for Peace and Freedom was founded in 1915, it has stood for freedom and equality. Choice and control over one's own life and decisions are integral aspects of freedom and equality. To overturn Roe v. Wade or to limit in any way women's -- and especially poor women's -- access to abortion would be the gravest infringement upon the rights and opportunities for women to be truly free, equal, and self-

defined. In 110 chapters across the U.S. and in 28 countries, WILPF works for a world free of racism and sexism; the building of a constructive peace through world disarmament; and the changing of government policies to meet human needs.

Women's Law Center, Inc.

The Women's Law Center, Inc. is an advocacy organization whose membership consists of attorneys and judges in the State of Maryland. In existence since 1971, the goal of the Women's Law Center is to promote legal rights for women. The Women's Law Center believes the restrictions at issue in Planned Parenthood of Southeastern Pennsylvania v. Casey pose a critical threat to the reproductive rights of women.

Women's Legal Defense Fund

The Women's Legal Defense Fund (WLDF) is a non-profit national advocacy organization that works at the federal and state levels to promote policies that offer equal opportunity to women, respond to women's basic economic and health needs, and enable women and men to participate fully in family and community life. Specifically in the area of reproductive freedom, WLDF participates in major reproductive rights and health cases, advocates for reproductive rights and health care for women before Congress, and provides policy options about reproductive health policies to federal and state legislators.

Women's Medical Centers, LTD.

Women's Medical Centers, Ltd. is a private medical practice located in Dayton and Cincinnati, Ohio, with physicians who specialize in gynecological care, including birth control and abortions.

Women's Medical Clinic

The Women's Medical Clinic is a private group practice specializing in gynecology. We are interested in retaining the right to abortion access for all American women.

Women's Rights Coalition of Oregon

The Women's Rights Coalition of Oregon is an active legislative effort composed of more than sixty local and statewide organizations across the State of Oregon. Founded in 1973 the Coalition brings together a wide range of service, professional, and advocacy groups who have the common belief that Oregon women should have equal rights and reproductive freedom.

Worldwatch Institute

Founded in 1974, Worldwatch Institute is designed to inform policy-makers and the public about the complex links between the world economy, social change, and the integrity of environmental support systems. Research focuses on a wide array of topics of importance to the concept of sustainable development, including among these the issues of health, human rights, and reproductive choice.

YWCA of the U.S.A.

The Young Women's Christian Association of the U.S.A. (YWCA), a national membership organization, has been an advocate for women and girls since the mid 1850's. Again at its 1991 Convention in Atlanta, the YWCA of the U.S.A. made reproductive freedom of choice a public policy priority necessary to fulfill its mission, the empowerment of women. Therefore, the YWCA of the U.S.A. supports the position taken in this amicus curiae brief.

Zero Population Growth

Zero Population Growth is a national membership organization working to achieve a sustainable balance between the earth's population, environment and resources. Through education and advocacy, the organization promotes voluntary efforts to stabilize population growth and to stop overconsumption of our natural resources by changing U.S. public policies attitudes, and behavior.

Appendix B

Appendix

B-1

Ad Hoc Committee of American Law Professors[1]

Kathryn Abrams, Boston University
Alice Alexander, Northeastern University
William L. Andreen, University of Alabama School of Law
Fran Ansley, University of Tennessee College of Law
Susan Apel, Vermont Law School
John S. Applegate, University of Cincinnati
Susan Frelich Appleton, Washington University
Jennifer Arlen, Emery Law School
Frank Askin, Rutgers Law School
Barbara Ann Atwood, College of Law
Brook K. Baker, Northeastern University School of Law
Susan Bandes, DePaul University
William Banks, Syracuse University College of Law
Elizabeth Bartholet, Harvard University Law School
Mary Becker, University of Chicago Law School
Stephen Befort, University of Minnesota Law School
Deborah Hodges Bell, University of Mississippi School of Law
Leslie Bender, College of Law
Robert W. Benson, Loyola Law School
Vivian Berger, Columbia University School of Law
Herbert Bernhardt, University of Baltimore
Dennis Bires, The University of Tulsa
Barbara Black, Vice Dean, Pace University School of Law
Catherine Blackburn, University of Louisville

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[1]Law school names are for the purpose of identification only. Amici are the individual professors whose names appear.

Marianne Blair, University of Tulsa
Chris Blair, The University of Tulsa
Susan Block-Lieb, Seton Hall Univ. Law School
Grace Ganz Blumberg, University of California
Theodore Blumoff, Mercer University Law School
Kathleen Boozang, Seton Hall School of Law
James Boskey, Seton Hall University
Amelia Boss, Temple Law School
Cynthia Bowman, Northwestern University School of Law
Bruce A. Boyer, Northwestern University Law School
James Boyle, Harvard Law School
Jean Braucher, University of Cincinnati
Paul Brietzke, Valparaiso University
John C. Brittain, University of Connecticut
Katherine Broderick, University of the District of Columbia
Mark Brodin, Boston College Law School
Jennifer Brooks, Harvard Law School
Karen Brown, Brooklyn Law School
Judith Olans Brown, Northeastern University School of Law
John Burkhoff, University of Pittsburgh
John Burkoff, University of Pittsburgh
Barbara Burnett, Syracuse University College of Law
Michael Burns, Nova University Law Center
Carole Butler, Capital University
Robert Calhoun, Jr., Golden Gate Law School
M. Susan Carlson, Washington University
Leah Chanin, Mercer University Law School
Marguerite Chapman, The University of Tulsa College of Law
Thomas Christensen, New York University

Richard Chused, Georgetown University Law Center
Roger S. Clark, Rutgers
David M. Cobin, Hamline University
Amy Cohen, Western New England
Douglas L. Colbert, Hofstra Unviersity
Liz Ryan Cole, Vermont Law School
Mary I. Coombs, University of Miami School of Law
Laura Cooper, University of Minnesota Law School
Corinne Cooper, University of Missouri
Laura Cooper, University of Minnesota Law School
Wes Daniels, University of Miami School of Law
Nancy Dart, University of Connecticut
Kenneth Dau-Schmidt, Indiana University Law School at Bloomington
John H. Davidson, University of South Dakota
Michael Davis, Cleveland State University
Sandra DeGraw, South Texas College of Law
Michael DeVito, Golden Gate University
Martha Bakos Dietz, Brooklyn Law School
Robert Dinerstein, American University
Victoria Dodd, Suffolk University Law School
Norman Dorsen, New York University
Donald Dunn, Western New England
Nancy S. Ehrenreich, University of Denver
David Elder, Northern Kentucky University
Jane Ellis, University of Washington
Leslie Espinoza, University of Arizona College of Law
Debra Evenson, DePaul Univ. College of Law
David Faigman, University of California
Cynthia Farina, Cornell Law School
Paul Ferber, Vermont Law School
Mary Ferrari, University of Bridgeport

Nancy Fink, Brooklyn Law School
David B. Firestone, Vermont Law School
Harry Fletcher, University of Pittsburgh
William Fletcher, University of California
Caroline Forell, University of Oregon
Teree Foster, University of Oklahoma College of Law
Leslie Pickering Francis, University of Utah
Eric Freedman, Hofstra Unviersity
Eric T. Freyfogle, University of Illinois
James J. Friedberg, West Virginia University
Lawrence Frolik, University of Pittsburgh
Mary Ellen Gale, Whittier College School of Law
Paula Galowitz, New York University
Judith Gaskell, De Paul University College of Law
Nancy S. Gibson, Northwestern University School of Law
Barbara Gilchrist, St. Louis University
Stephens Gillers, New York University
Morton Gitelman, University of Arkansas
Howard Glickstein, Tuoro College Jacob D. Fuchsberg Law Center
Howard Glickstein, Touro Law School
Dale Goble, University of Idaho
Thomas Goetzl, Golden Gate University
Carol R. Goforth, Seton Hall School of Law
Phyllis Goldfard, Boston College Law School
Alvin L. Goldman, University of Kentucky
Robert D. Goldstein, University of California
Anne Goldstein, Western New England
Richard Gordon, Esq., Harvard Law School
Nathaniel E. Gozansky, Emory University School of Law
Grayfred Gray, Uniersity of Tennessee College of Law

Gwen Thayer Handelman, Washington and Lee University School of Law
Leora Harpaz, Western New England College School of Law
Penny Hazelton, University of Washington
Thomas Hazen, University of North Carolina
John Heinz, Northeastern University
Susan N. Herman, Brooklyn Law School
Mark Heyrman, University of Chicago Law School
Stephen C. Hicks, Suffolk University Law School
Michael Hoffheimer, University of Mississippi
Peter Hoffman, University of Nebraska
Joan Heifetz Hollinger, University of Detroit
Gilbert A. Holmes, Seton Hall School of Law
Joan Howarth, Golden Gate University School of Law
Nan Hunter, Brooklyn Law School
Sheila Hyatt, University of Denver
Linda M. Jackson, College of William & Mary
Eric Janus, William Mitchell College of Law
Peter Jaszi, American University
Stewart M. Jay, University of Washington
Beryl Jones, Brooklyn Law School
James Jones, Univ. of Louisville School of Law
Cathy Jones, Western New England
Paul R. Joseph, Shepard Broad Law School
Leo Kanowitz, University of California
Lewis Katz, Case Western Reserve University
Dr. Jay Katz, Yale Law School
Eileen Kaufman, Tuoro College Jacob D. Fuchsberg Law Center
Caroline Kearney, Brooklyn Law School
Linda Keenan, New York Law School

Arthur Kinoy, Rutgers University - School of Law
Philip C. Kissom, University of Kansas
Richard Klein, Tuoro College Jacob D. Fuchsberg Law Center
Lois Knight, Boston University
Laurence Knowles, University of Louisville
Daniel T. Kobil, Capital University
Jane Korn, University of Arizona College of Law
Minna Kotkin, Brooklyn Law School
Joan Krauskopf, Ohio State University
Kenneth P. Kreiling, Vermont Law School
Bailey Kuklin, Brooklyn Law School
Christina Kunz, William Mitchell College of Law
Linda Lacey, The University of Tulsa
Renee Landers, Boston College Law School
John Larson, Florida State University
Jane Larson, Northwestern University Law School
Edith Lavin, Golden Gate University
Sylvia Law, NYU Law School
David Leibson, Univ. of Louisville School of Law
John Leubsdorf, Rutgers Law School - Newark
Stephanie Levin, Western New England College School of Law
Alan Levine, Hofstra University School of Law
David Levine, University of California
Barbara Lewis, University of Louisville
Susan E. Looper Friedman, Capital University Law School
Jennifer Lyman, Washington College of Law
Catherine Mahern, Texas Southern University
Karl Manheim, Loyola Law School
Isabel Marcus, Law School State University of NY
Elizabeth Phillips Marsh, University of Bridgeport

William Marsh, Indiana University School of Law
Calvin Massey, University of California
M. Minette Massey, University of Miami School of Law
Taylor Mattis, University of Miami
Judith Maute, University of Oklahoma Law
Therese Maynard, Loyola Law School
Kamilla Mazanec, Northern Kentucky University
Banks McDowell, Washburn University
Judith McKelvey, Golden Gate University
Alan Meisel, University of Pittsburgh
Michael Mello, Vermont Law School
Michael Meltsner, Northeastern University School of Law
Saul Mendolovitz, Rutgers Law School
Roy Mersky, University of Texas
Vanessa Merton, New York Law School
Carlin Meyer, New York Law School
Laura J. Miller, Northwestern University Legal Clinic of
Bruce Miller, Western N.E. College School of Law
Mauro Montoya, Jr., District of Columbia School of Law
Martha I. Morgan, University of Alabama School of Law
Ellen Morgan, Northwestern University School of Law
Suzanne Mounts, Univ. of San Francisco, School of Law
Sean Murray, University of Dayton
Michael Mushlin, Pace University School of Law
Eric Neisser, Rutgers Law School - Newark
Gerald L. Neuman, University of Pennsylvania Law School
Richard Nowka, University of Louisville
Paul O'Neil, Pace University School of Law
Michelle Oberman, Institute for Health Law
Anthony Palasota, Thurgood Marshall School of Law
Joyce Palomar, University of Oklahoma College of Law
Jerry Parkinson, University of Oklahoma College of Law

Wendy E. Parmot, Northeastern University Law School
Lisa Parsons, Edwin F. Mandel Legal Aid Clinic
Michael Perlin, New York Law School
Jean K. Peters, Yale Law School
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IN THE
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OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, REPRODUCTIVE HEALTH AND COUNSELING CENTER, WOMEN'S HEALTH SERVICES, INC., WOMEN'S SUBURBAN CLINIC, ALLENTOWN WOMEN'S CENTER, and THOMAS ALLEN, M.D., on behalf of himself and all others similarly situated,
Petitioners,

v.

ROBERT P. CASEY, N. MARK RICHARDS, and ERNEST D. PREATE, JR., personally and in their official capacities,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE STATES OF NEW YORK, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, IOWA, MAINE, MARYLAND, MASSACHUSETTS, NEVADA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, RHODE ISLAND, TEXAS AND VERMONT AND THE DISTRICT OF COLUMBIA, JOINED BY 13 GOVERNORS, 12 LIEUTENANT GOVERNORS AND 995 STATE LEGISLATORS FROM FIFTY STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. OUR CONSTITUTIONAL STRUCTURE AND THE DOCTRINE OF *STARE DECISIS* REQUIRE REAFFIRMANCE OF *ROE v. WADE*	4
A. The Commands Of *Stare Decisis*, Always Weighty, Are Especially Compelling In The Case of *Roe v. Wade*	4
B. No Circumstances Exist That Justify A Departure From *Roe*	8
1. *Roe v. Wade* Is Sound In Principle	9
2. Changes In Society And In Law Since *Roe* Was Decided Fortify, Not Weaken, Its Validity	12
3. *Roe* Is Workable In Practice	13
II. THIS COURT'S FAILURE TO REAFFIRM THAT THE CONSTITUTION PROTECTS A FUNDAMENTAL RIGHT TO MAKE CHOICES ABOUT CHILDBEARING WILL JEOPARDIZE THE HEALTH OF THE NATION'S WOMEN	15
A. Permitting States To Criminalize Abortion Will Inflict Severe Harm On Women Who Seek To Terminate Their Pregnancies	15

	Page
1. Travel Out-of-State	16
2. Illegal Abortions	17
3. Carrying To Term	19
B. States Where Abortion Remains Legal Can Expect An Influx Of Non-residents, Overburdening Abortion Providers In Those States And Displacing Resident Women From Securing Timely Abortion Services	22
III. THIS COURT'S FAILURE TO PROTECT THE RIGHT TO CHOOSE ABORTION AS A FUNDAMENTAL RIGHT WILL UNDERMINE STATE LAW ENFORCEMENT EFFORTS	25
CONCLUSION	30

TABLE OF AUTHORITIES

Cases	Page
Application of Grand Jury, 143 N.Y.S. 2d 501 (App. Div. 1955)	26
Arizona v. Rumsey, 467 U.S. 203 (1984)	8
Bellotti v. Baird, 443 U.S. 622 (1979)	10
Bering v. Share, 721 P.2d 918 (Wash. 1986), *cert. dismissed*, 479 U.S. 1050 (1987)	29
Booth v. Maryland, 482 U.S. 496 (1987)	9
Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872)	12
Brown v. Board of Education, 347 U.S. 483 (1954)	3, 6, 11
Brown v. Board of Education, 349 U.S. 294 (1955)	14
Carey v. Population Services International, 431 U.S. 678 (1977)	7
City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983)	9, 10, 14, 23
Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974)	7
Colautti v. Franklin, 439 U.S. 379 (1979)	10
CTS Corp. v. Dynamics Corp., 481 U.S. 69 (1987)	9
Doe v. Bolton, 410 U.S. 149 (1973)	23
Eisenstadt v. Baird, 405 U.S. 438 (1972)	7
Engel v. Vitale, 370 U.S. 421 (1962)	11

Cases — Page

Florida Dep't of Health v. Florida Nursing Homes Ass'n, 450 U.S. 147 (1981) 5

Frontiero v. Richardson, 411 U.S. 677 (1973) 13

Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) 8, 11

Green v. United States, 355 U.S. 184 (1957) 5, 6, 7

Griswold v. Connecticut, 381 U.S. 479 (1965) 7

Harris v. McRae, 448 U.S. 297 (1980) 14, 16

Helvering v. Hallock, 309 U.S. 106 (1940) 6

Hilton v. South Carolina Public Railways Comm'n, 112 S.Ct. 560 (1991) 6, 8

Hoffart v. State, 686 S.W.2d 259 (Tex. 1985), *cert. denied*, 479 U.S. 824 (1986) 29

Ingram v. Problem Pregnancy of Worcester, Inc., 486 N.E.2d 408 (Mass. 1986) 29

Kentucky v. Dennison, 24 How. 66 (1861) 10

Loving v. Virginia, 388 U.S. 1 (1967) 7

Maher v. Roe, 432 U.S. 464 (1977) 14

Meyer v. Nebraska, 262 U.S. 390 (1923) 7

Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) 13

Page

Moore v. City of East Cleveland, 431 U.S. 494 (1977) 7

Moragne v. State Marine Lines, 398 U.S. 375 (1970) 5

N.O.W. v. Operation Rescue, 914 F.2d 582 (4th Cir. 1990), *cert. granted, sub. nom. Bray v. Alexandria Women's Health Clinic*, 111 S.Ct. 1070 (1991) 28-29

New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) 11

New York State N.O.W. v. Terry, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 2206 (1990) 29

Orr v. Orr, 440 U.S. 268 (1979) 12

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 5, 13

Payne v. Tennessee, 111 S.Ct. 2597 (1991) 5, 6, 8, 9, 14

People v. Barksdale, 503 P.2d 257 (Ca. 1972) 15, 26

People v. Belous, 458 P.2d 194 (Ca. 1969), *cert. denied*, 397 U.S. 915 (1970) 15, 26

People v. Miller, 45 N.Y.S.2d 789 (App. Div. 1944) 28

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 7

Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983) 10

Planned Parenthood League of Mass., Inc. v. Operation Rescue, No. 89-2487-F, 1991 WL 214047 (Mass. Super. 1991) 29

Cases	Page
Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976)	10
Poe v. Ullman, 367 U.S. 497 (1961)	10
Prince v. Massachusetts, 321 U.S. 158 (1944)	7
Puerto Rico v. Branstad, 483 U.S. 219 (1987)	10
Reeves, Inc. v. Stake, 447 U.S. 429 (1980)	11
Roberts v. United States Jaycees, 468 U.S. 609 (1984)	13
Roe v. Wade, 410 U.S. 113 (1973)	*passim*
Runyon v. McCrary, 427 U.S. 160 (1976)	13
Skinner v. Oklahoma, 316 U.S. 535 (1942)	7, 11
South Carolina v. Gathers, 490 U.S. 805 (1989)	9
Stanton v. Stanton, 421 U.S. 7 (1975)	12
State v. Evergreen Assoc., No. 41237/87 (N.Y. Sup. Ct. judgment entered 1987)	28
State v. Horn, 407 N.W.2d 854 (Wis. 1987)	29
State v. Mother and Child Services, Inc., No. 41236/87 (N.Y. Sup. Ct. judgment entered 1987)	28
State v. Mother and Unborn Baby Love, Inc., No. 412721/87 (N.Y. Sup. Ct. judgment entered 1987)	28
State v. Scholberg, 412 N.W.2d 339 (Minn. 1987)	29

Cases	Page
The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851)	12
Thornburgh v. Am. College of Obstetricians and Gynecologists, 476 U.S. 747 (1986)	9, 12
United States v. Carolene Prod. Co., 304 U.S. 144 (1938)	11
United States v. Scott, 437 U.S. 81 (1978)	8, 14
Vasquez v. Hillery, 474 U.S. 254 (1986)	5, 7, 8
Webster v. Reproductive Health Services, 109 S.Ct. 3040 (1989)	9
Welch v. Texas Dep't of Highways and Public Transportation, 483 U.S. 468 (1987)	5
West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)	11
Whalen v. Roe, 429 U.S. 589 (1977)	7
Williams v. Florida, 399 U.S. 78 (1970)	5, 6, 12
Zablocki v. Redhail, 434 U.S. 374 (1978)	7
CONSTITUTIONS, STATUTES AND ATTORNEY GENERAL OPINIONS	
U.S. Const. Amend. XIV	4, 10, 11, 12
Md. Const. art. XVI, §2	27
Colo. Rev. Stat. § 18-6-101 (1986 & Supp. 1990)	27

	Page
Ind. Code Ann. § 35-1-58.5-2(3)(c) (West 1986) ..	27
1991 Md. Laws, Ch. 1	27
Model Penal Code § 230.3 (Proposed Official Draft 1962)	26
18 Pa. Cons. Stat. § 3211 (Supp. 1991)	27
Utah Code Ann. § 76-7-302(3) (Supp. 1991)	27
74 Op. Md. Att'y Gen. No. 89-045 (Md. Nov. 30, 1989)	27

OTHER SOURCES

Alan Guttmacher Institute, *Safe and Legal : 10 Years' Experience With Legal Abortion in New York State* (1980)	15, 22, 23
Alan Guttmacher Institute, *Teenage Pregnancy: The Problem that Hasn't Gone Away* (1981). ..	20, 21
Armstrong, Elizabeth, Center for Population Options, *Teenage Pregnancy and Too-Early Childbearing: Public Costs, Personal Consequences* (5th ed. 1990).	20, 21
Binken, Nancy, et al., *Illegal Abortion Deaths in the United States: Why Are They Still Occurring?*, 14 Fam. Plan. Persp. 163 (1982)...	18, 24
Brotman, Barbara, *Secret Abortion Group of '60s Prepares for Return*, Chi. Trib, Aug. 28, 1989 .	18

	Page
Bureau of Census, U.S. Dept. of Commerce, *Current Population Reports Consumer Income*, Series P-60, No. 175 *in Poverty in the U.S.: 1990*, (1990) (tables 1,5).....	16
Cartoof, Virginia J. & Lorraine V. Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 76 Am. J. Pub. Health 397 (1986).	22
Cates, Willard, Jr., *Legal Abortion: The Public Health Record*, 215 Sci. 1586 (1982).	18, 19, 24
Cates, Willard, Jr. et al., *Morbidity and Mortality of Abortion in the United States in Abortion and Sterilization: Medical and Social Aspects* (Hodgson, ed. 1981).	16
Centers for Disease Control, U.S. Dep't of Health, Educ. and Welfare, *Abortion Surveillance, Annual Summary 1972* (April, 1974)	26
Darney, Philip D., et al., *Abortion Training in U.S. Obstetrics and Gynecology Residency Programs*, 19 Fam. Plan. Persp. 158 (1987).	24
Fetal Extrauterine Survivability, Report to the New York State Task Force on Life and Law (1988).	13
Forrest, Jacqueline & Stanley K. Henshaw, *The Harassment of U.S. Abortion Providers*, 19 Fam. Plan. Persp. 9 (1987).	29
Gold, Rachel Benson, Alan Guttmacher Institute, *Abortion and Women's Health, A Turning Point for America?* (1990).	16, 18, 19, 20
Gorney, Cynthia, *Abortion in the Heartland*, Wash. Post, Oct. 2, 1990.....	18, 23-24

Page

Grimes, David A., *Second Trimester Abortions in the United States*, 16 Fam. Plan. Persp. 260 (1984). 23

Hack, Maureen & Avroy A. Fanaroff, *Outcomes of Extremely Low Birth Weight Infants Between 1982 and 1988*, 321 New Eng. J. of Med. 1642 (1989)..... 13

Hall, Mimi, *Legal Abortions Tougher To Get*, USA Today, May 1, 1991..... 23

Harlap, Susan, et al., Alan Guttmacher Institute, *Preventing Pregnancy, Protecting Health: A New Look at Birth Control Choices in the United States* (1991) 19

Henshaw, Stanley K., et al., *Abortion Services in the United States, 1981-1982*, 16 Fam. Plan. Persp. 119 (1984)..... 23

Henshaw, Stanley K., et al., *Abortion Services in the United States, 1984 and 1985*, 19 Fam. Plan. Persp. 63 (1987)..... 23

Henshaw, Stanley K., et al., *Characteristics of U.S. Women Having Abortions, 1987*, 23 Fam. Plan. Persp. 75 (1991)..... 16

Henshaw, Stanley K., & Jennifer Van Vort, *Abortion Services in the United States, 1987 and 1988*, 22 Fam. Plan. Persp. 102 (1990). ... 15, 24

Institute of Medicine, *Legalized Abortion and the Public Health* (1975)..... 17, 18, 26

Kaplan, John, *Abortion as a Vice Crime: A "What If" Story*, 51 Law & Contemp. Probs. 151 (1988)..... 25, 26, 28

Page

Mackinson, Carolyn, *Health Consequences of Teenage Fertility*, 17 Fam. Plan. Persp. 132 (1985). 21

McFadden, Robert D., *Abortion Mills Thriving Behind Secrecy and Fear*, N.Y. Times, Nov. 24, 1991 25

Missouri Dept. of Health, *Missouri Monthly Vital Statistics* (Jan. 1990). 22

Monaghan, Henry Paul, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723 (1988) 4, 8, 14

NARAL Foundation/NARAL, *Who Decides? A State-By State Review of Abortion Rights* (1991) 29

National Abortion Federation, American College of Obstetricians and Gynecologists, *Who Will Provide Abortions? Ensuring the Availability of Qualified Practitioners* (1990). 23, 24

Niswander, Kenneth R., *Medical Abortion Practices in the United States in Abortion and the Law* (Smith ed. 1967). 25, 26

Note, *Too Close for Comfort: Protesting Outside Medical Facilities*, 101 Harv. L. Rev. 1856 (1988). 29

Oversight Hearings on Abortion Clinic Violence, Subcomm. on Civil and Constitutional Rights, House Comm. on the Judiciary, 99th Cong., 1st & 2nd Sess. (1985)..... 28, 29

	Page
Pakter, Jean, et al., *Two Years Experience in New York City With the Liberalized Abortion Law – Progress and Problems*, 63 Am. J. Pub. Health 524 (1973).	20, 22
Pamuk, Elsie R., & W.D. Mosner, *National Center for Health Statistics* 11 (1988).	20
Placet & Taffel, *Recent Patterns in Caesarean Delivery in the United States*, 5 Obstet. Gynec. Clin. N.A. 607 (1988).	19
Powell, Lewis F. Jr., *Stare Decisis and Judicial Restraint*, 1991 Journal of Supreme Court History 13 (1991).	5
President's Comm'n on Law Enforcement and Admin. of Justice, *Task Force Report: The Courts* (1967).	16, 25, 28
Pritchard, J., et al., *Williams Obstetrics* (17th ed. 1985)	19
Regan, Leslie J., *About to Meet Her Maker: Women, Doctors, Dying Declarations, and the State's Investigation of Abortion, Chicago, 1867-1940*, J. of Am. Hist. 1240 (March 1991).	28
Rosen, Harold, *Psychiatric Implications of Abortion: A Case Study in Social Hypocrisy in Abortion and the Law* (Smith ed. 1967).	25
Shelton, James D., et al., *Abortion Utilization: Does Travel Distance Matter*, 8 Fam. Plan. Persp. 260 (1976).	17
Stone, Rebecca, Center for Population Options, *Adolescents and Abortion, Choice In Crisis* (1990).	21, 22
The Federalist No. 78 (H. Lodge ed. 1888)	5

	Page
Tietze, Christopher & Stanley K. Henshaw, Alan Guttmacher Institute, *A World Review 1986* (1986).	16, 17, 19
Torres, Aida & Jacqueline Darroch Forrest, *Why Do Women Have Abortions?*, 20 Fam. Plan. Persp. 169 (1988).	17, 23
Trussell, James, et al., *Impact of Restricting Medicaid Financing for Abortion*, 12 Fam. Plan. Persp. 120 (1980).	19
van den Berg, Bea J., & Chin Long Chiang, *Maternal Mortality and Differentiation By Cause of Death* 239 (1986).	17
Whalen, Robert P., New York State Dept. of Health, *Report of Selected Characteristics of Induced Terminations of Pregnancy Recorded in New York State, January - December 1975 with Five Year Summary*.	22
Wilson, J., et al., *Obstetrics and Gynecology* (8th ed. 1987).	23
Ziff, Harvey L., *Recent Abortion Law Reforms (Or Much Ado About Nothing)*, 60 J. Crim. L. and Criminology and Police Sci. 13 (1969).	18, 25, 26, 28

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INTEREST OF *AMICI CURIAE*[1]

Amici are the chief legal officers of sixteen States and the District of Columbia, thirteen Governors, twelve Lieutenant Governors and 995 legislators from the fifty states,[2] who have a direct interest in the

[1] The parties have consented to the filing of this brief by letters that accompany the brief.

[2] A list of the *amici* appears in the appendix to this brief.

continued vitality of *Roe v. Wade*, 410 U.S. 113 (1973). *Amici* share a commitment to the preservation of fundamental individual rights and an abiding respect for the judiciary's constitutional role in securing those rights against infringement by the state and national governments.

Our experience and duties provide a unique perspective on governmental regulation of abortion. In our respective states, *amici* enact legislation, direct executive agencies in implementing legislation, and enforce state laws through criminal and civil sanctions. *Amici* are also obligated to protect the health and well-being of women in our states, which includes their right to safe and appropriate health care and their right to decide whether and when to bear children.

Amici have found the standard of review for the constitutionality of abortion regulations described in *Roe v. Wade* to be a workable and fair accommodation of state interests and individual rights. In *Roe*, this Court correctly held that a state must have a compelling interest to justify its regulation of a woman's fundamental right to choose whether to bear a child. That framework accords to states the necessary authority to regulate abortion in the genuine interest of promoting health and preserving potential life while also respecting the fundamental privacy rights of women.

As officials charged with enforcing laws, *amici* have a special interest in promoting respect for the doctrine of *stare decisis*. Adherence to *stare decisis* preserves stability in the law, prevents relitigation of divisive issues, and endows our citizens with confidence that laws will be interpreted consistently and fairly. A retreat from the uniform national standard for regulation of abortion provided by *Roe* will turn state legislatures into political battlegrounds, and divert attention from a multitude of critical economic and public policy issues that need to be addressed. The evisceration of a woman's fundamental constitutional right to choose abortion after it has been exercised for almost twenty years also threatens to jeopardize public faith in the legitimacy of our system of laws.

Because of our roles and responsibilities within the states, *amici* are uniquely qualified, and in fact compelled, to address the question of whether the Court should continue to protect a woman's deeply personal decision about childbearing as a fundamental

constitutional right. An abandonment by this Court of the fundamental right to choose and of the application of strict scrutiny to state abortion regulations will undermine our interest in protecting the health and well-being of women in our states, and in administering the law fairly and effectively.

SUMMARY OF ARGUMENT

In *Roe v. Wade* this Court properly recognized that a woman's decision whether or not to bear a child is encompassed in the fundamental constitutional right to privacy and that state interference with that decision is subject to strict scrutiny. For almost two decades, the states and millions of individuals have relied on the framework established by *Roe* and its progeny in structuring their affairs and lives. Like *Brown v. Board of Education*, 347 U.S. 483 (1954), *Roe* has become part of the political and moral fabric of this country. A decision that turns back the clock on women's ability to control reproduction and shape their futures would unjustifiably frustrate reasonable reliance upon the Court's judgments. A break from a precedent of such importance, particularly when it coincides with a shift in the membership of the Court, also threatens to erode public faith in the impartiality and legitimacy of law.

Under the doctrine of *stare decisis*, reversal of a precedent whose principles are deeply embedded in the national consciousness, in the lives of individuals, and in governmental decisionmaking can be justified only upon a demonstration that the precedent is harmful. No evidence exists that *Roe v. Wade* causes harm. But an abandonment of the fundamental right secured by *Roe* would almost certainly inflict injury — both on individual women and on the states.

Retreating from *Roe* and forcing states to determine the parameters of the right to choose abortion will significantly jeopardize the public health and welfare. Experience shows that women seek abortion in substantial numbers regardless of the state of the law. While women with money will often be able to secure safe and legal abortions by traveling to other states, recriminalization of abortion will drive women without sufficient resources to back-alley abortionists, where they risk grave harm to their health and even death. In addition, states that

continue to protect abortion will face a dramatic increase in the number of women seeking abortions, which will severely strain already overburdened health care systems and impede the delivery of medical services.

A failure by this Court to protect a woman's fundamental right to determine her reproductive destiny will also subvert law enforcement efforts. The criminal anti-abortion laws that may arise will be extremely difficult to enforce, and will divert resources from protecting the public from other crimes. History teaches that the attempt to enforce unpopular laws that are widely disobeyed and easily evaded by the affluent undermines the integrity of the criminal justice system and our institutions of government.

ARGUMENT

I. OUR CONSTITUTIONAL STRUCTURE AND THE DOCTRINE OF *STARE DECISIS* REQUIRE REAFFIRMANCE OF *ROE* v. *WADE*

A. *The Commands Of Stare Decisis, Always Weighty, Are Especially Compelling In The Case Of Roe v. Wade*

Nineteen years ago, seven Members of this Court recognized that the due process clause of the Fourteenth Amendment secures to women a fundamental right to choose whether or not to continue a pregnancy. Since *Roe v. Wade*, courts have scrutinized regulation of abortion strictly, demanding that a state's encroachment on that right serve a compelling interest and be narrowly drawn. Those who now urge this Court to abandon protection of the right to choose abortion and to thrust the issue back upon the states invite disaster. As chief legal officers, chief executives, and elected representatives of the people of our respective states, *amici* therefore urge the Court to be steadfast in its application of *Roe v. Wade*.

The doctrine of *stare decisis* requires strict adherence to past precedents "absent a showing of substantial countervailing considerations."[3] Although sometimes accorded less weight in cases

[3] Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723, 757 (1988).

interpreting the Constitution,[4] an examination of the doctrine's underlying purposes makes clear that it is especially compelling in the case of *Roe v. Wade*.

"Perhaps the most important . . . argument for *stare decisis* is one of public legitimacy." Powell, *supra*, at 16. It has long been recognized that "[t]he rule of law depends in large part on adherence to the doctrine of *stare decisis*," *Welch v. Texas Dep't of Highways and Public Transportation*, 483 U.S. 468, 478-79 (1987), and that it is the basis of "public faith in the judiciary as a source of impersonal and reasoned judgments." *Moragne v. State Marine Lines*, 398 U.S. 375, 403 (1970). By providing a check against arbitrary and partial decisionmaking, *stare decisis* allows citizens to "have confidence that the rules on which they rely in ordering their affairs . . . are rules of law and not merely the opinions of a small group of men who temporarily occupy high office." *Florida Dep't of Health v. Florida Nursing Homes Ass'n*, 450 U.S. 147, 154 (1981)(Stevens, J., concurring). Thus, the obligation of judges to be bound by the rules of cases already decided "is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.'" *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (quoting The Federalist No. 78, at 490 (H. Lodge ed. 1888) (A. Hamilton)).

Adherence to precedent also promotes stability and consistency in the law, "ensur[ing] that the law will not merely change erratically, but will develop in a principled and intelligible fashion." *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986). As a result, *stare decisis* permits citizens and governments alike to rely on the law in structuring their activities and affairs. *See, e.g., Williams v. Florida*,

[4] *See, e.g., Payne v. Tennessee*, 111 S.Ct. 2597, 2610 (1991). Most Justices and commentators, however, agree that its strictures apply even in constitutional cases. As former Justice Powell has remarked, "the elimination of constitutional *stare decisis* would represent an explicit endorsement of the idea that the Constitution is nothing more than what five Justices say it is. This would undermine the rule of law." Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 1991 Journal of Supreme Court History 13, 16 (1991); *see also Payne v. Tennessee*, 111 S.Ct. at 2618 (Souter, J., concurring) ("Even in constitutional cases, [*stare decisis*] carries . . . persuasive force"); *Green v. United States*, 355 U.S. 184, 215 (1957) (Frankfurter, J., dissenting).

399 U.S. 78, 127 (1970) (Harlan, J., dissenting in part and concurring in part); *Helvering v. Hallock*, 309 U.S. 106, 119 (1940) (remarking upon "the psychologic need to satisfy reasonable expectations").

The need for stability and legitimacy in the law weighs heavily in favor of abiding by the precedent of *Roe v. Wade* regardless of individual views on how the case should be decided if it arose *res nova* today.[5] Like *Brown v. Board of Education*, 347 U.S. 483, *Roe* has become part of the political and moral fabric of this country. Millions of women who have come of age in the last twenty years have structured their identities, their families, and their pursuits around the possession of a fundamental privacy right to decide whether or not or when to bear a child. *Roe* has also rooted itself in the practices and expectations of the States as sovereign entities, which have relied on *Roe* over the last two decades in developing a uniform statutory and regulatory framework within which health planning decisions are made.

This Court has consistently held that when individuals and governments have relied on a precedent, as they have on *Roe*, there should be extreme reluctance to overrule it. Only recently, this Court reaffirmed that "*[s]tare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations. . . ." *Hilton v. South Carolina Public Railways Comm'n*, 112 S.Ct. 560, 564 (1991). *See also Payne v. Tennessee*, 111 S.Ct. at 2610.[6] *Stare decisis*, after all, rests upon the "principle that the settled practices and expectations of a democratic society should generally not be disturbed by the courts." *Id.* at 2614 (Scalia, J., concurring). Yet if the Court were to abandon *Roe* now, it would needlessly and unjustifiably frustrate the settled practices and "reasonable expectations," *Helvering v. Hallock*, 309 U.S. at 119, of both vast numbers of women and governmental entities.

[5] *See Green v. United States*, 355 U.S. at 215 (Frankfurter, J., dissenting).

[6] The fundamental personal freedom secured by *Roe* is clearly not a "mere procedural or evidentiary rule," which the Court views as carrying diminished precedential weight. *Payne*, 111 S.Ct. at 2610. It is more akin to a "property or contract right" in that both categories of rights involve "strong reliance interests." *Id.*

Because *Roe v. Wade* is so deeply embedded in both individual and governmental decisionmaking, reversal or modification of its holding would also substantially undermine the rule of law. Never before has this Court overruled a case that recognized a fundamental personal freedom. A departure from the guarantee of a fundamental liberty that coincides with a shift in the membership of the Court would run athwart the principal objective the doctrine of *stare decisis* is intended to serve: to enable citizens "to presume that bedrock principles are founded in the law rather than the proclivities of individuals. . . ." *Vasquez v. Hillery*, 474 U.S. at 265-66. It would thereby undermine public confidence in "the wisdom of this Court as an institution transcending the moment," *Green v. United States*, 355 U.S. at 215 (Frankfurter, J., dissenting), with resulting damage to citizens' respect for the law.

Roe v. Wade's precedential status is entitled to great weight in another respect. The constitutional terrain it describes is an area which the Court long ago marked out as a "zone of privacy created by several fundamental constitutional guarantees." *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965). A series of historic decisions leading up to *Roe* extended autonomy to individuals in matters relating to childrearing, marriage, and procreation.[7] Since *Roe*, this Court not only has repeatedly reaffirmed the existence of that zone of privacy when striking down restrictive abortion laws but also has relied upon it in reaching a variety of decisions outside the abortion area.[8] A repudiation of *Roe v. Wade* would therefore remove the constitutional girders of some

[7] *See Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Griswold v. Connecticut*, 381 U.S. 479; *Loving v. Virginia*, 388 U.S. 1 (1967); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

[8] *See, e.g., Zablocki v. Redhail*, 434 U.S. 374 (1978)(invalidating state laws burdening the right to marry); *Carey v. Population Services International*, 431 U.S. 678 (1977) (invalidating prohibitions on distribution and advertisement of contraceptives); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (invalidating a zoning law that interfered with decisions as to family composition); *Whalen v. Roe*, 429 U.S. 589 (1977) (recognizing right to informational privacy); *Cleveland Board of Education v. La Fleur*, 414 U.S. 632 (1974) (invalidating an employment rule burdening a woman's decision to bear a child).

of the Court's most important decisions in this century, and call into question an entire field of constitutional law.[9]

Because of the "bedrock" nature of the right it recognizes, the settled practices and expectations it has engendered, and its integral role in a foundational aspect of constitutional law, a reaffirmation of *Roe* commands exceptional consideration on *stare decisis* grounds.[10]

B. *No Circumstances Exist That Justify A Departure From Roe*

The proponent of overruling a precedent always bears a "heavy burden." *Vasquez v. Hillery*, 474 U.S. at 266. "Even in constitutional cases, [*stare decisis*] carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.' " *Payne v. Tennessee*, 111 S.Ct. at 2618 (Souter, J., concurring) (citing *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)).

In our system of law, a belief that a case was wrongly decided in the first instance is far from a sufficient justification for overruling it.[11] Because of the important policies advanced by *stare decisis*, this Court does not abandon a precedent absent a special showing that "changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective," *Vasquez*, 474 U.S. at 266, that the precedent is "unsound in principle," *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985), that it is "unworkable in practice," *id.* at 546, or that "the lessons of experience indicate that [a new rule] . . . would significantly advance the public interest." *United States v. Scott*, 437 U.S. 81, 101 (1978).

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[9] *See Hilton v. South Carolina Public Railways Comm'n*, 112 S.Ct. at 564 (if overruling precedent would "throw into doubt previous decisions from this Court," that result weighs "in favor of adhering to *stare decisis*").

[10] As one legal scholar has aptly explained, *stare decisis* serves "to prevent disruption of practices and expectations so settled, or to avoid the revitalization of a public debate so divisive, that departure from the precedent would contribute in some perceptible way to a failure of confidence in the lawfulness of fundamental features of the political order." Monaghan, *supra* note 3, at 750.

[11] Under American notions of *stare decisis*, "[e]ven an 'overriding conviction' of prior error is not enough [to justify overruling]; the precedent must have some palpable adverse consequences beyond its existence." Monaghan, *supra* note 3, at 758.

Roe does not suffer from any of the infirmities that justify the overruling of a precedent. In fact, a reversion to the pre-*Roe* regime would encourage divisive and inconsistent state regulation of a woman's abortion decision, disserving the public interest. *See* Points II and III, *post*. A healthy observance of restraint in judging, an interest served by adherence to the doctrine of *stare decisis*, counsels against overruling *Roe v. Wade*.

1. *Roe v. Wade Is Sound In Principle*

Almost twenty years ago, this Court held that the right of personal privacy — which finds its doctrinal sources in decisions dating back to the nineteenth century — "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe*, 410 U.S. at 153. That holding was rooted in a solid line of cases establishing that individuals enjoy a fundamental liberty interest in matters related to childrearing, marriage, and procreation,[12] and it remains the governing law today.[13]

This Court has already found "especially compelling reasons for adhering to *stare decisis* in applying the principles of *Roe v. Wade*." *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 420 n.1 (1983). Among them were the special consideration afforded the issues in *Roe*, the solid majority it commanded,[14] and the repeated adherence in subsequent cases to the basic principles there announced. Indeed, the Court not only has explicitly reaffirmed *Roe*, but has repeatedly relied on it to strike down regulations impermissibly interfering with a woman's right to have an abortion.[15]

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[12] *See* cases cited *supra* note 7.

[13] Chief Justice Rehnquist's plurality opinion in *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989), did not command a majority of the Members of the Court and therefore its reasoning is not binding. *See, e.g., CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 81 (1987). Justice O'Connor, along with the four dissenting Justices, refused to question the validity of *Roe*. 109 S.Ct. at 3060-61 (O'Connor, J., concurring in part and concurring in the judgment).

[14] *Compare Payne*, 111 S.Ct. at 2611 (justifying overruling of *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989), in part on the ground that they were "decided by the narrowest of margins").

[15] *See Thornburgh v. Am. College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (striking down mandatory dissemination of information designed

(Footnote continued)

No doctrinal development has appeared since *Roe v. Wade* that diminishes the conclusion of seven Members of the Court that the liberty component of the due process clause of the Fourteenth Amendment protects as fundamental the right of a woman to choose whether to terminate a pregnancy. On the contrary, *Roe*'s holding has been relied on not only in abortion cases but in a variety of decisions in the privacy area outside the abortion context.[16] Because this Court has repeatedly followed its decision, the right recognized in *Roe* has become not only a part of our constitutional landscape, but an element widely perceived to be part of the nation's social fabric.

Roe v. Wade falls squarely within the historical and rational traditions of this Court in elaborating the meaning of the due process clause under which liberty is a "continuum which ... includes a freedom from all substantial arbitrary impositions and purposeless restraints." *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting). Those who now urge that the issue be remitted to fifty or more legislatures as a proper subject of majoritarian rule fail to recognize that the majority, in adopting the Fourteenth Amendment, endorsed the principle that the judiciary is the guarantor of personal freedoms.

Under our Constitution, the judiciary is entrusted with the critical task of safeguarding the most fundamental aspects of people's lives – their personal sovereignty – from interference by legislative bodies. As this Court has declared:

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to discourage abortion, two-physician requirement for post-viability abortions, and mandatory medical procedures for possibly viable fetuses); *Akron*, 462 U.S. 416 (1983) (invalidating 24-hour waiting period, mandatory dissemination of information designed to discourage abortions and hospitalization requirement for second trimester abortions); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983)(striking down requirements unrelated to maternal health for second trimester abortions); *Colautti v. Franklin*, 439 U.S. 379 (1979)(striking down mandatory medical procedures for possibly viable fetuses); *Bellotti v. Baird*, 443 U.S. 622 (1979)(overturning parental consent requirement); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976)(overturning parental and spousal consent requirements).

[16] *See* cases cited *supra* note 8. *Cf. Puerto Rico v. Branstad*, 483 U.S. 219, 227-30 (1987) (overruling *Kentucky v. Dennison*, 24 How. 66 (1861), because the holding of *Dennison* "is fundamentally incompatible with more than a century of constitutional development" and "the basic consitutional principles now point as clearly the other way").

> The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's ... fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).[17] That the passions which attend the abortion debate make judicial resolution difficult does not relieve this Court of its constitutional duty. Rather, the Court's duty reaches its zenith when the issue, as here, is one of a "sensitive and emotional nature," generating heated public debate and controversy, "with vigorous opposing views" and "deep and seemingly absolute convictions." *Roe*, 410 U.S. at 116. For it is precisely then that majoritarian institutions are the least reliable guarantors of individual rights and liberties. *See, e.g., Brown v. Board of Education*, 347 U.S. 483; *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938).

The federal structure of our government offers abundant opportunities for states to serve as laboratories for new social and economic ideas. *See, e.g., Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). But there is a critical difference between a state's experimentation within a sphere of power ceded to government by the individual and the state's usurpation of those powers and rights reserved to the individual. A state law infringing a fundamental individual liberty protected by the Fourteenth Amendment cannot be upheld on federalism grounds. *See New State Ice*, 285 U.S. at 279-80. After all, "[t]here are limits to the extent to which a legislatively represented majority may conduct ... experiments at the expense of the dignity and personality" of the individual. *Skinner v. Oklahoma*, 316 U.S. 535, 546 (1942) (Jackson, J., concurring). Because "[f]ew decisions are more personal and intimate, more properly private, or more basic

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[17] *See also Garcia*, 469 U.S. at 565 n.8 ("One can hardly imagine this Court saying that because Congress is composed of individuals, individual rights guaranteed by the Bill of Rights are amply protected by the political process.") (Powell, J., dissenting, joined by Burger, C.J., Rehnquist and O'Connor, JJ.); *Engel v. Vitale*, 370 U.S. 421, 429-30 (1962).

to individual dignity and autonomy, than a woman's decision . . . whether or not to end her pregnancy," *Thornburgh*, 476 U.S. at 772, the Court correctly decided in *Roe v. Wade* that a woman's right to control her reproductive destiny cannot be a candidate for state-by-state experimentation.

2. *Changes In Society And In Law Since Roe Was Decided Fortify, Not Weaken, Its Validity*

In the two decades since *Roe* was decided, society has witnessed enormous changes in the status of women. Women, who have entered the workforce in staggering numbers, demand and are entitled to participate as equals in the social and economic life of this country. Those changes, however, do not demonstrate that the principles of *Roe v. Wade* must be rejected as "no longer suited to contemporary life." *Cf. Williams v. Florida*, 399 U.S. at 128 (Harlan, J., dissenting in part and concurring in part).[18] On the contrary, women's growing independence as citizens depends on freedom from forced childbearing and on the ability to control whether or when to have children. The advances women have made toward equality do not support, let alone justify, reinstating a rule of law that deprives them of reproductive autonomy and consigns them purely to the domestic sphere.

Law has evolved to keep pace with the changing role of women. Although at one time a distinguished Member of the Court concluded that the Fourteenth Amendment did not prevent a state from denying women admission to the practice of law because the "paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother," *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring), such views have fallen into serious disrepute.[19] During the last two decades, the Court has repeatedly recognized that the Constitution will not tolerate state actions that coerce women to fill

[18] *Cf. The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 455-56 (1851) (overruling 1825 precedent limiting admiralty jurisdiction to tidal waters on account of changed boundaries of U.S. territory and concomitant increase in inland waters).

[19] "'No longer is the female destined solely for the home and the rearing of the family and only the male for the marketplace and world of ideas.' " *Orr v. Orr*, 440 U.S. 268, 280 (1979) (quoting *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975)).

stereotypical domestic or nurturing roles;[20] and has acknowledged the compelling governmental interest in eradicating sex discrimination.[21] This Court's recognition of women's right to autonomy and equality under the law strongly support reaffirmance of *Roe v. Wade*.[22]

3. *Roe Is Workable In Practice*

Roe provides a workable, predictable framework within which states can regulate abortion and courts can review such regulations. Although legislative responses have frequently required the Court to delineate the fundamental right to choose and to define the limits on the states' authority to regulate abortions, the need for the Court to furnish guidance in this area does not argue for a doctrinal retraction of *Roe v. Wade*. Constitutional adjudication of rights secured by the Bill of Rights often involves complicated tasks of definition and line drawing.

In comparison to other distinctions articulated by this Court in constitutional cases, however, the *Roe* framework provides clear guidance to state governments and lower courts. It guarantees that the state may not regulate the abortion procedure prior to viability unless the regulation is necessary to protect a woman's health, provided that the state may not restrict abortions after viability in a way that harms the woman's life or health.[23] *See Roe*, 410 U.S.

[20] *See Mississippi University for Women v. Hogan*, 458 U.S. 718, 725-26 (1982); *Frontiero v. Richardson*, 411 U.S. 677, 684-85 (1973).

[21] *See Roberts v. United States Jaycees*, 468 U.S. 609, 625-26 (1984) (noting "the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women").

[22] *Cf. Patterson v. McLean Credit Union*, 491 U.S. at 174 (deep national commitment to eradicating race discrimination supports adherence to holding of *Runyon v. McCrary*, 427 U.S. 160 (1976), that 42 U.S.C. § 1981 applies to private conduct whether holding was "right or wrong as an original matter").

[23] Contrary to some predictions, changes in science and technology since *Roe* was decided have not undermined its validity. No technology has appeared that lowers the threshold during pregnancy at which a fetus can survive separate from the woman. Medical authorities have concluded that viability exists – and is likely to remain fixed – at the 24th week of pregnancy. *See* Maureen Hack & Avroy A. Fanaroff, *Outcomes of Extremely Low Birth Weight Infants Between 1982 and 1988*, 321 New Eng. J. of Med. 1642, 1647 (1989); *see also Fetal Extrauterine Survivability*, Report to the New York State Task Force On Life and Law 10 (1988).

at 163-64; *Akron*, 462 U.S. at 428-30. These basic guidelines have neither proved unduly "confusing" nor "defied consistent application." *Cf. Payne*, 111 S.Ct. at 2611. The results of two decades of their application in the courts have been largely consistent and predictable.[24]

The opposition by some to the principle that a woman has a constitutionally protected right to decide whether or not to continue her pregnancy should not be confused with any doctrinal or practical deficiency of *Roe*. It "should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." *Brown v. Board of Education*, 349 U.S. at 300. Individuals, government, and the medical profession all operate with the benefit of nearly twenty years of experience under *Roe*. Far from lessening litigation or dampening the controversy, a new standard would only increase contention.

Furthermore, as discussed in Points II and III, *post*, "the lessons of experience" teach us that overruling *Roe* would not "significantly advance the public interest." *Cf. United States v. Scott*, 437 U.S. at 101. On the contrary, modification or abandonment of *Roe* would inflict harm on women, wreak havoc on public health care systems, and undermine law enforcement efforts in the states. Departure from precedents is rarely if ever defensible when "the effects of the precedents are not harmful, and overruling the precedents would produce exceptionally harmful results."[25] As representatives of state governments that will be deeply affected by any reversal or erosion of *Roe*, *amici* submit that a concern for the public interest demands reaffirmation of *Roe*'s principles.

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[24] *See* cases cited *supra* note 15. This Court has also upheld certain kinds of restrictive abortion legislation on the ground that they do not interfere with the rights recognized in *Roe*. *See, e.g., Harris v. McRae*, 448 U.S. 297 (1980) (upholding ban on public funding of abortions on the ground that ban did not interfere with right recognized in *Roe*); *Maher v. Roe*, 432 U.S. 464 (1977) (same).

[25] Monaghan, *supra* note 3, at 760; *cf. Payne*, 111 S.Ct. at 2613 (Scalia, J., concurring) (abandonment of rule excluding victim-impact evidence in sentencing hearings justified when the precedent "significantly harms our criminal justice system").

II. THIS COURT'S FAILURE TO REAFFIRM THAT THE CONSTITUTION PROTECTS A FUNDAMENTAL RIGHT TO MAKE CHOICES ABOUT CHILDBEARING WILL JEOPARDIZE THE HEALTH OF THE NATION'S WOMEN

The consequences for women's health in this country will be devastating if the Court jettisons *Roe v. Wade*. American women will not abandon exercise of a right so long enjoyed and so basic to their ability to control their destiny.[26] Some will seek to circumvent restrictive laws within their own states, increasing the risk of abortion-related death, injury and illness. Others will flee to states where abortion remains legal, taxing heavily burdened health care systems and displacing residents of those states. Experience shows that women of color and poor women will suffer the most. Overturning *Roe v. Wade* thus promises to restore a brutal regime in many states which this Court properly ended two decades ago.

A. *Permitting States To Criminalize Abortion Will Inflict Severe Harm On Women Who Seek To Terminate Their Pregnancies*

A return of abortion to a criminal status in some states will not end abortion; women will find ways to circumvent the prohibition just as they did before *Roe*. Women who live in states

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[26] Legalization did not significantly increase the numbers of women obtaining abortions. Rather it guaranteed that abortions that had been obtained clandestinely could be secured under safe, legal conditions, thus reducing the mortality and morbidity rate of women obtaining them. *See* Alan Guttmacher Institute, *Safe and Legal: 10 Years' Experience With Legal Abortion in New York State* 17, 23 (1980) [hereinafter AGI, *Safe and Legal*]. Statistics from other states are similarly revealing. *Id.* at 23; *see also People v. Belous*, 458 P.2d 194, 201 (Ca. 1969), *cert. denied*, 397 U.S. 915 (1970) (prior to California's passage of Therapeutic Abortion Act of 1967, between 35,000 and 100,000 criminal abortions were performed annually in California); *People v. Barksdale*, 503 P.2d 257, 265 nn. 7 & 8 (Ca. 1972) (by 1970, approximately 116,749 legal abortions were performed in California - a slight increase in the number of abortions, adjusted for population growth, that occurred before legalization). Similarly, only a 10% rise was reported for Oregon. AGI, *Safe and Legal*, *supra*, at 23. The annual number of 1.6 million women obtaining abortions remained relatively unchanged between 1980 and 1989. Stanley K. Henshaw & Jennifer Van Vort, *Abortion Services in the United States, 1987 and 1988*, 22 Fam. Plan. Persp. 102 (1990).

that criminalize abortion and wish to terminate their pregnancies will have three alternatives. First, if they have the financial means, they can travel to a state that offers legal abortion. Second, they can attempt to obtain an illegal or self-induced abortion in their own state. Third, they can carry the pregnancy to term. Each option dramatically increases the risks to women's health. As there continues to exist a two-tiered health care system, particularly with regard to abortion services,[27] poor women, a disproportionate number of whom are women of color, will suffer the greatest burdens of the recriminalization of abortion.[28]

1. *Travel Out-of-State*

Requiring a woman to travel out of state for an abortion causes delay, and significantly increases the risk to her health. After the first eight weeks of pregnancy, the risk of major complications from abortion increases about 15 to 30 percent for each week of delay.[29] A woman forced to travel faces not only the costs of

[27] Legitimate physicians willing to certify a medical indication for abortion will frequently be available to women with financial resources. Rachel Benson Gold, Alan Guttmacher Institute, *Abortion and Women's Health, A Turning Point for America?* 3 (1990); President's Comm'n on Law Enforcement and Admin. of Justice, *Task Force Report: The Courts* 105 (1967) [hereinafter *Task Force Report*]. *See also Harris v. McRae*, 448 U.S. 297, 330 n.4 (Brennan, J., dissenting).

[28] Women of color are disproportionately affected because they constitute a disproportionate percentage of the poor. In 1990, 35.5% of Black women, 29.9% of Hispanic women, and 12% of white women lived in poverty, although Blacks constituted 12.4% of the general population, Hispanics 8.6%, and whites 83.9%. (Hispanics can be of any race, but for purposes of this discussion they are included as "women of color" or "nonwhite women.") Bureau of Census, U.S. Dept. of Commerce, *Current Population Reports Consumer Income*, Series P-60, No. 175 in *Poverty in the U.S.: 1990*, (1990) (tables 1,5). Because abortion rates are negatively associated with income, restriction on abortion will disproportionately affect the poor, and thus, women of color. Stanley K. Henshaw et al., *Characteristics of U.S. Women Having Abortions, 1987*, 23 Fam. Plan. Persp. 75, 77 (1991). Gold, *supra* note 27, at 19 (nonwhite women are twice as likely as white women to utilize abortion services).

[29] Willard Cates, Jr. et al., *Morbidity and Mortality of Abortion in the United States in Abortion and Sterilization: Medical and Social Aspects* 155, 158 (Hodgson, ed. 1981). However, the risks of legal abortion never exceed the risks of childbirth. Christopher Tietze & Stanley K. Henshaw, Alan Guttmacher Institute, *A World Review 1986* 110 (1986).

the abortion but the costs of travel, food and accommodations.[30] Delays may be caused by difficulties in raising the funds necessary to secure an abortion, in locating an out-of-state provider and in arranging transportation.[31] Women of color will be least likely to be able to afford an out-of-state abortion.[32]

2. *Illegal Abortions*

Women intent on terminating their pregnancies but unable to afford out-of-state abortions will be forced to back-alley abortionists or to attempt self-abortion. Although the risk of death from legal abortion is never higher than the risk of death from childbirth, the mortality rate for illegal abortion is much higher than that for legal abortion.[33] The mortality ratio for legal abortions in 1981 was .4 deaths per 100,000 abortions and for childbirth was 7.2 per 100,000 births; the ratio for illegal abortion has been estimated to reach or exceed 1,000 deaths per 100,000 illegal abortions.[34]

[30] Almost 50% of women who obtained abortions after 16 weeks of pregnancy attributed their delay to difficulty in making arrangements, the major problem being raising the money needed. Aida Torres & Jacqueline Darroch Forrest, *Why Do Women Have Abortions?*, 20 Fam. Plan. Persp. 169, 174 (1988).

[31] *Id.* at 174-75. *See infra* note 59.

[32] The farther a woman has to travel for an abortion, the less likely she is to obtain one. Black women, and especially Black teenagers, are least able to surmount the barriers imposed by travel requirements. James D. Shelton et al., *Abortion Utilization: Does Travel Distance Matter*, 8 Fam. Plan. Persp. 260, 262 (1976).

[33] Tietze, *supra* note 29, at 109-10.

[34] *Id.* at 111 (estimate for illegal abortions performed internationally). In Romania, after restrictive abortion legislation was adopted in 1966, the number of deaths attributed to illegal abortion increased almost three-fold between 1966 and 1968; in 1971 there were more than four times as many deaths as in 1966. Institute of Medicine, *Legalized Abortion and the Public Health* 84 (1975). In 1980, 84% of maternal deaths in Romania were due to illegal abortion. Bea J. van den Berg & Chin Long Chiang, *Maternal Mortality and Differentiation By Cause of Death* 239, 250 (1986).

In the United States, "the number of reported deaths from [illegal or self-induced] abortions declined steadily as less restrictive abortion legislation was passed and implemented throughout the country."[35] Before the legalization of abortion, twenty percent of all deaths related to childbirth and pregnancy occurred because of illegal abortion,[36] and complications from illegal abortion were a major cause of hospital admission.[37] Just as was the case before abortion was legalized, it is likely that women of color will die or suffer health complications from illegal abortions at a disproportionate rate.[38]

Some women not able to obtain an out-of-state abortion will attempt self-abortion. Literature discussing illegal abortion options for women commonly cite examples of women dying from attempts to self-abort using coat hangers or ingesting poisons.[39]

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[35] Institute of Medicine, *supra* note 34, at 85. Legalization of abortion significantly reduced abortion-related deaths and illness. Studies in California and New York showed that criminal abortion was the leading cause of deaths related to pregnancy; the most common victims were married women with several children who attempted to self-abort. Harvey L. Ziff, *Recent Abortion Law Reforms (Or Much Ado About Nothing)*, 60 J. Crim. L. and Criminology and Police Sci. 13 (1969).

[36] Willard Cates, Jr., *Legal Abortion: The Public Health Record*, 215 Sci. 1586 (1982).

[37] Gold, *supra* note 27, at 6.

[38] More than two-thirds of women who died from illegal abortions between 1972 and 1974 were women of color; the mortality rate from illegal abortions for nonwhite women was 12 times the rate for white women. *Id.* at 5.

[39] *See* Nancy Binken et al., *Illegal Abortion Deaths in the United States: Why Are They Still Occurring?*, 14 Fam. Plan. Persp. 163, 164 (1982) (methods included intrauterine insertion of coat hangers, glass thermometers or metal objects; instillation of cleaning solutions into the uterine cavity); Cynthia Gorney, *Abortion in the Heartland*, Wash. Post, Oct. 2, 1990 at 13 (Health, A Weekly J. of Med., Sci. and Soc'y) (before legalization, a New York City woman tried to induce her abortion by eating rat poison that irreversibly destroyed all her organ systems. "She did abort," the physician attending her at the time recalled, "just before she died"); Barbara Brotman, *Secret Abortion Group of '60s Prepares for Return*, Chi. Trib. Aug. 28, 1989, at 1. Following the passage of the Hyde Amendment, Medicaid-eligible women unable to afford abortions similarly lost

(Footnote continued)

3. *Carrying To Term*

Women forced to carry unwanted pregnancies to term will face a higher risk of death or pregnancy-related complications than those able to obtain legal abortions.[40] The risk of incurring major surgery as a result of carrying a pregnancy to term is almost 100 times the risk of surgery due to a legal abortion.[41] Many women seeking abortions also have health problems that make them more likely to experience complications giving birth.[42] Pregnancy can seriously endanger a woman's health by exacerbating medical conditions such as lupus, multiple sclerosis, asthma, diabetes, high blood pressure and AIDS.[43] The risk of complications is still greater when the pregnancy is unwanted.[44]

Women with unwanted pregnancies are also less likely to receive early prenatal care. In a 1988 study, 73 percent of wanted births received first-trimester prenatal care, whereas only half

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their lives or were seriously injured attempting to self-abort. In Georgia, a Medicaid-eligible woman who had had 12 previous pregnancies attempted to induce her abortion with a glass thermometer. After two months of unsuccessful efforts, she died of a pulmonary embolism following a hysterectomy. In Ohio, a pregnant teenage mother shot herself in the stomach, reportedly after being denied an abortion by a public hospital because she lacked $600 in cash. James Trussell et al., *Impact of Restricting Medicaid Financing for Abortion*, 12 Fam. Plan. Persp. 120, 129 (1980).

[40] Susan Harlap et al., Alan Guttmacher Institute, *Preventing Pregnancy, Protecting Health: A New Look at Birth Control Choices in the United States* 96 (1991); *see* Tietze, *supra* note 29, at 110.

[41] Cates, *supra* note 36, at 1587. Nearly 25% of term births occur by caesarean section, a major surgical procedure that subjects women to substantial risks to life and health, whereas .07% of first trimester abortions entail intra-abdominal operations, and second trimester abortions lead to major surgery in only .1 to .2% of cases. *Id.*; Placet & Taffel, *Recent Patterns in Caesarean Delivery in the United States*, 5 Obstet. Gynec. Clin. N.A. 607 (1988).

[42] Gold, *supra* note 27, at 36.

[43] *See* J. Pritchard et al., *Williams Obstetrics* 597, 600, 609, 619-20 (17th ed. 1985).

[44] Cates, *supra* note 36, at 1587 (women with unwanted pregnancies have higher postpartum infection and hemorrhage rates than women with favorable attitudes toward their pregnancies).

of all unwanted births received such care.[45] Numerous studies show that women receiving prenatal care have better birth outcomes, including fewer low birth weight babies, than women receiving no care.[46] It is likely that infant mortality rates and low birth weight will increase in those states that re-criminalize abortion, resulting in an increased need for neonatal intensive care, and higher hospital costs. Because on average they have less money and poorer health,[47] women of color will be less able than other women to obtain legal abortions, more frequently required to carry unintended pregnancies to term, and thus subject to the greatest health risks for themselves and their infants.[48]

The implications of forcing teenagers to bear children are particularly disturbing. Of more than one million pregnancies to teenagers every year, eighty-four percent are unintended. The half who carry their pregnancies to term face detrimental health, social and economic consequences.[49]

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[45] Elsie R. Pamuk & W.D. Mosner, *National Center for Health Statistics* 11 (1988). Prenatal care during the first trimester is important because it is at that stage that counseling about nutrition, smoking, and alcohol and drug consumption during pregnancy can make the greatest difference. The first trimester is also the best stage to identify medical conditions that may complicate pregnancy or endanger the woman's health. *Id.*

[46] *Id.*; Alan Guttmacher Institute, *Teenage Pregnancy: The Problem that Hasn't Gone Away* 29 (1981) [hereinafter AGI, *Teenage Pregnancy*]. Low birth weight is a major cause of infant mortality and a host of serious childhood illnesses, birth injuries and neurological defects, including mental retardation. *Id.* After legalization of abortion in New York State, infant mortality rates declined to record lows. Jean Pakter et al., *Two Years Experience in New York City With the Liberalized Abortion Law – Progress and Problems*, 63 Am. J. Pub. Health 524 (1973).

[47] *See* Gold, *supra* note 27, at 32.

[48] *See, e.g.*, AGI, *Teenage Pregnancy*, *supra* note 46, at 29 (health risks of pregnancy, maternal mortality and other complications of giving birth are greater for Black women than for white women; low birth weight rates among Black infants are higher than among whites).

[49] Elizabeth Armstrong, Center for Population Options, *Teenage Pregnancy and Too-Early Childbearing: Public Costs, Personal Consequences* 2, 26, 29 (5th ed. 1990).

Adolescents aged 15 to 19 are more than 24 times more likely to die from childbirth than from an early legal abortion.[50] During pregnancy, teenagers are at a much higher risk of suffering from serious medical complications, including anemia, pregnancy-induced hypertension (toxemia), cervical trauma and premature delivery, than older women. For those under 15 years, the maternal mortality rate is 60 percent greater than it is for women in their twenties.[51]

Children born to teenage mothers are nearly twice as likely to die in their first year of life as those born to mothers in their twenties.[52] Teenage mothers are more likely than teenagers who delay childbearing to have low-status, low-paying jobs or to be unemployed.[53] Children of teen parents are also more likely to continue the cycle of poverty and early childbearing and to become teen parents themselves.[54]

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[50] Rebecca Stone, Center for Population Options, *Adolescents and Abortion, Choice In Crisis* 7 (1990).

[51] Armstrong, *supra* note 49, at 27. Medical complications frequently arise from late or no prenatal care in teenage pregnancy. Carolyn Mackinson, *Health Consequences of Teenage Fertility*, 17 Fam. Plan. Persp. 132, 134 (1985). In 1978, two-thirds of mothers under 15, and half of mothers aged 15-17, received no prenatal care during the first three months of pregnancy, compared to 85% of older women. AGI, *Teenage Pregnancy*, *supra* note 46, at 59. One-fifth of those under 15 and one-eighth of those 15-17 received no prenatal care until the last trimester of pregnancy. Mothers aged 15 and younger are twice as likely as those aged 20-24 to have low birth weight babies. Among all teenage mothers, the risk of having low birth weight babies is 39% higher than for those aged 20-24. *Id.* at 29.

[52] AGI, *Teenage Pregnancy*, *supra* note 46, at 27.

[53] *Id.* at 30. A national study that controlled for race, socioeconomic status, academic achievement, and educational expectations found that mothers who had given birth before they were 18 were only half as likely to graduate from high school as those who postponed childbearing until after age 20. *Id.*

[54] *Id.* at 35. In 1975, about half of the $9.4 billion invested in the federal Aid to Families with Dependent Children programs went to families in which the mother had given birth as a teenager. *Id.* at 32.

B. *States Where Abortion Remains Legal Can Expect An Influx Of Non-residents, Overburdening Abortion Providers In Those States And Displacing Resident Women From Securing Timely Abortion Services*

Restriction of abortion services in a state will cause women who can muster the resources to flee to states that continue to safeguard a woman's right to choose. The increased demand for abortion services in states that permit abortions will impose additional burdens on the health care systems and residents of those states.

New York State, for example, was flooded with non-resident women seeking abortion services after July 1, 1970, when it permitted abortions for consenting women less than 24 weeks pregnant. In New York City, from July 1970 to June 1972, 65.7 percent of abortions were provided to non-residents.[55] Throughout New York State, 61 percent of those obtaining abortions in 1971 and 1972 were non-residents.[56] After *Roe*, the proportion dropped precipitately; by 1979 non-resident women obtained only about 7 percent of all abortions in New York State.[57] The experiences of other states demonstrate that the events in New York were not aberrant.[58]

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[55] Pakter, *supra* note 46, at 524.

[56] Robert P. Whalen, New York State Department of Health, *Report of Selected Characteristics of Induced Terminations of Pregnancy Recorded in New York State, January - December 1975 with Five Year Summary* 37 (Table 27).

[57] AGI, *Safe and Legal*, *supra* note 26, at 9.

[58] An exodus of minors to other states occurred in 1981 after Massachusetts passed a parental consent law. At least 1,800 more Massachusetts minors traveled to five surrounding states without parental consent laws during the 20 months after enactment than had done so previously. Virginia G. Cartoof & Lorraine V. Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 76 Am. J. Pub. Health 397, 398 (1986). Nevertheless, Massachusetts minors continued to conceive, abort, and give birth in the same proportions as before the law was implemented. *Id.* at 400. After Rhode Island passed its parental consent law in 1982, 49% of minors who contacted clinics in their state obtained abortions out of state. Stone, *supra* note 50, at 13. In 1988, three years after Missouri began enforcing its parental consent law, there were 300 fewer teenage abortions performed in the state, and almost half that number of teenagers went to Kansas for abortions. Missouri Dept. of Health, *Missouri Monthly Vital Statistics* (Jan. 1990).

The increased numbers of non-resident women seeking abortions or related medical services in states where abortion remains legal will strain already overburdened health care systems. Many non-resident women will be delayed in obtaining abortions due to their inability to obtain proper counseling in their home states or a lack of resources.[59] As a result, abortion providers will be faced with an increased number of late, more complicated and more dangerous abortions, which tend to result in more frequent hospitalizations.[60] It is likely that women who must travel to states where abortion remains legal will compete with and displace a number of residents of the states who also must be hospitalized.

This Court's failure to protect the right to choose abortion will also increase the barriers to legal abortion that exist for resident women by exacerbating the scarcity of physicians able and willing to perform them. Many physicians able to provide abortion services do not do so because they and their families will be harassed by anti-abortion groups.[61] If this Court were to permit

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[59] Non-residents obtaining abortions in New York, for example, have been more likely to obtain abortions after twelve weeks than New Yorkers. AGI, *Safe and Legal*, *supra* note 26, at 19. Inability to locate a provider and make arrangements to obtain an abortion are significant factors leading to delay. Torres, *supra* note 30, at 174-75. Delay also increases costs, thereby resulting in even further delay. AGI, *Safe and Legal*, *supra* note 26, at 14; *see also* Stanley K. Henshaw et al., *Abortion Services in the United States, 1981-1982*, 16 Fam. Plan. Persp. 119, 126 (1984) (abortion fees are significantly higher for pregnancies past 12 to 14 weeks); Stanley K. Henshaw et al., *Abortion Services in the United States, 1984 and 1985*, 19 Fam. Plan. Persp. 63, 69 (1987).

[60] *See generally* J. Wilson et al., *Obstetrics and Gynecology* 207 (8th ed. 1987); David A. Grimes, *Second Trimester Abortions in the United States*, 16 Fam. Plan. Persp. 260, 263 (1984) (the risk of death from abortions performed at 16 or more weeks is 24 times greater than from abortions performed at 8 weeks or earlier). This Court has recognized that "time, of course, is critical in abortion." *Doe v. Bolton*, 410 U.S. 179, 198 (1973); *see also Akron*, 462 U.S. at 450-51.

[61] National Abortion Federation, American College of Obstetricians and Gynecologists, *Who Will Provide Abortions? Ensuring the Availability of Qualified Practitioners* 8 (1990) [hereinafter NAF, ACOG]. One doctor who has had rocks thrown through the windows of his clinic and shots fired through the waiting room walls characterizes his practice as "working in a war zone." Mimi Hall, *Legal Abortions Tougher To Get*, USA Today, May 1, 1991, at 7A. Other harassment includes the use of picketers at physicians' homes who

(Footnote continued)

states to enforce laws criminalizing abortion, anti-abortion harassment will concentrate on states where abortion services remain legal. That will serve further to discourage physicians from providing such services. At the same time, abortion training opportunities in residencies for obstetrics and gynecology are declining.[62] Although rural areas have been particularly affected by the scarcity of physicians who perform abortions,[63] the shortage also impairs access to abortion services in cities.[64]

A certain result of the heightened demand for abortion services in states where abortion remains legal will be an increase in illegal, health-endangering practices. Although abortion has been legal in this country for almost twenty years, illegal abortion mills continue to exist for a certain population of women.[65] A dwindling in the number of legitimate physicians who perform abortions, together with an increased demand for their services from out-of-state women, will likely result in a proliferation of abortion mills.[66] The inaccessibility of legal abortion will force resident women, especially those who are poor, non-English speaking, least educated, and least able to navigate bureaucracies,

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distribute pictures of aborted fetuses, and physicians' children being told at school that their parents kill babies. Gorney, *supra* note 39, at 15.

[62] Philip D. Darney et al., *Abortion Training in U.S. Obstetrics and Gynecology Residency Programs*, 19 Fam. Plan. Persp. 158, 161 (1987) (the proportion of programs offering training declined 22% from 1976 to 1985); NAF, ACOG, *supra*, note 61, at 8.

[63] *See* Henshaw, *supra* note 26, at 104. Some states, such as North Dakota and South Dakota, have only one abortion provider. *Id.*

[64] NAF, ACOG, *supra* note 61, at 4.

[65] In 1978, investigations in Detroit, Los Angeles, Chicago, and New York uncovered illegal clinical practices where "abortion" procedures were performed on non-pregnant women, operations were performed by unlicensed personnel, and facilities operated without licenses. Cates, *supra* note 36, at 1588-89. Women of color vastly outnumber white women among those who die as a result of illegal abortions. Between 1975 and 1979, 82% of the women who died following illegal abortions were Black and Hispanic. Binken, *supra* note 39, at 166.

[66] *See infra* text accompanying note 80.

to utilize abortion mills.[67] Although many women will be attracted to such abortionists because of the promise of short-term savings, they and society will pay considerably more in the long term for the illegal services they are forced to obtain.

III. THIS COURT'S FAILURE TO PROTECT THE RIGHT TO CHOOSE ABORTION AS A FUNDAMENTAL RIGHT WILL UNDERMINE STATE LAW ENFORCEMENT EFFORTS

If this Court should eviscerate a woman's fundamental constitutional right to make decisions about childbearing, a patchwork of inconsistent state laws will replace the uniform system of laws now in place. Experience demonstrates that laws criminalizing abortion are unenforceable. Readopting them will breed cynicism toward institutions of government and engender contempt for law enforcement efforts. At the same time, new burdens will be imposed on law enforcement authorities, diverting their limited resources from the apprehension and prosecution of other criminals.

History teaches that citizens will engage in wide-scale disregard of laws that prohibit abortion.[68] During the 1960's, between 300,000 and a million *criminal* abortions were performed each year in the United States,[69] but an arrest was made at most in one case in a thousand,[70] and conviction rates were extraordinarily low.[71] The

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[67] *See* Robert D. McFadden, *Abortion Mills Thriving Behind Secrecy and Fear*, N.Y. Times, Nov. 24, 1991, at A1 (reporting the case of a 29-year-old Dominican woman who went to a doctor whose name she obtained from a Spanish language newspaper, largely because of his low fee; an incomplete abortion resulted and four days later she was hospitalized with a high fever and parts of the fetus that remained in her uterus had to be removed).

[68] Ziff, *supra* note 35, at 5; Kenneth R. Niswander, *Medical Abortion Practices in the United States in Abortion and the Law* 37 (Smith ed. 1967).

[69] Ziff, *supra* note 35, at 5; Harold Rosen, *Psychiatric Implications of Abortion: A Case Study in Social Hypocrisy in Abortion and the Law* 72, 90 (Smith ed. 1967).

[70] *Task Force Report*, *supra* note 27, at 105; Ziff, *supra* note 35, at 8 ("The abortion statutes have been as unsuccessful in prohibiting abortions as the eighteenth amendment was in eradicating drinking").

[71] John Kaplan, *Abortion as a Vice Crime: A "What If" Story*, 51 Law & Contemp. Probs. 151, 165-67 (1988); Ziff, *supra* note 35, at 8.

sheer number of illegal abortions, the ambiguity of out-dated statutes, difficulties of proof, widespread opposition to the law, and the absence of complainants made prosecutions of those who violated anti-abortion laws the exception rather than the rule.[72]

A principal reason for the failure of enforcement efforts was the vagueness of the "justifiable abortion" exceptions to laws criminalizing abortion.[73] When prosecutors, physicians and women can discern in such provisions little to guide their conduct, inconsistency results.[74] For example, when thirteen states adopted the identical provisions of the Model Abortion Code,[75] the rates of legal abortion for women aged 15 to 44 varied markedly – from 1.5 percent in South Carolina to 26.7 percent in New Mexico.[76] If this Court restores to states the pre-*Roe*

[72] Kaplan, *supra* note 71, at 165-67; Ziff, *supra* note 35, at 8. *See also Application of Grand Jury*, 143 N.Y.S.2d 501 (App. Div. 1955) (court rejected efforts of the Brooklyn District Attorney, who surmised that "doctors have been reporting only a small percentage of the cases in which the abortion or miscarriage has been induced by 'criminal practice'", to subpoena *all* hospital records for persons treated for abortion or miscarriage (other than therapeutic) at Kings County Medical Center in New York).

[73] *See, e.g., People v. Barksdale*, 503 P.2d 257, 263-66 (Ca. 1969) (that portion of California statute which justified abortion where "continuation of pregnancy would gravely impair" mother's health was void for vagueness, and language establishing medical criteria failed to provide due process). *See also People v. Belous*, 458 P.2d 194 (Ca. 1969), *cert. denied*, 397 U.S. 915 (1970).

[74] *See* Niswander, *supra* note 68, at 56 (citing study where 11 hypothetical cases, considered typical applications for therapeutic abortion, were submitted in a survey to 29 hospitals. In response to those applications clearly failing to meet the statutory provisions for therapeutic abortion, 59% of the hospitals participating in the survey would have agreed to abort).

[75] *Model Penal Code* § 230.3 (Proposed Official Draft 1962) ("A licensed physician is justified in terminating a pregnancy if he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest or other felonious intercourse").

[76] Centers for Disease Control, U.S. Dep't of Health, Educ. and Welfare, *Abortion Surveillance, Annual Summary 1972* (April, 1974) (Table 22); Institute of Medicine, *supra* note 34, at 28.

authority to prohibit abortion, states that criminalize abortions will adopt different exceptions with varying degrees of vagueness.[77] As a consequence, inconsistent applications will abound within and among states, leading to selective prosecutions, inconsistent jury verdicts and an impairment of *amici*'s efforts to foster uniform law enforcement.[78]

A return of abortion to criminal status in some states will result in even more prevalent flouting of the law than existed two decades ago. Women will turn to sympathetic physicians, or worse, to criminal enterprises, such as abortion rings. A reversal of *Roe* will not deter abortion; it will instead transform millions of law-abiding women and physicians into criminals. Furthermore, as before *Roe*, women with financial resources will travel to other states or countries to circumvent the restrictions in their home states, leaving only those of limited means to face criminal prosecutions. Avoidance of restrictions by the affluent will breed cynicism about the law among those less fortunate, and have a corrosive effect on institutions of self-government.

In states that recriminalize abortion, the reallocation of resources necessary to enforce such laws will divert the resources of the police

[77] Existing statutes indicate some of the possible variations and difficulties of interpretation. *See, e.g.*, Utah Code Ann. § 76-7-302(3) (Supp. 1991) (post-viability abortion prohibited unless necessary to save the woman's life or to prevent grave damage to her medical health); Ind. Code Ann. § 35-1-58.5-2(3)(c) (West 1986) (post-viability abortion prohibited unless "necessary to prevent a substantial permanent impairment of the life or physical health" of the mother); Colo. Rev. Stat. § 18-6-101 (1986 & Supp. 1990) (enacted 1963) (abortion prohibited unless hospital board certifies that continuation of pregnancy is likely to result in the woman's death or "serious permanent impairment" of the mother's physical or mental health); 18 Pa. Cons. Stat. § 3211 (Supp. 1991) (abortion after 24 weeks prohibited unless necessary to preserve the woman's life or to "prevent a substantial and irreversible impairment of a major bodily function").

[78] A retreat from *Roe v. Wade* would create particularly serious problems for law enforcement in states that have abortion statutes still in place that are unconstitutional under the principles of *Roe*. In Maryland, for example, the law repealing Maryland's pre-*Roe* restrictive statutes, 1991 Md. Laws, ch.1, has been petitioned to referendum. If *Roe* is overruled, Maryland's repealed pre-*Roe* statutes will be effective at least until the Maryland General Assembly re-repeals them as an emergency measure or until at least 30 days after the vote on the referendum in November. Md. Const. art. XVI, §2; 74 Op. Att'y Gen. No. 89-045, at 271-72 (Md. Nov. 30, 1989).

from protecting the public from other crimes, and cause a "loss of morale and self-esteem among police who are obligated to engage in tasks which must seem to them demeaning or degrading or of little relevance to the mission of law enforcement."[79] Even in those states that continue to permit abortion, officials will be pressed to deal with a growing number of illegal abortion providers. The attraction of quick profits inevitably will cause some unscrupulous abortion practitioners to emerge;[80] preying on those desperate for an affordable abortion, they will use advertisements in newspapers and in phone books to lure women into unsafe and illegal settings. Even where abortion remains legal, state consumer protection agencies will need to step up enforcement of deceptive advertising laws against those who would make fraudulent promises.[81]

In states where abortion remains legal, law enforcement authorities will also face an increase in illegal anti-abortion activities. Some zealots, such as those in Operation Rescue, have undertaken a national campaign of lawlessness aimed at abortion providers.[82] *See N.O.W. v. Operation Rescue*, 914 F.2d 582

[79] *Task Force Report*, *supra* note 27, at 107. *See also* Leslie J. Reagan, *About to Meet Her Maker: Women, Doctors, Dying Declarations, and the State's Investigation of Abortion, Chicago, 1867-1940*, J. of Am. Hist. 1240 (March 1991) (describing efforts of law enforcement officials and some medical personnel to force women who were dying from abortion-related complications to provide the name of the person who performed the abortion because such statements were admissable at trial as dying declarations). Police also frequently used female decoys to gain incriminating evidence against illegal abortionists. *See, e.g., People v. Miller*, 45 N.Y.S.2d 789 (App. Div. 1944).

[80] Ziff, *supra* note 35, at 5-6 (describing the operation of illegal abortion "mills" and "rings" in New York); Kaplan, *supra* note 71, at 163-65; *Task Force Report*, *supra* note 66, at 105 (describing a "black market" of abortions).

[81] The New York Attorney General, for example, has vigorously prosecuted clinics that advertise as providing "abortion services" but only provide anti-abortion counseling. *See, e.g., State v. Evergreen Assoc.*, No. 41237/87 (N.Y. Sup. Ct. judgment entered 1987); *State v. Mother and Unborn Baby Love, Inc.*, No. 412721/87 (N.Y. Sup. Ct. judgment entered 1987); *State v. Mother and Child Services, Inc.*, No. 41236/87 (N.Y. Sup. Ct. judgment entered 1987).

[82] *Oversight Hearings on Abortion Clinic Violence*, Subcomm. on Civil and Constitutional Rights, House Comm. on the Judiciary, 99th Cong., 1st & 2nd Sess. (1985) [hereinafter *Oversight Hearings*].

(4th Cir. 1990), *cert. granted, sub. nom. Bray v. Alexandria Women's Health Clinic*, 111 S.Ct. 1070 (1991). Federal and state courts have enjoined their activities under civil rights, trespass and public nuisance laws, but the campaign persists.[83] Some states and cities have been forced to commence their own injunctive actions[84]; other jurisdictions have passed legislation to secure access to health facilities blocked by anti-abortion opponents.[85]

Those states will need to commit even greater enforcement resources to ensure that their citizens continue to have access to lawful medical services.[86] It is estimated that forty-seven percent of the nation's abortion providers experienced some form of anti-abortion harassment in 1985.[87] Nineteen percent of abortion clinics reported death threats against their staffs, and forty-eight percent reported bomb threats.[88] If *Roe v. Wade* is overruled, it is virtually certain that illegal anti-abortion activity will increase in states where abortion remains legal.

[83] *See State v. Horn*, 407 N.W.2d 854 (Wis. 1987); *State v. Scholberg*, 412 N.W.2d 339 (Minn. 1987); *Ingram v. Problem Pregnancy of Worcester, Inc.*, 486 N.E.2d 408 (Mass. 1986); *Hoffart v. State*, 686 S.W.2d 259 (Tex. 1985), *cert. denied*, 479 U.S. 824 (1986). *See also Bering v. Share*, 721 P.2d 918 (Wash. 1986), *cert. dismissed*, 479 U.S. 1050 (1987). *See also* Note, *Too Close for Comfort: Protesting Outside Medical Facilities*, 101 Harv. L. Rev. 1856 (1988) [hereinafter *Too Close For Comfort*].

[84] *Planned Parenthood League of Mass., Inc. v. Operation Rescue*, No. 89-2487-F, 1991 WL 214047 (Mass. Super. 1991) (sustaining state's standing as plaintiff); *New York State N.O.W. v. Terry*, 886 F.2d 1339, 1349 (2d Cir. 1989) (granting City of New York's motion to intervene), *cert. denied*, 110 S.Ct. 2206 (1990).

[85] States with laws protecting access to medical facilities include Maryland, Nevada, Oregon, and Wisconsin. *See* NARAL Foundation/NARAL, *Who Decides? A State-By-State Review of Abortion Rights*, 52, 77, 101, 136 (1991). *See also Too Close For Comfort*, *supra* note 83, at 1857-59 (describing ordinance adopted by Boulder, Colorado).

[86] *Oversight Hearings*, *supra* note 82.

[87] Jacqueline Forrest & Stanley K. Henshaw, *The Harassment of U.S. Abortion Providers*, 19 Fam. Plan. Persp. 9, 13 (1987).

[88] *Id.* at 10.

In sum, this Court's failure to protect a fundamental right to choose abortion and to apply strict scrutiny to abortion regulations will undermine *amici*'s interest in uniform, effective law enforcement, diminish the states' ability to maintain public confidence in the law and divert resources and attention from the prosecution of other criminal conduct.

CONCLUSION

For the foregoing reasons, *amici* respectfully request this Court to continue to protect a woman's decision whether or not to bear a child as a fundamental constitutional right and to apply strict scrutiny to state regulation of abortion under the uniform guidelines of *Roe v. Wade*.

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MARJORIE FUJIKI
SHELLEY B. MAYER
Assistant Attorneys General
(*Counsel of Record)

APPENDIX

APPENDIX

The following *amici*, including 13 Governors, 12 Lieutenant Governors, 16 Attorneys General, 995 State Legislators and the Mayor and Corporation Counsel for the District of Columbia, submit this brief on behalf of petitioners.

ALABAMA

State Representative Demetrius C. Newton

ALASKA

State Senator Virginia M. Collins
State Senator Drue Pearce
State Senator Pat Pourchot
State Senator Patrick M. Rodey
State Senator Arliss Sturgulewski

Speaker of the House Ben F. Grussendorf
State Representative Mark Boyer
State Representative Kay Brown
State Representative Betty Bruckman
State Representative Shirley Craft
State Representative Bettye Davis
State Representative Dave Donley
State Representative Johnny Ellis
State Representative David Finkelstein
State Representative Max F. Gruenberg, Jr.
State Representative Niilo Koponen
State Representative Eugene Kubina
State Representative Georgianna Lincoln
State Representative Tom Moyer
State Representative Mike Navarre
State Representative Fran Ulmer

ARIZONA

State Senator Lela Alston
State Senator Gus Arzberger

State Senator Chuck Blanchard
State Senator John Dougherty
State Senator Karan English
State Senator Stan Furman
State Senator John Greene
State Senator Jaime P. Gutierrez
State Senator Nancy Hill
State Senator Cindy Resnick
State Senator Carol Springer
Senate Minority Leader Alan J. Stephens

State Representative Linda Beezley
State Representative George Brooks
State Representative Carmen F. Cajero
State Representative Chris Cummiskey
State Representative Catherine Eden
State Representative Ruth E. Eskesen
State Representative Susan Gerard
State Representative Peter Goudinoff
State Representative Sue Grace
State Representative Lisa Graham
State Representative Herb Guenther
State Representative Benjamin Hanley
State Representative Bev Hermon
State Representative Roger Hooper
State Representative Herschella Horton
State Representative Phillip Hubbard
State Representative Jack B. Jewett
State Representative Sandra Kennedy
State Representative John Kromko
State Representative Jo Eddie Lopez
State Representative Patricia Noland
State Representative Ruben F. Ortega
State Representative Mike Palmer
State Representative Marion Pickens
State Representative Eleanor Schorr
State Representative Ruth Solomon

ARKANSAS

Governor Bill Clinton

State Senator Jay Bradford

State Representative Jim Argue, Jr.
State Representative Myra Jones

CALIFORNIA

Lieutenant Governor Leo T. McCarthy

State Senator Alfred E. Alquist
State Senator Leroy F. Greene
State Senator Gary K. Hart
State Senator Patrick Johnston
Senate Majority Leader Barry Keene
State Senator Lucy Killea
State Senator Bill Lockyer
State Senator Milton Marks
State Senator Dan McCorquodale
State Senator Becky Morgan
State Senator Nicholas C. Petris
State Senator Herschel Rosenthal
State Senator Mike Thompson
State Senator Art Torres
State Senator Diane Watson

Speaker of the Assembly Willie L. Brown, Jr.
State Assemblywoman Dierdre Alpert
State Assemblywoman Marguerite Archie-Hudson
State Assemblyman Rusty Areias
State Assemblyman Tom Bane
State Assemblyman Tom Bates
State Assemblyman Xavier Becerra
State Assemblyman Bruce Bronzan
State Assemblyman John L. Burton
State Assemblyman Robert Campbell
State Assemblyman Sal Cannella

State Assemblyman Jim Costa
State Assemblywoman Delaine Eastin
State Assemblyman Dave Elder
State Assemblyman Sam Farr
State Assemblyman Richard E. Floyd
State Assemblyman Terry Friedman
State Assemblywoman Barbara Friedman
State Assemblyman Mike Gotch
Assembly Majority Leader Thomas M. Hannigan
State Assemblyman Dan Hauser
State Assemblyman Tom Hayden
State Assemblywoman Teresa P. Hughes
State Assemblywoman Tricia Hunter
State Assemblyman Phillip Isenberg
State Assemblyman Richard Katz
State Assemblyman Johan Klehs
State Assemblywoman Barbara Lee
State Assemblyman Ted Lempert
State Assemblyman Burt M. Margolin
State Assemblywoman Gwen Moore
State Assemblyman Willard Murray Jr.
State Assemblyman Jack O'Connell
State Assemblyman J. Stephen Peace
State Assemblyman Richard Polanco
State Assemblyman Charles Quackenbush
State Assemblywoman Lucille Roybal-Allard
State Assemblywoman Jackie Speier
State Assemblyman Curtis R. Tucker
State Assemblyman Tom Umberg

COLORADO

Governor Roy Romer
Lieutenant Governor C. Michael Callihan

State Senator Bonnie Allison
State Senator Donald J. Mares
State Senator Jana Wells Mendez
State Senator Ray E. Peterson
State Senator Dottie Wham

State Representative Celina Benavidez
State Representative Ken Chlouber
State Representative Lewis Entz
State Representative Renny Fagan
State Representative Faye Fleming
State Representative Daphne Greenwood
State Representative Tony Hernandez
State Representative Matt Jones
State Representative Peggy Kerns
State Representative Wayne N. Knox
State Representative Gerald Kopel
State Representative Michelle Lawrence
State Representative Dorothy Rupert
House Minority Leader Ruth Wright

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Governor Lowell Weicker
Lieutenant Governor Eunice Groark
Attorney General Richard Blumenthal

Senate President Pro Tem John Barry Larson
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State Senator W. Aniskovich
State Senator Lawrence Bettencourt
State Senator M. Adela Eads
State Senator Judith G. Freedman
State Senator George L. Gunther
State Senator Gary A. Hale
State Senator George C. Jepsen
State Senator Cynthia A. Matthews
State Senator William H. Nickerson
Senate Majority Leader Cornelius P. O'Leary
State Senator Lee Scarpetti
State Senator Kevin B. Sullivan

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State Representative George P. Avitabile
State Representative Reginald G. Beamon
State Representative Sally Bolster

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State Representative Norma Gyle
State Representative Barbara M. Ireland
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State Representative Geri W. Langlois
State Representative David Lavine
State Representative Michael P. Lawlor
State Representative Gary Le Beau
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State Representative Vincent Loffredo
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State Representative Paul Munns
State Representative Edna Negron
State Representative Ernest Newton II
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State Representative Jonathan W. Pelto
State Representative Janet Polinsky
State Representative Janet Poss
State Representative David Pudlin
State Representative Miles Rapoport
State Representative Lee A. Samowitz
State Representative Americo Santiago
State Representative Pete Smith
State Representative Lydia Stevens
State Representative Irving J. Stolberg
State Representative Jessie Stratton
State Representative Lynn H. Taborsak
State Representative Craig P. Taylor

State Representative David O. Thorp
State Representative John S. Tiffany, III
State Representative Elinor F. Wilber
State Representative Lenny Winkler
State Representative Nancy S. Wyman

DELAWARE

Attorney General Charles M. Oberly, III

Senate Minority Leader Myrna L. Bair
State Senator James P. Neal

State Representative Marybeth T. Boykin
State Representative Ada Leigh Soles

DISTRICT OF COLUMBIA

Mayor Sharon Pratt Kelly
Corporation Counsel John Payton

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State Senator Helen Gordon Davis
State Senator Jack D. Gordon
State Senator Carrie P. Meek
State Senator Eleanor Weinstock

State Representative Elaine Bloom
State Representative Mary Brennan
State Representative Susan Guber
House Majority Leader Anne Mackenzie
State Representative Philip Mishkin
State Representative Steve Press
State Representative Frank Stone

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State Senator Cathey Steinberg

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State Representative Tom Bordeaux
State Representative Tom Cauthorn
State Representative Grace W. Davis
State Representative John Hammond
State Representative Michele Henson
State Representative Glynda B. King
State Representative Jim Martin
State Representative Cynthia McKinney
State Representative James E. McKinney
State Representative Mary Margaret Oliver
State Representative Nancy Orrock
State Representative Dorothy B. Pelote
State Representative William C. Randall
State Representative Frank L. Redding, Jr.
State Representative Douglas Teper
State Representative Mable "Able" Thomas
State Representative Nadine Thomas
State Representative Kiliaen V.R. Townsend
State Representative Henrietta Turnquest
State Representative Rita Valenti

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State Representative Duke Bainum
State Representative Clarice Y. Hashimoto
State Representative Barbara Marumoto
State Representative Wayne Metcalf
State Representative Michael O'Kieffe

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State Senator Michael Blackbird
State Senator Karl Brooks
State Senator Terry A. Haun
State Senator Mary Lou Reed
State Senator Cynthia Scanlin
State Senator Sally Snodgrass

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State Representative Janet Jenkins
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State Senator Ann Stepan

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State Representative Barbara Flynn Currie
State Representative Mary E. Flowers
State Representative Lovana "Lou" Jones
State Representative James M. Kirkland
State Representative Louis Lang
State Representative Robert LeFlore, Jr.
State Representative Ellis B. Levin
State Representative Gary Marinaro
State Representative David B. McAfee
State Representative Geoffrey S. Obrzut
State Representative Lee S. Preston
State Representative Alfred G. Ronan
State Representative Michael Rotello
State Representative Helen Satterthwaite
State Representative Janice D. Schakowsky
State Representative Jeffrey Schoenberg
State Representative Terry A. Steczo
State Representative Grace M. Stern
State Representative Donne E. Trotter

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State Senator Louis J. Mahern

State Representative Brad Bayliff
State Representative M. Tracy Boatwright
State Representative Anita Bowser
State Representative Rolland L. Webber

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State Senator Ralph Rosenberg
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State Representative Joel Brown
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State Representative Kay Chapman
State Representative John H. Connors
State Representative Minnette Doderer
State Representative Robert E. Dvorsky
State Representative John Groninga
State Representative Josephine Gruhn
State Representative James F. Hahn
State Representative Johnie Hammond
State Representative Jack Hatch
State Representative Daniel J. Jay
State Representative Glen Jesse
State Representative Ray Lageschulte
State Representative Janet Metcalf

State Representative Mary C. Neuhauser
State Representative Joyce Nielsen
State Representative Mark Shearer
State Representative Don Shoultz
State Representative Jane Teaford
State Representative Philip Wise

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State Representative Kathleen Sebelius
State Representative Joan Wagnon
State Representative Gwen Welshimer

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State Representative Susan Stokes
State Representative Mike Ward

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State Senator Marc Morial

State Representative Melissa Flournoy
State Representative Suzanne Mayfield Krieger

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State Representative Elizabeth Mitchell
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State Senator Nancy Achin Sullivan
State Senator Jane Swift

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State Representative David B. Cohen
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State Representative Mary Jane Gibson
State Representative Leonard Gonsalves
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State Representative Lynn Jondahl
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State Representative Mickey Knight
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State Representative Nelson W. Saunders
State Representative Alma G. Stallworth

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State Senator John J. Marty
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State Senator Jane Ranum
State Senator Allan H. Spear
State Senator Judy Traub

Speaker of the House Dee Long
State Representative Andrew Dawkins
State Representative Lee Greenfield
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State Representative Gloria M. Segal
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State Representative Edward Blackmon, Jr.
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State Representative Joseph S. Kenton
State Representative Sheila Lumpe
State Representative Karen McCarthy
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State Representative Annette N. Morgan
State Representative Sandra Reeves
State Representative O. L. Shelton
State Representative Charles Shields
State Representative Beth M. Wheeler
State Representative Connie Wible

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State Senator Chet Blaylock
State Senator Judy H. Jacobson
State Senator Thomas Towe
State Senator Eleanor L. Vaughn

State Representative Arlene Becker
State Representative Jan Brown
State Representative Mary Ellen Connelly
State Representative Gary Forrester
State Representative Mike Kadas
State Representative Ed McCaffree
State Representative Scott McCulloch
State Representative Linda J. Nelson
State Representative Angela Russell
State Representative Ted E. Schye
State Representative Jessica Stickney
State Representative William S. Strizich

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Lieutenant Governor Maxine Moul

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State Senator David Landis
State Senator Spencer W. Morrissey
State Senator Arlene Neslon
State Senator Jessie Rasmussen
State Senator DiAnna R. Schimek
State Senator William R. Wickersham
State Senator Eric Will

NEVADA

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Attorney General Frankie Sue Del Papa

State Senator Diana M. Glomb

State Assemblyman Bernie Anderson
State Assemblyman Rick Bennett
State Assemblywoman Vivian L. Freeman
State Assemblyman Jim Gibbons
State Assemblywoman Christina R. Giunchigliani
State Assemblyman Joseph Johnson
State Assemblyman John L. Norton
State Assemblyman Robert M. Sader

NEW HAMPSHIRE

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State Senator Wayne D. King
State Senator Susan McLane
State Senator Richard Russman

State Representative Eleanor H. Amidon
State Representative Eleanor M. Anderson
State Representative Frederick Andrews
State Representative Lowell D. Apple

State Representative James E. Appleby
State Representative Deborah A. Arnesen
State Representative Pamela B. Bean
State Representative Juanita L. Bell
State Representative Thea G. Braiterman
State Representative Channing T. Brown
State Representative Julie M. Brown
State Representative Patricia B. Brown
State Representative Raymond C. Buckley II
State Representative Dan Burnham
State Representative Albert Caswell, Jr.
House Minority Leader Mary P. Chambers
State Representative Richard L. Champagne
State Representative Eugene W. Clark
State Representative Martha Fuller Clark
State Representative Jane Clemons
State Representative Marion L. Copenhaver
State Representative Arthur B. Corte
Asst. Majority Leader Garret P. Cowenhoven
State Representative Art Ferlan
State Representative Joseph N. Feuer
State Representative Martin Feuerstein
State Representative Paul R. Fillion
State Representative John W. Flanders, Sr.
State Representative Edward J. Flynn
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State Representative Katherine D. Foster
State Representative Robert W. Foster
State Representative Scott E. Green
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State Representative Betty B. Hall
State Representative Douglas E. Hall
State Representative Patricia Hambrick
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State Representative Robert S. Hawkins
State Representative John B. Hunt
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State Representative Peter M. Jankowski
State Representative Lionel W. Johnson

State Representative Mary Jordan
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State Representative Sandra B. Keans
State Representative Paula J. Kinney
State Representative Ervin R. Lachut
State Representative Mary Ann Lewis
State Representative Elizabeth D. Lown
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State Representative W. Kent Martling
State Representative William F. McCain
State Representative Bonnie Lou McCann
State Representative Cynthia Ann McGovern
State Representative Deborah McIlwaine
State Representative Amanda A. Merrill
State Representative Elizabeth Millard
State Representative Mary Molner
State Representative Elizabeth A. Moore
State Representative Avis B. Nichols
State Representative Sharon L. Nordgren
State Representative Joe B. Parks
State Representative Robert H. Porter
State Representative Irene A. Pratt
Asst. Majority Whip Alice Record
State Representative William A. Riley
State Representative James R. Rosencrantz
State Representative George R. Rubin
State Representative Roland A. Sallada
State Representative Merle W. Schotanus
State Representative Merilyn P. Senter
State Representative Leonard A. Smith
State Representative Lee Anne S. Steiner
State Representative Charles L. Vaughn
State Representative Karen O. Wadsworth
State Representative Mary Jane Wallner
State Representative Robert R. Walsh
State Representative John F. Weeks
State Representative Katherine W. Wheeler
State Representative Paul R. White
State Representative Allen R. Wiggin
State Representative Deborah Woods

State Representative Charles B. Yeaton
State Representative Alice S. Ziegra

NEW JERSEY

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Attorney General Robert J. Del Tufo

State Senator John H. Adler
State Senator John O. Bennett

State Assemblywoman Maureen Ogden
State Assemblyman George F. Geist
State Assemblyman David Kronick

NEW MEXICO

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State Senator Ken Kamerman
State Senator Victor R. Marshall
State Senator Janice Paster
State Senator Thomas T. Rutherford

State Representative Thomas Atcitty
State Representative E. Shirley Baca
State Representative Max Coll
State Representative Robert M. Hawk
State Representative Ramon Huerta
State Representative Gary King
State Representative Marty Lambert
State Representative Cisco McSorley
State Representative Rick Miera
State Representative Kip Nicely
State Representative Danice Picraux
State Representative William E. Porter
State Representative Shannon Robinson

NEW YORK

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State Senator Donald M. Halperin
State Senator Franz S. Leichter
State Senator Martin Markowitz
Senate Minority Leader Manfred Ohrenstein
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State Senator Ada L. Smith
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State Senator Jeremy S. Weinstein

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State Asseblyman Richard Brodsky
State Assemblyman Thomas Catapano
State Assemblyman John C. Cochrane
State Assemblywoman Vivian E. Cook
State Assemblyman Thomas P. DiNapoli
State Assemblywoman Eileen C. Dugan
State Assemblyman Ralph J. Eannace, Jr.
State Assemblyman Anthony J. Genovesi
State Assemblymember Deborah Glick
State Assemblyman Richard N. Gottfried
State Assemblyman Alexander Gromack
State Assemblyman Alan G. Hevesi
State Assemblyman Morton C. Hillman
State Assemblyman William B. Hoyt
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State Assemblyman Martin A. Luster
State Assemblywoman Nettie Mayersohn
State Assemblyman John Brian Murtaugh
State Assemblyman Jerrold Nadler
State Assemblywoman Audrey I. Pheffer
State Assemblyman John Ravitz
State Assemblywoman Cecile D. Singer
State Assemblyman Robert Sweeney
State Assemblyman David R. Townsend
State Assemblywoman Helene E. Weinstein
State Assemblyman Gregory P. Young
State Assemblyman Vivian E. Cook

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Attorney General Lacy H. Thornburg

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State Senator Russell Walker

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State Representative Peggy Stamey

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State Representative Henning Jacobson
State Representative August Ritter

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State Senator Jeffrey D. Johnson

State Representative Jane L. Campbell
State Representative Dean Conley
State Representative Robert L. Corbin
State Representative Robert H. Doyle
State Representative Robert F. Hagan
State Representative David Hartley
State Representative William J. Healy
State Representative Joan W. Lawrence
State Representative C.J. Prentiss
State Representative Helen Rankin
State Representative Judy Sheerer

OKLAHOMA

State Senator Cal Hobson

OREGON

Governor Barbara Roberts

Senate Majority Leader Bill Bradbury
State Senator Ron Cease
State Senator Joyce Cohen
State Senator Wayne Fawbush
State Senator Shirley Gold
State Senator Jeannette Hamby
State Senator Jim Hill
State Senator Grattan Kerans
State Senator Frank Roberts
State Senator Bob Shoemaker
State Senator Tricia Smith
State Senator Dick Springer
State Senator Clifford Trow

State Representative Lee L. Beyer
State Representative Tom Brian
State Representative Kate Brown
State Representative Mike Burton
State Representative Ted Calouri
State Representative Margaret L. Carter
State Representative Jim Edmunson
State Representative Mary Alice Ford
State Representative Avel L. Gordley
State Representative Carl Hosticka
State Representative Bruce Hugo
State Representative Delna Jones
State Representative Tim Josi
State Representative Vera Katz
State Representative Tom Mason
State Representative Dave McTeague
State Representative Lisa Naito
State Representative Tom Novick

State Representative Bob Pickard
State Representative Hedy Rijken
State Representative Gail R. Shibley
State Representative Robert Shiprack
State Representative Beverly Stein
State Representative Jackie Taylor
State Representative Antone Van Vliet

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State Senator Roxanne H. Jones
State Senator H. Craig Lewis
State Senator Jeanette F. Reibman
State Senator Allyson Schwartz

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State Representative Louise Williams Bishop
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State Representative Roy W. Cornell
State Representative William DeWeese
State Representative Dwight Evans
State Representative Robert Freeman
State Representative Ellen Harley
State Representative Ruth B. Harper
State Representative David W. Heckler
State Representative Ivan Itkin
State Representative Harold James
State Representative Babette Josephs
State Representative Allen G. Kukovich
State Representative Gordon J. Linton
State Representative Frank L. Oliver
State Representative David P. Richardson
State Representative Karen A. Ritter
State Representative James R. Roebuck
State Representative Ruth C. Rudy

State Repesentative Stephen Stetler
State Representative Mike Sturla
State Representative W. Curtis Thomas

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Attorney General James E. O'Neil

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State Senator June N. Gibbs
State Senator Ann H. Hanson
State Senator Paul S. Kelly
State Senator John Lyle, Jr.
State Senator Rhoda Perry
State Senator Charles D. Walton
State Senator Myrth York

State Representative Sandy Barone
State Representative Christine H. Callahan
State Representative Sandra Campbell
State Representative David W. Dumas
State Representative Francis A. Gaschen
State Representative William Greene III
State Representative Patrick J. Kennedy
State Representative Linda J. Kushner
State Representative Joan Quick

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State Representative Harriet H. Keyserling
State Representative Candy Y. Waites

SOUTH DAKOTA

State Senator Scott N. Heidepriem
State Senator R. Lars Herseth
State Senator Dorothy M. Kellogg
State Senator Carol Maicki
Senate Minority Leader Roger D. McKellips

State Senator Pamela A. Nelson
State Senator Judith R. Olson
State Senator Roberta Rasmussen
State Senator Linda Stensland
State Representative Jean T. Beddow
State Representative Robert Caselli
State Representative Janet Good
State Representative Jim Hood
State Representative Dale L. Howlett
State Representative Patrick Kane
State Representative Janice Nicolay
State Representative Patricia Ann Pilcher
State Representative Craig D. Schaunaman
State Representative John L. Timmer
State Representative Mary Vanderlinde

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State Senator Chet Brooks
State Senator Rodney Ellis
State Senator Bob Glasgow
State Senator Peggy Rosson

State Representative Debra Danburg
State Representative Ernestine V. Glossbrenner
State Representative Sherri Greenberg
State Representative Christine Hernandez
State Representative John Hirschi
State Representative James Hury
State Representative Libby Linebarger
State Representative Glen Maxey

State Representative Elliott Naishtat
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State Representative Jeff Wentworth

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State Senator Karen Shepard

State Representative Max Young

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State Senator Althea Kroger
State Senator Richard McCormack
State Senator Elizabeth M. Ready

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State Representative Alice C. Bassett
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, REPRODUCTIVE HEALTH AND COUNSELING CENTER, WOMEN'S HEALTH SERVICES, INC., WOMEN'S SUBURBAN CLINIC, ALLENTOWN WOMEN'S CENTER, and THOMAS ALLEN, M.D., on behalf of himself and all others similarly situated,

Petitioners, Cross-Respondents,

vs.

ROBERT P. CASEY, N. MARK RICHARDS, and ERNEST D. PREATE, JR., personally and in their official capacities,

Respondents, Cross-Petitioners.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE PENNSYLVANIA COALITION AGAINST DOMESTIC VIOLENCE, THE AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, ET AL., AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS/CROSS-RESPONDENTS

(List of *Amici Curiae* continued on inside cover)

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Men Stopping Violence, Inc.
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National Coalition Against Sexual Assault
National Women Abuse Prevention Center
New Jersey Coalition for Battered Women
New York State Coalition Against Domestic Violence
Oregon Coalition Against Domestic and Sexual Violence
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Pennsylvania Coalition Against Rape
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Women's Center of Warren and Forest Counties, Inc.
Women's Coalition of St. Croix, Virgin Islands
Women's Help Center, Inc.
Women's Resources of Monroe County, Inc.

TABLE OF CONTENTS

Table of Authorities v

Interest of *Amici Curiae* 1

Summary of Argument 2

ARGUMENT:

I. SECTION 3209 IS UNCONSTITUTIONAL BECAUSE IT WILL PREVENT BATTERED AND ABUSED WIVES FROM EXERCISING THEIR RIGHT TO HAVE AN ABORTION 3

A. Domestic Violence Burdens Wives' Exercise of Reproductive Choice 4

1. Many Married Women in Pennsylvania Are Battered and Raped 5

2. Reproductive Coercion Is A Substantial Component of Domestic Violence Against Married Women 7

3. Married Women Continue to Be Abused by Their Husbands After Separation 11

B. Because Women Fear That Reporting Abuse Will Result in Further Violence Against Them, the Exceptions in §3209 Are Unavailing 14

C. Section 3209 Provides No Protection for Psychologically Abused Married Women Who Are at Risk of Forced Pregnancy 19

II. THE HUSBAND NOTIFICATION REQUIREMENT IS NOT RATIONALLY RELATED TO ANY LEGITIMATE STATE PURPOSE 22

Conclusion 24

APPENDIX: Statements of Interest of *Amici Curiae*

Pennsylvania Coalition Against Domestic Violence A1

American Association of University Women A3

Alle-Kiski Area Hope Center, Inc. A3

Battered Women's Program, Capital Area Family Violence Center, Inc. A3

Berks Women in Crisis A4

Bradford County Coalition for Choice A4

Caring Unlimited, Inc. A4

Cleveland Rape Crisis Center A5

Clinton County Women's Center A5

Colorado Domestic Violence Coalition A6

Connecticut Coalition Against Domestic Violence A6

Domestic Violence Research and Resources A7

Families in Transition Center, Milford, Delaware A8

Family Service of Philadelphia A9

Florida Coalition Against Domestic Violence A9

Gwinnett Citizens for Choice A10

Hospitality House Services for Women, Inc. A10

Houston Area Women's Center A11

Illinois Coalition Against Sexual Assault (ICASA) A11

Laurel House A12

Lutheran Social Services - South Region A12

Marin Abused Women's Services A13

Men Stopping Violence, Inc. A13

My Sister's Place A13

National Coalition Against Domestic Violence A14

National Coalition Against Sexual Assault A15

National Women Abuse Prevention Center A15

New Jersey Coalition for Battered Women A16

New York State Coalition Against Domestic Violence .. A16

Oregon Coalition Against Domestic and Sexual Violence A17

Pennsylvania Campaign for Choice A17

Pennsylvania Coalition Against Rape A18

Psychology Society A18

Survivors, Inc. A18

Tioga County Women's Coalition A19

Turning Point of Lehigh Valley, Inc. A19

Vermont Network Against Domestic Violence and Sexual Assault A20

Volunteers Against Abuse Center of Butler County, Inc. A20

Washington Coalition of Sexual Assault Programs A21

A Woman's Place A21

Women Against Abuse, Inc. and Women Against Abuse Legal Center, Inc. A22

Women's Center & Shelter of Greater Pittsburgh A23

Women's Center of Montgomery County A24

Women's Center of Warren and Forest Counties, Inc. .. A24

Women's Coalition of St. Croix, Virgin Islands A25

Women's Help Center, Inc. A25

Women's Resources of Monroe County, Inc. A25

TABLE OF AUTHORITIES

CASES

Carey v. Population Services Int'l., 431 U.S. 678 (1977) . 23

Eubanks v. Brown, 604 F. Supp. 141, 148 (W.D. Ky. 1984) 4

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) 3, 23, 24

Planned Parenthood of Rhode Island v. Bd. of Medical Review, 598 F. Supp. 625 (D.R.I. 1984) 4, 22

Planned Parenthood of Southeastern Pennsylvania v. Casey, 947 F.2d 682 (3rd Cir. 1991) ..... *passim*

Planned Parenthood of Southeastern Pennsylvania v. Casey, 744 F. Supp. 1323 (E.D. Pa. 1990) ..... *passim*

Scheinberg v. Smith, 428 F. Supp. 529, 538 (S.D. Fla. 1979), *vacated and remanded*, 659 F.2d 476 (5th Cir. 1981), *on remand*, 550 F. Supp. 1112 (S.D. Fla. 1982) 4

STATUTES

Pennsylvania Abortion Control Act, 18 Pa. Cons. Stat. §3209 ..... *passim*

OTHER AUTHORITIES

American College of Obstetricians and Gynecologists, "The Abused Woman: Fact Sheet," January 3, 1989 10

Bernard, G.W., Vera, H., Vera, M.I., & Newman, G., "Till Death Do Us Part: A Study of Spouse Murder," *Bulletin of the American Academy of Psychiatry and the Law*, 1982 12

Bisea, Napper, Sikes, "Family and Other Intimate Assaults," *Morbidity and Mortality Weekly Report*, U.S. Dept. of Health and Human Services, Vol. 39, No. 31, August 10, 1990, citing Rosenberg, Stark, Zahn, "Interpersonal Violence: Homicide and Spouse Abuse," *Public Health and Preventive Medicine*, 12th ed. (1986) 6

Browne, A., *When Battered Women Kill*, New York, The Free Press, 1987 12

Carlson, Bonnie E., "Dating Violence: A Research Review and Comparison with Spouse Abuse," 68 *Social Casework*, January 1987 6

Casanave, N., and Zahn, M., "Women, Murder and Male Domination: Police Reports of Domestic Homicide in Chicago and Philadelphia," paper presented at the Annual Meeting of the American Society of Criminology, Atlanta, October 31, 1986 12

Chez, Ronald A., "Battered Pregnant Women," *Genesis*, 11:1, January/February 1989 19

Dutton, D.G., *The Domestic Assault of Women: Psychological and Criminal Justice Perspectives*, Boston, Allyn & Bacon, 1988 12

Edleson, J.L., and Syers, M., "The Relative Effectiveness of Group Treatments for Men Who Batter," Research Update, June 1989 18

Federal Bureau of Investigation, *Crime in the United States*, 1986-7 6

Federal Bureau of Investigation, *Crime in the United States*, 1990 7

Frieze, Irene, "Causes and Consequences of Marital Rape,'paper presented at the American Psychological Association Meetings, Montreal, Canada, September 1980 . 7

Gelles, Murray A., and Straus, Richard J., *Intimate Violence*, New York, Simon & Schuster, 1988 ..... 19, 20

Gelles, R., "Violence and Pregnancy," *Journal of Marriage and the Family*, 1988 9

Goldsmith, Stephen, "Taking Spouse Abuse Beyond a Family Affair," *Law Enforcement News*, Vol. XVII, no. 334, 1991 18

Katz, S., and Mazur, M., *Understanding the Rape Victim*, Wiley & Sons, 1979 9

Koss, Mary P., "Rape Incidence: A Review and Assessment of the Data," Testimony on behalf of the American Psychological Association before the Senate Judiciary Committee, August 29, 1990 15

Koss, Mary P., Woodruff, M.S., and Koss, Paul G., "Criminal Victimization among Primary Care Medical Patients: Prevalence, Incidence, and Physician Usage," *Behavioral Sciences and the Law*, Vol. 9, 1991 9

Kurz, D., and Coughey, K., "The Effects of Marital Violence on the Divorce Process," paper presented at the American Sociological Association Meeting, August 9, 1989 13

Langley, R., and Levy, R., *Wife-Beating, The Silent Crisis*, 1977 6

National Center on Women and Family Law, "Woman Battering: The Facts," New York, 1989 20

Ohio Attorney General, *Ohio Report on Domestic Violence*, 1979 17

Okun, Lewis, *Women Abuse: Facts Replacing Myths*, Albany, State University of New York Press, 1986 10

Pagelow, Mildred Daley, *Woman-Battering, Victims and Their Experiences*, Beverly Hills, Sage Publications, 1981 ..... 11, 17

Pagelow, Mildred Daley, *Family Violence*, New York, Praeger, 1984 ..... 8, 13

Pennsylvania State Police, *Uniform Crime Report*, 1990 ... 7

Reynolds, Lynn, *Executive Summary of the Second National Workshop on Female Offenders*, Raleigh, NC, April 1987 10

Russell, Diana E.H., *Rape in Marriage*, New York, Macmillan, 1982 8

Saunders, D.G., and Browne, A., "Domestic Homicide," chapter to appear in R.T. Ammerman and M. Herson (eds.) *Case Studies in Family Violence*, New York, Plenum Press 12

Shields, Nancy M., and Hanneke, Christine R., "Battered wives' reactions to marital rape," in Finkelhor, David, Gelles, Richard J., Hotaling, Gerald T., and Straus, Murray A. (eds.), *The Dark Side of Families*, Beverly Hills, Sage, 1983 8

Sonkin, D., Martin, D., and Walker, L.E.A., *The Male Batterer: A Treatment Approach*, New York, Springer, 1985 12

Stark, E., and Flitcraft, A., "Spouse Abuse," in *Surgeon General's Workshop on Violence and Public Health Source Book* 9

Stark, E., Flitcraft, A., Zuckerman, D., Grey, A., Robison, J., & Frazier, W., "Wife Abuse in the Medical Setting: An Introduction for Health Personnel." *Domestic Violence Monograph Series*, No. 7, Rockville, MD, National Clearinghouse on Domestic Violence, April 1981 13

Straus, Murray, Gelles, Richard, and Steinmetz, Suzanne, *Behind Closed Doors: Violence in the American Family*, New York, Doubleday, 1980 6

U.S. Department of Justice, Federal Bureau of Investigation, *Crime in the U.S. - Uniform Crime Reports 1975* 15

U.S. Department of Justice, Bureau of Justice Statistics, *Intimate Victims: A Study of Violence Among Friends and Relatives*, 1980 15

U.S. Department of Justice, Bureau of Justice Statistics, *Report to the Nation on Crime and Justice: The Data*, Government Printing Office, October 1983 ..... 7, 12

U.S. Department of Justice, *Uniform Crime Reports 1985*, Government Printing Office (Federal Bureau of Investigation, 1986) 7

Walker, Lenore, *The Battered Woman Syndrome*, New York, Springer Publishing Company, 1984 ..... 11, 20

Interest of Amici Curiae

Amici are 47 non-profit organizations within and outside Pennsylvania who represent the interests of victims of domestic violence. Organizations from every state and territory in the Third Circuit are included, as well as national organizations and organizations from other states. In this brief *Amici* argue that the husband notification requirement of the Pennsylvania Abortion Control Act impermissibly invades the privacy of battered wives and places them at elevated risk of life-imperiling violence and therefore is unconstitutional.

Amici work to end violence in families and to uphold the rights of women. *Amici* include organizations that provide shelters to which battered women and abused children may escape and be safe from their abusers, organizations that provide counseling to abused women and children, organizations that provide training and technical assistance to the bar, bench and law enforcement agencies on domestic violence, organizations that represent battered women in the courts, organizations that counsel men who are abusive to their intimate partners, and organizations that provide medical and legal advocacy for women. Appendix A to this brief contains the individual Statements of Interest of *Amici*.

Amici have first-hand knowledge of the serious physical and psychological injury suffered by victims of domestic violence. Our experience has demonstrated that many batterers are most life-threatening when their battered wives attempt to leave and thereby escape their husbands' control. Abuse of children by batterers is often instrumental: directed toward controlling the battered woman, preventing her from leaving the relationship, or coercing her to return to the relationship. Kidnapping and hostage-taking of children to gain access to a battered wife or to persuade her to return to the relationship are commonplace.

Amici respectfully file this brief because they believe that, if enforced, the husband notice requirement of the Pennsylvania Abortion Control Act will have a severe impact on the lives and

health of battered and abused wives. *Amici* have found that in dysfunctional marriages, when an abusive husband finds out that his wife is pregnant, the likelihood and severity of physical, emotional and economic abuse increase. Frequently, such an abusive husband will force his wife to carry the pregnancy to term against her will.

As both the District Court and the Court of Appeals found, in the majority of marriages, the decision whether to continue or to terminate a pregnancy will be discussed between the spouses. As to these marriages, the spousal notification provision is superfluous. It is only in dysfunctional marriages, in which the wife is physically battered, psychologically tortured, or raped by her husband that §3209 would operate. In such marriages, the notice requirement, if upheld, will force pregnant abused women who want abortions to choose between their right to obtain an abortion and their physical safety and sometimes their very lives. *Amici* believe that Pennsylvania may not constitutionally impose this choice on battered women, who are among the most vulnerable people in our society.

Summary of Argument

I. The husband notification requirement of the Pennsylvania Abortion Control Act is unconstitutional because it would prevent abused wives from exercising their right to choose abortion. Abuse and rape of wives by their husbands is shockingly widespread. Many abusive husbands frequently use their wives' pregnancies as an instrument of control over their wives, and pregnancy often triggers an escalation of violence. Because of the nature of battering, the exceptions to the notice requirement will not be used by the wives who need them most. Furthermore, the statute contains no exception for psychologically abused wives, who face as great a risk of forced pregnancy as do physically battered wives.

II. The notice requirement is not rationally related to any legitimate state purpose. In functioning marriages the provision is unnecessary, as the wife will disclose her abortion plans

voluntarily to her husband. In abusive marriages coerced notification will operate to grant the abusive husband the *de facto* power to make the abortion decision, in violation of the holding of *Planned Parenthood v. Danforth*.

ARGUMENT

I. SECTION 3209 IS UNCONSTITUTIONAL BECAUSE IT WILL PREVENT BATTERED AND ABUSED WIVES FROM EXERCISING THEIR RIGHT TO HAVE AN ABORTION

In abusive marriages in which wives are terrorized and held hostage by repeated physical violence, economic duress, or continuous emotional abuse, a pregnancy may be both the excuse for aggravated violence by battering husbands and an additional, powerful fetter with which to control and discredit wives. In such marriages, the "real world consequences,"[1] of Pennsylvania's requirement[2] that the wife notify the husband that she is planning to have an abortion would be severely to limit a wife's ability to have an abortion and in many cases to foreclose that choice altogether. In effect, the husband notification requirement would give abusive husbands the "unilateral...ability to prohibit the wife from terminating her pregnancy," *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 70 (1976), and hand such husbands an additional weapon to wield in the subordination of their wives. As the District Court and the Court of Appeals held, the statutory exceptions to the husband notification requirement are no remedy because they are unavailable to many abused wives.

Every court that has considered the merits of a spousal

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[1] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 947 F.2d 682, 711 (3rd Cir. 1991).

[2] Pennsylvania Abortion Control Act, 18 Pa. Cons. Stat. §3209.

notification requirement has discussed the prevalence of domestic violence as a decisive reason to reject such a requirement. Other than the decisions by the courts below in this case, the most thorough discussion of the actual effect of a spousal notice requirement is in *Planned Parenthood of Rhode Island v. Bd. of Medical Review*, 598 F. Supp. 625 (D.R.I. 1984). There, the court began by holding that "any statute which requires a physician to notify a third party of his or her patient's abortion decision is, as a matter of law, a constitutionally significant burden on a woman's right to an abortion." *Id.*, at 633. The court went on to hold that "[e]ven if a third party notification requirement were not to be considered burdensome as a matter of law, the evidence presented in this case demonstrates that Rhode Island's spousal notification law, if enforced, will have the effect of delaying or totally frustrating a woman's decision to terminate her pregnancy." *Id.* at 634-35. *See also Eubanks v. Brown*, 604 F. Supp. 141, 148 (W.D. Ky. 1984) ("The State should not be in the position of forcing a wife to tell her husband, in many situations where the two are not living together, or where, even if living together, there has been physical abuse or emotional disharmony, about her vitally important decision."); *Scheinberg v. Smith*, 428 F. Supp. 529, 538 (S.D. Fla. 1979), *vacated and remanded*, 659 F.2d 476 (5th Cir. 1981), *on remand*, 550 F. Supp. 1112 (S.D. Fla. 1982) (invalidating spousal notice statute).

A. Domestic Violence Burdens Wives' Exercise of Reproductive Choice

Abused wives do not live in a free country, able to exercise their constitutional rights. Rather, their lives are constricted and confined by their husbands' abusive behavior and their fear of it. Because pregnancy often is both the result of abuse and a catalyst for increased terror, abused wives have great difficulty in effectuating their reproductive choices. Based on their extensive experience with battered women, *Amici* believe that Pennsylvania's requirement that wives notify their husbands of

their abortion plans would prevent many abused wives from exercising their choice to obtain an abortion.[12]
[3] As the Court of Appeals said:

> The district court found that §3209's notification requirement creates a substantial risk that women who would otherwise have an abortion will be prevented from having one. Abortion is a matter about which individuals have deeply held and strongly felt convictions, often rooted in moral or religious commitment. In those situations where a husband is sufficiently opposed to abortion or sufficiently desirous of having a child that the wife will not voluntarily share the fact of her pregnancy and her intention to abort with him, the clinics' experts testified that coerced notification will predictably result in an effort to prevent the abortion. That testimony showed that the husband's response will frequently take a variety of forms other than persuasive discourse.

Casey, 947 F.2d at 712.

In the three numbered subsections below, *Amici* respectfully set out salient facts regarding the incidence and "variety of forms other than persuasive discourse" which abusive husbands in Pennsylvania employ to control their wives, and which Pennsylvania's husband notification requirement would be likely to unconstitutionally exacerbate.

1. Many Married Women in Pennsylvania Are Battered and Raped

Domestic violence is a very serious and widespread problem in the Commonwealth of Pennsylvania. *Amicus* Pennsylvania Coalition Against Domestic Violence estimates that each year 800,000 women in the state are assaulted in their own homes. In fiscal 1990-91, the 57 programs of the Pennsylvania Coalition Against Domestic Violence responded to 157,993 hotline calls

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[3] Appendix, Statements of Interest of *Amici*, *passim*.

and provided shelter for 8,157 battered women and 10,578 children (the programs turned away 11,339 additional women and children because of lack of shelter space). According to an estimate by the Philadelphia District Attorney's Office, in Philadelphia alone 45,000 women are battered each year.

At the trial in the District Court, Dr. Lenore Walker testified that women in Pennsylvania are battered at the same rate as women in the United States.[4] The National League of Cities and the U.S. Conference of Mayors have found that half of all wives will experience some form of spouse-inflicted violence sometime during their marriage or its breakup.[5] In any given year, at least one in six married couples will experience a violent incident.[6] Battering is the single major cause of injury to women, more significant than auto accidents and muggings combined.[7] In any single day at least 1,680 adults in this country face a spouse wielding a gun or knife.[8] Each day approximately 5,000 women are battered by their husbands in the United States.[9] Men are only rarely victims of domestic violence; the U.S. Department of Justice reported that 95 per cent of the victims of domestic violence are women.[10]

Domestic violence is also a leading cause of death for women. Thirty per cent of female homicide victims in the United States were killed by husbands or boyfriends.[11] During 1990, in Pennsylvania every sixth day a woman was killed by her husband or boyfriend;[12] in the same year, 5.5 adults were killed *each day* in the United States by a spouse or intimate partner.[13]

2. *Reproductive Coercion Is A Substantial Component of Domestic Violence Against Married Women*

Many abusive husbands engage in reproductive coercion and violence. The District Court found that domestic violence often involves marital rape, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 744 F. Supp. 1323, 1361 (E.D. Pa. 1990). In a study of 137 battered women in Pittsburgh, 34 per cent of the women reported being raped by their husbands at least once.[14] In a study of 325 married women who were battered, Dr. Mildred Pagelow found that 37 per cent had been

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[4] Trial Testimony of Dr. Lenore Walker, Vol. II, at 22.

[5] Langley, R. and Levy, R., *Wife-Beating, The Silent Crisis*, 1977, at 11-15.

[6] Carlson, Bonnie E., "Dating Violence: A Research Review and Comparison with Spouse Abuse," 68 *Social Casework*, January 1987, at 16-23.

[7] Bisea, Napper, Sikes, "Family and Other Intimate Assaults," *Morbidity and Mortality Weekly Report*, U.S. Dept. of Health and Human Services, Vol. 39, No. 31, August 10, 1990, at 525, citing Rosenberg, Stark, Zahn, "Interpersonal Violence: Homicide and Spouse Abuse," *Public Health and Preventive Medicine*, 12th ed., at 1399 (1986).

[8] Straus, Murray, Gelles, Richard, and Steinmetz, Suzanne, *Behind Closed Doors: Violence in the American Family*, New York, Doubleday, 1980.

[9] Federal Bureau of Investigation, *Crime in the United States*, 1986-7.

[10] U.S. Department of Justice, Bureau of Justice Statistics, *Report to the Nation on Crime and Justice: The Data*, Government Printing Office, October 1983.

[11] U.S. Department of Justice, *Uniform Crime Reports 1985*, Government Printing Office (Federal Bureau of Investigation, 1986), at 11.

[12] Pennsylvania State Police, *Uniform Crime Report*, 1990.

[13] Federal Bureau of Investigation, *Crime in the United States*, 1990.

[14] Frieze, Irene, "Causes and Consequences of Marital Rape," paper presented at the American Psychological Association Meetings, Montreal, Canada, September 1980.

raped by their husbands.[15] In a sample of 92 battered wives, Shields and Hanneke found that 46 per cent had been raped by their husbands.[16]

Diana Russell studied the incidence of rape of all types in a rigorously-designed study of 930 women randomly chosen from the population of San Francisco. She found that of the women who had ever been married, one out of seven had been raped by her husband; she also found that women reported more rapes by husbands and ex-husbands than by any other category of maie.[17] These numbers are probably underestimates, as many women are reluctant to describe an unwanted sexual experience with a husband or ex-husband as rape.[18] Dr. Russell found that marital rape was the most difficult type of sexual assault on which to obtain information, more difficult even than incest.[19]

Amici have found that many pregnancies among battered wives are the result of marital rape.[20] Similarly, service statistics from *Amici's* domestic violence programs reveal that abusive husbands forcibly prohibit the use of contraceptives and that

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[15] Pagelow, Mildred Daley, *Family Violence*, New York, Praeger, 1984, at 429.

[16] Shields, Nancy M., and Hanneke, Christine R., "Battered wives' reactions to marital rape," in Finkelhor, David, Gelles, Richard J., Hotaling, Gerald T., and Straus, Murray A. (eds.), *The Dark Side of Families*, Beverly Hills, Sage, 1983, at 131-48.

[17] Russell, Diana E.H., *Rape in Marriage*, New York, Macmillan, 1982, at 1-2, 65.

[18] Russell, *id.*, at 38.

[19] Russell, *id.*, at 39.

[20] Statements of Interest of Pennsylvania Coalition Against Domestic Violence, at Al; Women's Coalition of St. Croix, Virgin Islands, at A-25; Domestic Violence Research and Resources, at A-7; Women Against Abuse, Inc. and Women Against Abuse Legal Center, Inc., at A-22.

unwanted pregnancies occur with some frequency as a result.[21] A study of criminal victimization among 2,000 working women in Cleveland found that 6.6 per cent of rape victims had become pregnant as a result of the rape.[22] A much higher incidence of pregnancy has been identified when sexual assault occurs within the family. As many as 24 per cent of incest victims in one study reported that pregnancy resulted from the sexual abuse; researchers believe that the higher rate of pregnancy is due to the repeated assaults by men raping women within the family.[23]

Battered women have more pregnancies than nonabused women.[24] Moreover, when an abused woman becomes pregnant, her risk of being battered and/or raped increases.[25] The District Court found that "Mere notification of pregnancy is frequently a flashpoint for battering and violence within the

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[21] Statements of Interest of Pennsylvania Coalition Against Domestic Violence, appended to *Amici Curiae's* Brief at A1 ; Women's Coalition of St. Croix, Virgin Islands, at A25 ; Hospitality House Services for Women, Inc., at A11; Laurel House, at A12; Women Against Abuse, Inc. and Women Against Abuse Legal Center, Inc., at A22.

[22] Koss, Mary P., Woodruff, M.S., and Koss, Paul G., "Criminal Victimization among Primary Care Medical Patients: Prevalence, Incidence, and Physician Usage," *Behavioral Sciences and the Law*, Vol. 9, 1991, at 85-96.

[23] Katz, S. and Mazur, M., *Understanding the Rape Victim*, Wiley & Sons, 1979, at 274.

[24] Stark, E., and Flitcraft, A., "Spouse Abuse," in *Surgeon General's Workshop on Violence and Public Health Source Book*, at 16; Statement of Interest of Pennsylvania Coalition Against Domestic Violence, at A-1.

[25] Gelles, R., "Violence and Pregnancy," *Journal of Marriage and the Family*, 1988, at 841-47. Statements of Interest of Pennsylvania Coalition Against Domestic Violence, at A-1; National Coalition Against Domestic Violence, at A14; Hospitality House Services for Women, Inc., at A10; Laurel House, at A12; National Women Abuse Prevention Center, at A15; Women Against Abuse, Inc. and Women Against Abuse Legal Center, Inc. at A22.

family." *Casey*, 744 F. Supp. at 1361. A woman who has previously suffered psychological abuse will now be physically abused for the first time; a woman who has previously been battered will now be attacked more viciously.[26] The American College of Obstetricians and Gynecologists has found that 25 to 45 per cent of battered women are assaulted during pregnancy.[27] Of 225 women from a battered women's shelter sample, 62 per cent were beaten during pregnancy.[28] Pregnant women are assaulted in their abdominal area with great frequency.[29] Many married women suffer miscarriages as a result of being battered by their husbands.[30]

Abuse, including violence and marital rape, repeats and recurs in the lives of battered women; as time goes on the abuse tends to occur more frequently, becomes more violent, and results in more serious injuries.[31] A twenty-five year-old mother of six who is a client of *Amicus* Women Against Abuse Legal Center, Inc., described the violence that she suffered when she was pregnant:[32]

> I have lived with [my abusive husband] off and on for eight years. I have been beaten by him repeatedly over this period of time. Recently he has become more abusive and threatens to kill me. He has hit me with belts, with a shoe, and with his fists. I am pregnant but I am not gaining weight. He forced me to get pregnant by throwing away my birth control pills. I am afraid for my life and for my children's psychological well being... [He has] threatened to cause a miscarriage.

3. Married Women Continue to Be Abused by Their Husbands After Separation

Many, perhaps most, people believe that battered women will be safe once they separate from the batterer. They also believe that women are free to leave their abusers at any time. However, leaving does not usually put an end to the violence. Batterers may, in fact, escalate their violence to coerce a battered woman into reconciliation or to retaliate for the battered woman's perceived rejection or abandonment of the batterer. Men, who believe they are entitled to a relationship with battered women or that they "own" their wives, view women's departure as an

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[26] Trial testimony of Dr. Lenore Walker, Vol. II, at 41.

[27] The American College of Obstetricians and Gynecologists, "The Abused Woman: Fact Sheet," January 3, 1989, page 1.

[28] Okun, Lewis, *Women Abuse: Facts Replacing Myths*, Albany, State University of New York Press, 1986, at 234-240.

[29] Reynolds, Lynn, *Executive Summary of the Second National Workshop on Female Offenders*, Raleigh, NC, April 1987, at 12; The American College of Obstetricians and Gynecologists, "The Abused Woman: Fact Sheet," January 3, 1989, page 1. Statements of Interest of Pennsylvania Coalition Against Domestic Violence, at A-1; Women Against Abuse, Inc. and Women Against Abuse Legal Center, Inc., at A-22; Women's Center & Shelter of Greater Pittsburgh, at A-23.

[30] Statements of Interest of Pennsylvania Coalition Against Domestic Violence, at A1; National Coalition Against Domestic Violence, at A14; Hospitality House Services for Women, Inc., at A10.

[31] Walker, Lenore, *The Battered Woman Syndrome*, New York, Springer Publishing Company, 1984, at 24-26; Pagelow, Mildred Daley, *Woman-Battering Victims and Their Experiences*, Beverly Hills, Sage Publications, Sage Library of Social Research, Vol. 129, at 163.

[32] Statement of Interest of Women Against Abuse, Inc. and Women Against Abuse Legal Center, Inc., at A22.

ultimate betrayal which justifies retaliation.[33]

Amici's experience and a number of studies demonstrate that when a woman decides to leave an abusive relationship, she faces an *increased* danger of violence, including marital rape and death.

Women are most likely to be murdered when attempting to report abuse or to leave an abusive relationship.[34] Almost one-quarter of the women killed by their male partners in one study in Philadelphia and Chicago were separated or divorced from the men who killed them, and 28.6% of the women were attempting to end the relationship when they were killed.[35] In another study of spousal homicide, over half of the male defendants were separated from their victims.[36]

Three-fourths of domestic assaults occur while victims are separated or divorced from the abusers.[37] In one study, 73

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[33] Saunders, D.G., and Browne, A., "Domestic Homicide," chapter to appear in R.T. Ammerman and M. Herson (Eds.), *Case Studies in Family Violence*, New York, Plenum Press; Dutton, D.G., *The Domestic Assault of Women: Psychological and Criminal Justice Perspectives*, Boston, Allyn & Bacon, 1988.

[34] Sonkin, D., Martin, D., and Walker, L.E.A., *The Male Batterer: A Treatment Approach*, New York, Springer, 1985; Browne, A., *When Battered Women Kill*, New York, The Free Press, 1987.

[35] Casanave, N., and Zahn, M., "Women, Murder and Male Domination: Police Reports of Domestic Homicide in Chicago and Philadelphia," paper presented at the Annual Meeting of the American Society of Criminology, Atlanta, October 31, 1986.

[36] Bernard, G.W., Vera, H., Vera, M.I., and Newman, G., "Till Death Do Us Part: A Study of Spouse Murder," *Bulletin of the American Academy of Psychiatry and the Law*, 1982, at 10.

[37] U.S. Department of Justice, Bureau of Justice Statistics, *Report to the Nation on Crime and Justice: The Data*, Government Printing Office, October 1983, at 21.

percent of battered women seeking emergency medical services had sustained their injuries after leaving the batterer.[38] There is substantial evidence that some men become violent only *after* their partners declare their intentions of severing the relationship.[39] In a study of women seeking divorce in Philadelphia in 1986, four percent of the women stated that they were assaulted during separation even though they had not been abused during cohabitation.[40]

Most battered wives report that their husbands will not permit an abortion because the husbands anticipate that the birth of the child will enable them to exert more control over the battered wife.[41] Husbands also often use the exercise of parental rights as a way to gain access to their former wife, to continue the violence and abuse, and to control her and terrorize her.[42]

Therefore, for pregnant wives who wish to leave an abusive marriage in order to seek a safe life, getting an abortion without

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[38] Stark, E., Flitcraft, A., Zuckerman, D., Grey, A., Robison, J., and Frazier, W., "Wife Abuse in the Medical Setting: An Introduction for Health Personnel." *Domestic Violence Monograph Series*, No. 7, Rockville, MD, National Clearinghouse on Domestic Violence, April 1981.

[39] Pagelow, Mildred Daley, *Family Violence*, New York, Praeger, 1984, at 43.

[40] Kurz, D., and Coughey, K., "The Effects of Marital Violence on the Divorce Process," paper presented at the American Sociological Association Meeting, August 9, 1989.

[41] Statements of Interest of Pennsylvania Coalition Against Domestic Violence, at A1; Domestic Violence Research and Resources, at A7; Connecticut Coalition Against Domestic Violence, at A6; National Coalition Against Domestic Violence, at A14.

[42] Statements of Interest of Pennsylvania Coalition Against Domestic Violence, at A1; Domestic Violence Research and Resources, at A7; Hospitality House Services for Women, Inc., at A10; Women's Center & Shelter of Greater Pittsburgh, at A23.

their husband's knowledge may mean the difference between being trapped permanently in violent or abusive situations and achieving lives free of violence. *Amici* believe that the husband notification requirement of §3209 would prevent many abused wives from getting an abortion and concomitantly from leaving their abusive husbands.[43]

B. Because Women Fear that Reporting Abuse Will Result in Further Violence Against Them, the Exceptions in §3209 Are Unavailing

A central feature of domestic abuse is that it occurs in private and is kept secret within the family. The District Court found that "Family members are instructed not to tell anyone, especially police or doctors, about the abuse and violence." *Casey*, 744 F. Supp. at 1361. Sometimes the woman maintains secrecy because she is deeply ashamed that she is a victim; or she actually believes that she is to blame for the violence and deserves the abuse she is suffering. More frequently the batterer will punish the woman if she attempts to inform anyone of the violence. The District Court also found that "Battering husbands often threaten their wives or her children with further abuse if she tells an outsider of the violence." *Id*. A woman who has been the victim of terrorism by her husband over a long period of time will have great difficulty reaching out to anyone, especially to the police. Precisely because the police represent a potential threat to abusers, an abused wife will fear that going to the police would only result in increased violence by her husband.

The Federal Bureau of Investigation, as well as virtually every researcher who has worked in the area, has found that women do not disclose that they have suffered physical violence at the hands of their husbands. Women do not report such occurrences to the police, and often will not even disclose them on anonymous surveys. The FBI has stated:

> Underreporting remains the most serious analytic problem. Available measurements of domestic violence, no matter what their origin or intent, are too low.[44]

Wife assault is underreported by a factor of at least ten to one.[45]

The problem of underreporting is even more severe in regard to marital rape. The District Court found that "Marital rape is rarely. . .reported to law enforcement authorities," *Casey*, 744 F. Supp. at 1362. The FBI has expressed its frustration in obtaining data on rape:

> Even with the advent of rape crisis centers and an improved awareness by police in dealing with rape victims, forcible rape is still recognized as one-of the most underreported of all index crimes. Victims' fear of their assailants and their embarrassment over the incidents are just two factors which can affect their decisions to contact law enforcement.

One of the major causes of the underreporting of marital rape is that many wives who have been raped by their husbands do not recognize that what has been done to them is the crime of rape. Dr. Mary P. Koss, who has done extensive research in this area, testified before the Senate Judiciary Committee, as follows:[46]

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[43] Statements of Interest of Pennsylvania Coalition Against Domestic Violence, at A1; National Coalition Against Domestic Violence, at A14; Connecticut Coalition Against Domestic Violence, at A6.

[44] U.S. Department of Justice, Bureau of Justice Statistics, *Intimate Victims: A Study of Violence Among Friends and Relatives*, 1980, at 3.

[45] U.S. Department of Justice, Federal Bureau of Investigation, *Crime in the U.S. - Uniform Crime Reports*, 1975, at 18-19.

[46] Koss, Mary P., "Rape Incidence: A Review and Assessment of the Data," Testimony on behalf of the American Psychological Association before the Senate Judiciary Committee, August 29, 1990, at 9.

> If a woman does not consider her unwanted, forced sexual experience to be a crime, she is unlikely to report it. . . There are reasons to believe that circumstances exist under which a person could be raped and not define the act as a crime. Empirical studies have revealed the existence of a rape supportive belief system in western industrialized countries. One component of the rape supportive belief system is rape myths, which are widely accepted false beliefs about rape such as the following: "Rapists are mentally-deranged strangers," "You cannot rape an unwilling woman," and "You cannot be raped by someone you know." Assaults that go against the stereotypes of "real rape" often are not seen as rape, even by the victim. . . . Among college women who had an experience that met legal requirements for rape, only a quarter labeled their experience as rape. Another quarter thought their experience was some kind of crime, but not rape. The remaining half did not think their experience qualified as any type of crime. (footnotes omitted)

The District Court found that:

> It is common for battered women to have sexual intercourse with their husbands to avoid being battered. While this type of coercive sexual activity would be spousal sexual assault as defined by the Act, many women may not consider it to be so and others would fear disbelief.

Casey, 744 F. Supp. at 1362. Dr. Lenore Walker testified at the trial that 59 percent of the 400 battered women whom she studied had been raped by their husbands, but *not one* had reported the rape to the police.[47]

Another reason why battered and raped women do not report the crimes committed against them by their husbands to the authorities is that they believe--often correctly--that the criminal justice system will fail to respond to them and cannot or will not protect them. For example, the Attorney General of

[47] Trial Testimony of Dr. Lenore Walker, Vol. II, at 23.

Ohio reported that during a nine-month period in 1979 police received approximately 15,000 domestic violence calls, filed reports in only 700 of those calls, and made arrests in 460 cases (three per cent).[48] In her survey of 350 battered women, Mildred Pagelow found that 60 percent of the victims who requested that their abusers be arrested were refused; another 24 per cent reported that although their abusers were arrested they were released shortly afterward.[49]

Joan Dillon, a battered wife, testified at the trial that her then-husband began to abuse her when she was pregnant and thereafter beat her once a week on average and refused to speak with her for long periods of time.[50] Ms. Dillon testified that for years she did not report the abuse to the police because she feared her husband's reaction if he were to find out that she had done so.[51] After she left her husband, she did attempt to obtain the help of the police and was turned down several times.[52] She testified:[53]

> One time I—my husband and I were talking on the phone and he said I'm coming to your house with a gun and I got really scared and really nervous and I thought he would really do it and I called them and I had a PFA [a protective order issued

[48] Ohio Attorney General, *Ohio Report on Domestic Violence*, 1979.

[49] Pagelow, Mildred Daley, *Woman-Battering, Victims and Their Experiences*, Beverly Hills, Sage Publications, 1981, at 81.

[50] Trial testimony of Joan Dillon, Appendix in the Court of Appeals, at 995, 1002-1003.

[51] Trial testimony of Joan Dillon, Appendix in the Court of Appeals, at 1001-1004.

[52] *Id.*

[53] Trial testimony of Joan Dillon, Appendix in the Court of Appeals, at 1004.

> pursuant to the Pennsylvania Protection From Abuse Act] and I talked to the State Police and told them what was happening and they said —the gentleman said to me, call me when you're dead, honey.

The requirement of §3209 that a marital rape be reported to the police before it will trigger the exception to the husband notification requirement does not protect the raped woman. It increases her danger. Not only are the police unlikely to make an arrest, but even in the relatively rare cases when the police do arrest an abusive husband, the wife is often subjected to further violence. Thirty per cent of arrested batterers assault their wives again prior to the disposition of the original charge.[54] Of battering husbands who are convicted of wife abuse, as many as 54 per cent batter their wives again within six months of completing a batterer treatment program, and virtually all men ordered to treatment by courts continue their verbal threats and their terrorism of their partners.[55] Thus, the marital rape reporting requirement of §3209 in effect replaces the danger associated with notifying an abusive husband of the intended abortion with the dangers attendant on reporting the rape to the police.

Because virtually all abused wives fear reprisals from their husbands if they disclose that they have been battered or raped to anyone and because many abused wives have been denied police protection and aid, battered wive are likely to be extremely reluctant to report to their doctors that they have been abused, and even more reluctant to file criminal charges of rape against their husbands. As a result, they will not be able to avail themselves either of the "bodily injury" exception to the husband notification requirement of Section 3209, or to the exception for

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[54] Goldsmith, Stephen, "Taking Spouse Abuse Beyond a Family Affair," *Law Enforcement News*, Vol. XVII, no. 334, 1991.

[55] Edleson, J. L., and Syers, M., "The Relative Effectiveness of Group Treatments for Men Who Batter," Research Update, June 1989.

pregnancies resulting from rapes reported to the police. As the District Court found, "Because of the nature of the battering relationship, battered women are unlikely to avail themselves of the exceptions to section 3209 of the Act regardless of whether the section applies to them." *Casey*, 744 F. Supp. at 1362.

C. Section 3209 Provides No Protection for Psychologically Abused Married Women Who Are at Risk of Forced Pregnancy

Psychological forms of abuse are not included in the exceptions to Section 3209. Yet, domestic abuse is not limited to violence that leaves the wife bruised or injured. Many abused women are abused in psychological, nonphysical ways. Gelles and Straus believe that psychological abuse may be even more prevalent than physical violence.[56]

Although psychological abuse, such as, threats, isolation, degradation, or economic abuse, does not injure a woman's body, as physical abuse does, it can be equally coercive. Dr. Ronald A. Chez, Professor and Vice Chairman of the Department of Obstetrics and Gynecology, New Jersey Medical School, believes that psychological abuse can be as devastating to a woman as physical abuse:[57]

> There is a tendency to think of battering as only physical.... Psychological abuse is of equal importance. Verbal harassment, terroristic threats, destruction of possessions, and isolation are all powerful weapons that are used to demean, degrade, and batter women. The net result of all these activities is unremitting stress, in which the home is converted from a safe haven into a hell.

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[56] Gelles, Murray A., and Straus, Richard J., *Intimate Violence*, New York, Simon & Schuster, 1988, at 68.

[57] Chez, Ronald A., "Battered Pregnant Women," *Genesis*, 11:1, January/February 1989, at 15.

Dr. Lenore Walker, who testified at the trial, described how husbands isolate their wives and control their behavior. For example, an abusive husband may deprive his wife of money to feed, clothe, and shelter herself and her children.[58] Some abusive husbands may commandeer a woman's own earnings so that she literally does not have access to any funds.[59] Victims report destruction of their property, which in itself implies a threat of harm and may also operate as a form of degradation.[60] Some women are not permitted to go where they want to, or are denied access to a car and to public transportation;[61] some women are not permitted to speak to neighbors.[62] Some women are physically confined to their homes.[63] The District Court found that such forms of psychological abuse fall within Amnesty International's definition of psychological torture. *Casey*, 744 F. Supp. at 1362.

Section 3209 requires that victims of psychological abuse, no matter how serious, give their husbands prior notice of the planned abortion. The District Court found that:

> The "bodily injury" exception could not be invoked by a married woman whose husband, if notified, would, in her reasonable belief, threaten to (1) publicize her intent to have an abortion to family, friends or acquaintances; (b) retaliate against her in future child custody or divorce proceedings; (c) inflict psychological intimidation or emotional harm upon her, her children or other persons; (d) inflict bodily harm on other persons such as children, family members or other loved ones; or (e) use his control over finances to deprive of necessary monies for herself or her children.

Casey, 744 F. Supp. at 1360.

The required notice would enable the husband to coerce the wife to continue the pregnancy to term so that he may maintain his emotional and financial control over her. One woman receiving services from a domestic violence program in Pennsylvania, who characterizes herself as emotionally abused, spoke of the dilemma she confronted in determining whether to tell her husband about her decision to terminate a pregnancy. She said:[64]

> I feel like I am at an impasse. My husband is very controlling. He is particularly troubled right now about the success of my career. I am earning more than he is, and he has been strongly urging that I quit my job and looking for every opportunity to put me down for enjoying my career. He calls me so often at work that my employer has begun to notice and asked me to curtail personal calls. I feel like my husband is intentionally jeopardizing my career. Now I am pregnant. My employer doesn't believe in abortion. If I tell my husband that I am pregnant, I am certain that he will tell my employer so as to destroy my career. I do believe my boss would find a pretext for discharging me if he learned that I had an abortion. His anti-choice values are so strong that he would no longer trust me with leadership in the organization. I just know that my husband will use this information against me. He has been so emotionally punitive of late.

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[58] Trial Testimony of Dr. Lenore Walker, Vol. II, at 20.

[59] *Id.*

[60] Gelles, Murray A., and Straus, Richard J., *Intimate Violence*, New York, Simon & Schuster, 1988, at 68.

[61] Walker, Lenore, *The Battered Woman Syndrome*, New York, Springer Publishing Company, 1984, at 172-73.

[62] *Id.*

[63] National Center on Women and Family Law, "Woman Battering: The Facts," New York, 1989, at 2.

[64] Personal communication to Barbara J. Hart, Esq., Legal Office, Pennsylvania Coalition Against Domestic Violence.

II. THE HUSBAND NOTIFICATION REQUIREMENT IS NOT RATIONALLY RELATED TO ANY LEGITIMATE STATE PURPOSE

Amici agree with plaintiffs as to the proper standard of review in this case. But even if the rational relationship test, or, *a fortiori*, the "undue burden" test adopted by the court below, is applied, §3209 must fail, because the requirement of husband notification is not rationally related to any legitimate state purpose.

As the Third Circuit held, Pennsylvania's purported goal of promoting beneficial communication between a woman and her husband[65] about the woman's decision whether to terminate a pregnancy is not a legitimate state interest, *Casey*, 947 F.2d at 714. Moreover, the requirement of husband notification does not foster the Commonwealth's goal. As the Third Circuit noted, for most married women, consultation about the abortion decision is the norm.[66] *Casey*, 947 F.2d at 711. For abused women, the husband notification requirement cannot serve Pennsylvania's goal, because there is no meaningful marital relationship to

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[65] Pennsylvania's claim that section 3209 is designed to promote the integrity of the marital relationship and the spouse's interest in having children within marriage is not entirely consonant with the legislative history of the section. The legislation as originally proposed contained a *paternal* notice requirement; as stated by the sponsor of the requirement, Rep. Stephen F. Freind, "The rationale for this is our belief that the father of the unborn baby has a right, at the very least, to know that his child, in fact, exists and is about to be killed." Pennsylvania Abortion Control Act of 1987 Legislative History published by House of Representatives member Stephen F. Freind (undated), page 5, paragraph "g." Only after the bill containing the paternal notice requirement was vetoed did husband notice and "integrity of the marital relationship" become paramount.

[66] *See also Planned Parenthood of Rhode Island v. Bd. of Medical Review*, 598 F. Supp. 625 (D.R.I. 1984) at 635 ("Mature married couples with healthy, stable relationships typically make joint decisions about abortions and a law requiring notification of the husband would be unnecessary for such couples.").

promote. As Justice White wrote in *Carey v. Population Services Int'l*, 431 U.S. 678 (1977), a state regulation must, even under a rational relationship test, "measurably contribute[] to the . . . purposes which the State advances as justification for the restriction." *Id.* at 703 (White, J., concurring in part and concurring in the result). Moreover, even where "the State may properly perform a teaching function...an attempt to persuade by inflicting harm on the listener is an unacceptable means of conveying a message that is otherwise legitimate." *Carey, supra,* at 715 (Stevens, J., concurring). This is precisely what Pennsylvania did in enacting section 3209. As the District Court found:

> A woman's personal perception of the consequences that will likely result from notifying her husband is likely to be accurate.... Forced husband notification would not improve communication within a battering relationship nor improve the marital integrity. Instead, it would foster negative and abusive communication and increase the likelihood that a woman would be seriously battered.

Casey, 744 F. Supp. at 1363.

Pennsylvania has also sought to justify the husband notification requirement by claiming that the section promotes the goal of protecting the interests of a married potential father in having children within the marriage and in protecting the prenatal life of his child. As discussed below, as a practical matter, this goal amounts to no more than a restatement of the goal of fostering beneficial communication in marriages.

In healthy marriages, the wife will tell the husband that she is pregnant, and together they will decide whether to continue the pregnancy. Through this consultation process, the husband is able to protect his procreative interests to the full extent permitted by the law. Nowhere has Pennsylvania said that it wishes to give husbands unilateral control over whether their wives carry pregnancies to term, and, indeed, such a goal would not be legitimate, as it would run directly counter to this Court's holding in *Planned Parenthood v. Danforth*, 428 U.S. (1976).

In abusive relationships, however, the effect of §3209 would be precisely to transfer such decisionmaking ability as the wife has managed to retain over her procreative choices from her to her husband, in violation of the holding in *Danforth*.

Thus, §3209 contributes nothing to either of Pennsylvania's stated purposes, and therefore the section is not rationally related to the state's purposes. As the District Court held:

> Marital accord arises from within the relationship not from the intervention of the state. Therefore, forced spousal notification is a totally irrational vehicle to achieve any of the state's purported goals.

Casey, 744 F. Supp. at 1388.

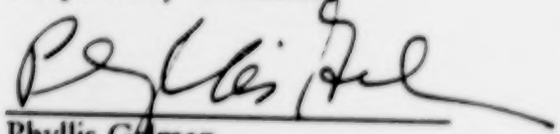
Conclusion

Amici have shown that: abuse and rape of women by their husbands is shockingly prevalent; abused wives rarely report the crimes they have endured; many abusive husbands use their wives' pregnancies, as well as their wives' children, as an instrument of control over their wives; and an abused wife's pregnancy often triggers an escalation of abuse by her husband. *Amici* have also shown that in these devastating circumstances the exceptions to Pennsylvania's husband notification requirement are either not applicable or cannot be used by those who most would need to use them. Consequently, the notice requirement would grant abusive husbands a state sanctioned *de facto* veto over their wives' ability to obtain an abortion and trap abused wives even more deeply in the hell in which they live. Finally, *Amici* have shown that Pennsylvania's husband notice requirement is not rationally related to any legitimate state purpose.

For all these reasons, this Court should affirm the holding of

the court below that the husband notification requirement does not pass constitutional muster.

Respectfully submitted,



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Dated: March 5, 1992

APPENDIX

APPENDIX

STATEMENTS OF INTEREST OF *AMICI CURIAE*

PENNSYLVANIA COALITION AGAINST DOMESTIC VIOLENCE

The Pennsylvania Coalition Against Domestic Violence is a non-profit organization incorporated in the Commonwealth of Pennsylvania for the purpose of providing services and advocacy on behalf of the victims of domestic violence and their minor children. PCADV is a membership organization of 57 shelters, hotlines, counseling programs, safe home networks, legal advocacy offices and transitional housing projects for battered women and their dependent children in the Commonwealth.

Many batterers engage in reproductive coercion and violence. Some forcibly prohibit the use of contraceptive measures. Others periodically rape their wives, sometimes inflicting severe injury to sexual organs, as well as to other parts of the body. Research reveals that the most sexually violent batterers are at greatest risk of homicidal violence toward their wives.

Denied contraceptives and coerced into intercourse, battered women sustain more pregnancies than non-battered women. Both sexual and physical violence often sharply increase once a batterer learns of a pregnancy. Violence during pregnancy is often focused on the abdomen, while otherwise more typically directed at the head or torso of battered women. As many as one-quarter of all pregnant women are battered by husbands or partners during pregnancy. Many batterers report that they interpret their wives' pregnancies as acts of abandonment or disloyalty which allow them to inflict retaliatory violence. Battered women experience more miscarriages than non-battered women.

Statutorily mandated disclosure of the pregnancy and the choice to abort risks the lives and welfare of battered women. While some pregnant battered women fear that batterers will coerce abortions, more report that batterers will forcibly prevent abortions because the birth of a child will enable husbands to assert more complete control over women's lives. The fear of

batterer violence following disclosure constrains a battered woman's liberty to choose abortion and inhibits a battered wife from taking timely action if she chooses to terminate her pregnancy.

Infants born to battered women are more likely to be premature or have low-birth-weight than children of non-battered women; and premature/low-birth-weight infants suffer greater risk of death and developmental problems than full-term/adequate-birth-weight babies. Many children of battered women suffer physical abuse and psychological terrorism at the hands of their battering fathers, and a significant number develop acute emotional and behavioral difficulties.

Post-delivery violence toward battered women often focuses on the battering husband's jealousy of the child or on his demands for total control of child-rearing practices, particularly to subordinate care of the child to nurturing and care of the battering husband. Those women forced by batterers to bear children are, as a consequence, also propelled into great economic dependence on batterers. Further, when battered women seek to separate from batterers, few husbands permit their wives independence and continue violence, controlling tactics and terrorism against wives through the exercise of their parental rights.

For many battered women, the right to an abortion means the difference between being trapped permanently in violent and abusive situations and achieving lives free of violence. Because the Pennsylvania Coalition Against Domestic Violence believes that the judgment of the Court of Appeals protects the reproductive and safety rights of battered women and children, we join with the plaintiffs and offer this brief to assist the Supreme Court in its deliberations on this critical issue of reproductive justice.

AMERICAN ASSOCIATION OF UNIVERSITY WOMEN

The American Association of University Women (AAUW), founded in 1881, is a national non-profit organization of graduates promoting equity for women, education and self-development over the life span, and positive societal change. Pennsylvania has 76 branches statewide with a membership of 6,500.

Contraceptive failure, medical complications, incest, rape and abuse can not be eradicated by law. Since unsafe, illegal abortion kills women and traumatizes families, AAUW believes abortion must remain an option in any comprehensive reproductive health program for those who need it. Ultimately, abortion is a decision to be made by the individual conscience, not a panel of judges or a chamber of legislators -- all strangers, all far removed from the consequences a woman will bear. Choice is an equity issue -- a fundamental, inalienable right impacting directly on women's self-determination. AAUW joins with the plaintiffs in *Planned Parenthood of Southeastern Pennsylvania v. Casey* in asserting that the Pennsylvania Abortion Control Act is unconstitutional.

ALLE-KISKI AREA HOPE CENTER, INC.

The Alle-Kiski Area Hope Center is a non-profit organization incorporated in the Commonwealth of Pennsylvania, serving 1,774 victims of domestic violence in 1991. The Alle-Kiski Area Hope Center believes that reproductive choice is critical to women's safety, autonomy and equality. The requirement of spousal notification of a woman's decision to terminate pregnancy impermissibly abridges a woman's right to reproductive choice, egregiously invades her right to privacy, and places her at grave personal risk. Therefore, we join in this brief to assist the Supreme Court in its deliberations on this critical issue of reproductive justice.

BATTERED WOMEN'S PROGRAM, CAPITAL AREA FAMILY VIOLENCE CENTER, INC.

The Battered Women's Program of Capital Area Family Violence Center, Inc. is a non-profit organization incorporated

in Pennsylvania serving 2,200 victims of domestic violence in 1991. The Battered Women's Program believes that reproductive choice is critical to women's safety, autonomy and equality. The requirement of spousal notification of a woman's decision to terminate pregnancy impermissibly abridges a woman's right to reproductive choice, egregiously invades her right to privacy, and places her at grave personal risk. Therefore, we join in this brief to assist the Supreme Court in its deliberations on this critical issue of reproductive justice.

BERKS WOMEN IN CRISIS

Berks Women In Crisis is a non-profit organization incorporated in the Commonwealth of Pennsylvania, serving 1,200 victims of domestic violence in 1991. Berks Women In Crisis believes that reproductive choice is critical to women's safety, autonomy, and equality. The requirement of spousal notification of a woman's decision to terminate pregnancy impermissibly abridges a woman's right to reproductive choice, egregiously invades her right to privacy, and places her at grave personal risk. Therefore, we join in this brief to assist the Supreme Court in its deliberations on this critical issue of reproductive justice.

BRADFORD COUNTY COALITION FOR CHOICE

Rural Bradford County, with a population of 61,000, has a high rate of teen pregnancy (2.3 times the state average), incest, spouse abuse and domestic violence. There is a very real concern in Bradford County regarding the impact the Abortion Control Act provisions will have on young and poor women. We must respect the privacy and dignity of these young women, or suffer the consequences of teen suicide, second trimester abortions, violence, runaways, and possible illegal or self-induced abortion.

Many of the same experiences confront poor women and/or those in abusive relationships. To force these women to jump over hurdle after hurdle is unconscionable. These stumbling blocks are not meant to "help women think about their decision" or "improve family communication" as the anti-choice people

would have us believe. They are meant to do one thing and one thing only -- make it so hard for women that they will be unable to obtain a safe abortion. State sanctioned implementation of a system made to impede access to medical service must be prohibited by this court. A consensus can never be reached. Each woman must be free to make these private decisions. Women are quite capable of doing so. We respectfully request that the challenged provisions of the Abortion Control Act be enjoined.

CARING UNLIMITED, INC.

Caring Unlimited, Inc., of Sanford, Maine, provides services to women who are victims of domestic violence. We strongly support Planned Parenthood and their efforts to challenge the Pennsylvania Abortion Control Act. We view the Act as another barrier to a woman's effort to get out of an unsafe, and in many cases an extremely violent, relationship.

CLEVELAND RAPE CRISIS CENTER

The Cleveland Rape Crisis Center is a non-profit organization incorporated in the State of Ohio in 1974. We are dedicated to providing supportive services to survivors of rape and related offenses, and further, to the prevention and ultimate elimination of the crime of rape itself.

These services are available to anyone regardless of her/his values, beliefs, or positions on issues. In any decision, we believe individuals have the right to discuss any and all possible options and we believe that the final choice is up to the individual. In order to assure survivors as many choices as possible, we support the constitutionally recognized right of procreative choice.

CLINTON COUNTY WOMEN'S CENTER

The Clinton County Women's Center, Inc., is a Domestic Violence and Rape Crisis program serving over 500 victims a year in Clinton and Potter counties in Pennsylvania. Incorporated in 1979, it is the only program providing advocacy services to victims in these counties. The organization is dedicated to keeping abortion safe, legal and accessible for victims of violence.

The Clinton County Women's Center recognizes that guaranteeing women the full range of reproduction choices is critical to women's autonomy and equality.

COLORADO DOMESTIC VIOLENCE COALITION

The Colorado Domestic Violence Coalition is dedicated to the elimination of domestic violence in all of its forms through community education, networking and the empowerment of battered women and their children. We recognize this requires a fundamental change in society's view of the roles of women and men.

CONNECTICUT COALITION AGAINST DOMESTIC VIOLENCE

The Connecticut Coalition Against Domestic Violence (CCADV) is a non-profit organization incorporated in the state of Connecticut for the purpose of providing services and advocacy on behalf of victims of domestic violence and their minor children. CCADV is a membership organization of 18 shelters, hotlines, counseling programs, safe home networks, and transitional housing projects for battered women and their dependent children.

CCADV is committed to empowering women in abusive relationships to make decisions for themselves, free from the coercive and violent control of their partners. This commitment to empowerment is rooted in a deep respect for the right to self-determination and the value of each woman's individuality.

It is out of this commitment and these beliefs that CCADV joins other organizations and individuals in proclaiming its strong support for efforts to protect a woman's right to choose when and where to bear children. The right to choose abortion, freely and without coercion, should be available to all women, regardless of economic resources. Women have a right to make decisions regarding contraception and the termination of a pregnancy in the privacy of their doctor's or medical advisor's office and in the privacy of their own consciences. This right must be protected.

For many battered women, the right to choose an abortion means the difference between continued entrapment in violence and abusive relationships and achieving lives free of violence. Because the Connecticut Coalition Against Domestic Violence believes that the judgment of the District Court of the Eastern District of Pennsylvania in *Planned Parenthood v. Casey* protects the reproductive and safety rights of battered women and children, we join with the plaintiffs and offer this brief to assist the Supreme Court in its deliberation of this critical issue of reproductive justice.

DOMESTIC VIOLENCE RESEARCH AND RESOURCES

Domestic Violence Research and Resources (DVRR) is a private consulting business, located in the Commonwealth of Pennsylvania, which offers training, materials, and research to the domestic violence field. It makes available several research, professional, and guide books through direct mail. Training lectures, particularly on men who batter, and program evaluation are presented upon request. A variety of research papers on aspects of domestic violence are also distributed under the auspices of DVRR. Furthermore, DVRR provides program development and evaluation consultation to women's shelters and batterers programs.

DVRR has a direct interest in the "abortion notification" issue because of the services it provides to women's shelters and batterer programs. Much of the work of DVRR focuses on the risks facing battered women and the dangerousness of battering men. One of the most challenging issues facing the field in this regard is the recurring and escalating violence that results from resumed partner contact. It is not unusual for men to use children, custody or pregnancy as a means to further control, retaliate, or terrorize their female partners. Abortion notification in battering cases would very likely contribute to this danger.

Moreover, a substantial portion of battered women are forced to have sex and become pregnant against their will. An unwanted pregnancy further reduces chances of gaining independence and the increased safety that generally accompanies that

independence, according to research made available by DVRR. Therefore, statutory law that limits a woman's options in this regard would reduce the likelihood of battered women gaining independence and safety, and thus it would negate much of the positive effect of shelter and counseling services.

FAMILIES IN TRANSITION CENTER, MILFORD, DELAWARE

Families in Transition Center, established in 1979, is a battered women's program under the umbrella of People's Place II, Inc. People's Place II, Inc. is a private, non-profit organization, incorporated in the State of Delaware. Families in Transition Center serves battered women and their children who reside in Kent and Sussex Counties. Services include a thirty day crisis facility, advocacy in the legal system, a twenty-four hour hotline and a long term transitional housing component for those women and their children who have completed their 30 day crisis shelter stay. From 1984-1989, 6,678 referrals/hotline calls were taken.

Men who are abusive use physical control and male domination over their mates in order to keep them submissive. Women who are abused have no control over their bodies. Isolation from friends, family and support services keep women from breaking the cycle of violence.

Most women who have entered our shelter have reported at least one rape during their abusive relationship. Some women have entered our shelter only to discover that they are pregnant. Battered women who find themselves pregnant are terrified to report this information to their abusive mates.

Laws that require spousal notification would erode a woman's right to self-determination and control over one's life. Spousal notification would require a battered woman to have contact with her abusive mate who would use this information to coerce her to return to the violent home, where she may find herself further isolated and more severely abused.

FAMILY SERVICE OF PHILADELPHIA

Family Service of Philadelphia is a voluntary non-profit social service agency which has been serving Philadelphia for more than 100 years. Family Service is a member of the United Way of Southeastern Pennsylvania and Family Service America, the national standard setting body for our field. We are accredited by the Council on Accreditation of Services for Families and Children. Family Service offers counseling to individuals, families and couples, family life education, Plays for Living and family advocacy. A substantial proportion of our counseling clients are victims of domestic abuse (domestic violence is an issue in approximately one-third of our cases); our family life education and Plays for Living offer education and training for the community on issues of domestic violence; Project RAP, our treatment program for male batterers, the only one of its kind in Philadelphia, treats almost 300 men annually.

The mission of Family Service is to strengthen and enhance family life. We believe that the effect of the spousal notification requirement is not to strengthen the marital relationship but rather to restrict access to health care and/or to place many pregnant women in a dangerous predicament. Furthermore, we believe that the less government is involved in family life decision making, the better it will be for the family.

FLORIDA COALITION AGAINST DOMESTIC VIOLENCE

The Florida Coalition Against Domestic Violence is deeply concerned over the issues involved in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.

We are opposed to the requirement that a married woman notify her husband before seeking an abortion because the notice requirement prevents a woman from exercising self-determination over her own body and life and because the requirement does not take into account the complexity within marital relationships.

It is the right of each human being to make decisions which will make her world and her children's world safe and secure.

GWINNETT CITIZENS FOR CHOICE

Gwinnett Citizens for Choice is a broad based coalition of individuals and groups in Gwinnett County, Georgia, committed to reproductive freedom of choice. We believe that abortion is a critical part of the entire package of reproductive rights that include contraception, sexuality education and the right to choose to end a crisis pregnancy. These rights belong to the individual and not to the government. Only the woman in a crisis pregnancy can weigh all of the factors that must enter into such a personal decision. We are committed to protecting this right through education and political action.

HOSPITALITY HOUSE SERVICES FOR WOMEN, INC.

Hospitality House Services for Women, Inc. was incorporated as a private, not for profit organization in July 1974.

Our mission is:

> We believe that every human being has the right to respect as a person and to a life free from abuse and fear. We recognize that domestic abuse whether physical, verbal or sexual is an act of oppression and often the outgrowth of an imbalance of power in our social structures.

Hospitality House Services for Women, Inc. is committed to ending violence against women by providing direct services to abused women and their children, and to changing social structures through education, legislation and advocacy. Our services shall aid and support women and children, empowering them with a sense of their own dignity and their right to a life free from abuse.

We provide shelter to approximately 600 battered women and their children each year. We also provide options counseling, advocacy and accompaniment to more than 1,500 women who are considering seeking protection under the Protection from Abuse Act.

We believe mandatory spousal notification would be extremely detrimental to women who are in abusive situations.

Pregnancy and children are routinely used by battering males as instruments of their control. Oftentimes the first or most severe battering incident takes place during pregnancy, and the battering male often severely abuses one or more of the couple's children.

The list of sexual abuses that one encounters in domestic violence is endless and yet the details do not appear in newspapers or proposals; it is the part of many battering situations that is still very much hidden. Rape and the prohibition of contraception are not uncommon; nor is miscarriage precipitated by blows to the abdomen. Further, when a woman leaves her violent situation, the batterer frequently focuses threats and coercion directly on the children or through the exercise of parental rights.

Mandatory spousal notification will provide legal support for abusive and controlling techniques used by batterers.

HOUSTON AREA WOMEN'S CENTER

The Houston Area Women's Center, an organization of volunteers and professional staff, provides shelter and support services to survivors of sexual assault and family violence. We educate and inform our community in order to eliminate the causes of violence. Our vision and leadership empower women to advance their role, their rights and their well being. Reproductive freedom is a fundamental right which women must be able to exercise unencumbered to be full, participating citizens in a democracy. For women to grow to their full potential, they cannot live in an atmosphere of fear and intimidation or without the ability to control their destinies.

ILLINOIS COALITION AGAINST SEXUAL ASSAULT (ICASA)

The Illinois Coalition Against Sexual Assault is a private, non-profit, tax-exempt coalition providing services to victims of sexual assault throughout Illinois. ICASA member centers provide service to adult survivors of rape, incest and childhood sexual abuse and assault. We support the right of all victims of sexual assault to make choices about reporting, prosecution,

pregnancy, future safety and other issues precipitated by the sexual abuse inflicted upon them. The preservation of reproductive freedom is essential to sexual abuse survivors. For this reason, we join with plaintiffs as *amicus curiae*.

LAUREL HOUSE

Laurel House, located in Montgomery County, Pennsylvania, offers shelter and support for women and children fleeing family violence. In its ten year history the program has served 4500 persons providing safe haven, counseling and advocacy, children's programming, and post-shelter support services.

The demand for power and complete control in a relationship is often the underlying cause for violent and threatening behavior. Battered women, gathered in support groups, speak of how that control was exacted. Marital rape and other forms of sexual violence are a sadly familiar part of many stories. Many women are not permitted to use any contraception and unwanted pregnancies occur with some frequency. The tragic cycle continues with an acceleration of battering during pregnancy, particularly to trunk and torso.

Mandated disclosure of pregnancy and choice to abort places women's lives in further danger. Women's options to break free of the stranglehold of violence are permanently blocked by unjust legal mandates of this nature. We join others working for the eradication of family violence in expressing our support for the judgment of the District Court on this critical issue.

LUTHERAN SOCIAL SERVICES - SOUTH REGION

Lutheran Social Services - South Region is a non-profit organization incorporated in Pennsylvania serving 175 perpetrators of violence against women in 1991. Lutheran Social Services - South Region believes that reproductive choice is critical to women's safety, autonomy, and equality. The requirement of spousal notification of a woman's decision to terminate pregnancy impermissibly abridges a woman's right to reproductive choice, egregiously invades her right to privacy, and places her at grave personal risk. Therefore, we join in this brief

to assist the Supreme Court in its deliberations on this critical issue of reproductive justice.

MARIN ABUSED WOMEN'S SERVICES

Marin Abused Women's Services is a non-profit organization serving battered women and their children in Marin County, California. The agency, now in its 15th year, provides two 24-hour hotlines for women (English and Spanish speaking), shelter/transitional housing, support groups for women, community outreach and trainings, and a re-education program for men who batter. It is our purpose to offer the opportunity and resources for women and their children to live self-determining lives free from violence.

MEN STOPPING VIOLENCE, INC.

Men Stopping Violence, Inc., is a non-profit organization incorporated in Georgia, serving 2,000 perpetrators of violence against women in 1991. Men Stopping Violence believes that reproductive choice is critical to women's safety, autonomy and equality. The requirement of spousal notification of a woman's decision to terminate pregnancy impermissibly abridges a woman's right to reproductive choice, egregiously invades her right to privacy, and places her at grave personal risk. Therefore, we join in this brief to assist the Supreme Court in its deliberations on this critical issue of reproductive justice.

MY SISTER'S PLACE

My Sister's Place - Refuge from Violence in The Family - provides direct service, advocacy, and community education for abused women and their children. The core of violence and abuse is an imbalance of power. Any act to reduce or remove a woman's control over her body is a violent, abusive act. We support the empowerment of women which requires women having the power to choose.

NATIONAL COALITION AGAINST DOMESTIC VIOLENCE

The National Coalition Against Domestic Violence (NCADV) is a private, non-profit organization incorporated in the state of Oregon which is dedicated to the empowerment of battered women and their children and the elimination of personal and societal violence in the lives of women and their children. NCADV is primarily a network of service providers for battered women and their children.

NCADV is committed to the struggle for reproductive choice and equality for all women. We are signing on as an *amicus curiae* acknowledging our support for the position of the plaintiffs in the appeal to the U.S. Supreme Court in *Planned Parenthood of Southeastern Pennsylvania et al v. Casey et al.* At issue in this case is the Abortion Control Act of Pennsylvania, a statute which may be the most intrusive upon reproductive freedom in the country.

Of particular concern to us is the spousal notice requirement which would require women seeking abortions to present to the physician a signed statement that she has notified her spouse that she is about to undergo an abortion.

NCADV believes violence against women and children results from the use or threat of force to achieve and maintain control over others in intimate relationships, and societal abuses of power and domination in the forms of sexism, racism, homophobia, classism, anti-semitism, able-bodyism, ageism and other oppressions. Batterers engage in many forms of coercion and violence, including reproductive coercion and violence. Battering also often occurs during pregnancy. In one hospital emergency department 21% of pregnant women had been battered. These women had twice as many miscarriages as nonbattered women (Stark et al, 1981).

Statutorily mandated disclosure of pregnancy and the choice to abort jeopardizes battered women. At the individual level it increases the opportunity for batterers to exert control and dominance. At the institutional level it oppresses battered women by taking away additional choices and therefore skewing power

differentials even more in the batterer's favor.

The right to obtain an abortion for many battered women can mean the difference between being trapped in a violent relationship and choosing to leave the violence. We therefore join with the plaintiffs in offering this brief.

NATIONAL COALITION AGAINST SEXUAL ASSAULT

The National Coalition Against Sexual Assault is a non-profit organization incorporated in Illinois, representing 500 programs which serve victims of sexual assault.

The National Coalition Against Sexual Assault believes that reproductive choice is critical to women's safety, autonomy and equality. The requirement of spousal notification of a woman's decision to terminate pregnancy impermissibly abridges a woman's right to reproductive choice, egregiously invades her right to privacy, and places her at grave personal risk. Therefore, we join in this brief to assist the Supreme Court in its deliberations on this critical issue of reproductive justice.

NATIONAL WOMEN ABUSE PREVENTION CENTER

The National Women Abuse Prevention Center (NWAPC) is a domestic violence policy and resource center that works to create positive change in the social institutions that affect the lives of battered women and their children. A non-profit organization established in 1986, the National Center provides training, technical assistance, public education materials, and assistance in program and policy development to domestic violence advocates and other professionals who work with battered women.

Our interest in this case is due to our concern for battered women who would lose their ability to escape from violent husbands. Many battered women are raped and describe sexual assaults occurring during pregnancy. In addition to the physical and sexual assaults experienced by battered women during pregnancy, victims with children often choose to remain with an abusive husband out of economic necessity. If the abuser denies victims the option of choosing abortion, women would be trapped in lives of violence in order to support their children.

In addition, the danger to the health and well-being of the child is at stake. The March of Dimes has found that more children are born with birth defects due to domestic violence than for all the diseases for which women are currently inoculated.

NWAPC supports the right of women and their children to live free from violence and intimidation, and therefore supports the judgment of the District court and joins as an *amici* in this case.

NEW JERSEY COALITION FOR BATTERED WOMEN

The New Jersey Coalition for Battered Women is a statewide coalition of domestic violence service programs and concerned individuals whose purpose and mission is to end violence in the lives of women. Incorporated in 1979, the Coalition is a private non-profit corporation whose members include all non-governmental domestic violence programs in New Jersey.

The Coalition advocates for battered women with state level governmental and private organizations and the state legislature and governor to support legislation and policies that will benefit victims of domestic violence.

The NJ Coalition for Battered Women opposes any law which interferes with a woman's reproductive choice. The NJ Coalition for Battered Women especially opposes and warns against a spousal notification requirement for abortions. In cases where a woman seeking an abortion is a victim of spousal abuse, a notification requirement presents the abuser with a particularly insidious method to further abuse, harass and control his victim. The exceptions to this notification requirement are insufficient to protect battered women.

NEW YORK STATE COALITION AGAINST DOMESTIC VIOLENCE

The New York State Coalition Against Domestic Violence is a membership organization of battered women's shelters, safe home projects, counseling and advocacy groups, and individuals committed to empowering women and helping them to lead

violence-free lives. The Coalition is an inclusive organization that works with all women, regardless of race, class, ethnicity or sexual orientation. The Coalition believes in women's rights to choice and in the accessibility of services to all women, regardless of economic status. The Coalition strongly supports every woman's right to self-determination. Further, we steadfastly oppose any restrictions imposed on any woman's ability to freely access reproductive care or abortion services.

OREGON COALITION AGAINST DOMESTIC AND SEXUAL VIOLENCE

The Oregon Coalition Against Domestic & Sexual Violence (OCADSV) is a non-profit corporation, incorporated under the laws of the State of Oregon since 1978. The OCADSV has 31 member programs that provide direct services to victims of domestic and sexual violence throughout Oregon.

The OCADSV believes that a woman has a right to make choices concerning her health and well-being, free from control by the state or her husband. Wife abuse is caused, to a large extent, by a husband's need to exert power and control over his wife. Therefore, Pennsylvania's requirement that a woman notify her husband before she can get an abortion places the government in a position of colluding with and promoting violent criminal behavior. We believe this undermines respect for law as well as respect for individual rights.

The OCADSV has a strong interest in seeing that the constitutional rights of victims of domestic and sexual violence are upheld and that the law is an active agent in preventing these crimes, not promoting them. For these reasons, the OCADSV respectfully requests to be granted *amicus curiae* status in the case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*.

PENNSYLVANIA CAMPAIGN FOR CHOICE

The Pennsylvania Campaign for Choice is a broad-based, statewide, bi-partisan political action committee whose sole focus is to support pro-choice candidates for state office. We believe

that women must have the right to make private and personal decisions, such as the decision to have an abortion, without interference from the state. Therefore, we support the position of the plaintiffs in this case and join as an *amicus*.

PENNSYLVANIA COALITION AGAINST RAPE

The Pennsylvania Coalition Against Rape (PCAR) is a private, non-profit, tax-exempt coalition organization of 45 rape crisis centers providing service to victims of sexual violence in 58 counties in the Commonwealth of Pennsylvania. Each of the 45 rape crisis centers are private, non-profit, tax-exempt organizations. None of the rape crisis centers in Pennsylvania in any way represents or is affiliated with any branch of state or local government. Individual rape crisis centers exist for the sole purpose of providing advocacy and counseling to adult and child victims of sexual violence and persons who are significant in the lives of these victims. PCAR, as an umbrella organization, acts as a clearinghouse for information about issues related to sexual violence.

PSYCHOLOGY SOCIETY

The Psychology Society is a professional organization of men and women who treat people. Our practitioners believe that persons, whether they are patients or not, can and should make decisions that affect them without unwanted interference. Although we believe that sexual partners should decide before the act whether pleasure or procreation are desired, we fully support the woman's right to terminate a pregnancy - often circumstances change after the fact.

SURVIVORS, INC.

Survivors, Inc. is a non-profit organization incorporated in the Commonwealth of Pennsylvania for the purpose of providing services and advocacy on behalf of victims of domestic violence and their minor children in Adams County, Pennsylvania. Survivors, Inc. is a member of the PCADV's organization of 53 shelters, hotlines, counseling programs, safe home networks, legal

advocacy offices and transitional housing projects for battered women and their dependent children in the Commonwealth.

As advocates for battered women, we have seen firsthand the physical results of battering during pregnancy and have heard from the victims of the psychological trauma they and their infants have experienced. We have witnessed the effects of growing up in violent homes on the children who eventually come to shelter or support groups.

We regard the statutorily mandated disclosure to husbands of pregnancy and the choice to abort as an unacceptable intrusion into the privacy of women's lives. We also regard the provisions of Section 3209 of the Pennsylvania Abortion Control Act of 1982, as amended by Act 31 and Act 64, as significantly disempowering to the autonomy and equality of women, as well as life threatening to many, and therefore join with the Pennsylvania Coalition Against Domestic Violence and other *amici curiae* in supporting the judgment of the District Court which protects the reproductive and safety rights of battered women and children. We join with the plaintiffs and offer this brief to assist the Supreme Court in its deliberations on this critical issue of reproductive justice.

TIOGA COUNTY WOMEN'S COALITION

The Tioga County Women's Coalition is a non-profit organization incorporated in the Commonwealth of Pennsylvania affiliated with the Pennsylvania Coalition Against Domestic Violence. Our purpose is to provide services and advocacy on the behalf of battered women and their minor children. We support the judgment of the District Court to protect the reproductive rights and safety of battered women.

TURNING POINT OF LEHIGH VALLEY, INC.

Turning Point of Lehigh Valley is a non-profit organization incorporated in the Commonwealth of Pennsylvania which served 2,124 victims of domestic violence in 1991.

Turning Point of Lehigh Valley believes that the requirement of spousal notification of a woman's decision to terminate

pregnancy egregiously invades her right to privacy, and places her at grave personal risk. Therefore, we join in this brief to assist the Supreme Court in its deliberations on this critical issue of reproductive justice.

VERMONT NETWORK AGAINST DOMESTIC VIOLENCE AND SEXUAL ASSAULT

The Vermont Network Against Domestic Violence and Sexual Assault is a statewide network of direct service groups committed to ending physical, sexual, and emotional violence against women and their children through direct services and social change. The Network believes the roots of violence against women lie in the patriarchal structure of society and the family, which condones violence as a method of control. Because most victims of domestic violence and sexual assault are women and children, the Network's primary focus is on the battered women and their children and sexual assault survivors. The Network's goals are: To facilitate communication among organizations for battered women and sexual assault survivors in Vermont. a) To share skills and information b) To coordinate service delivery and provide training. c) To develop resources. To educate the community about violence against women and children through public speaking, literature and news media. To initiate legislation on the state and national levels. To provide advocacy on behalf of battered women and sexual assault survivors on a statewide level and advocacy on behalf of member organizations.

VOLUNTEERS AGAINST ABUSE CENTER OF BUTLER COUNTY, INC.

The Volunteers Against Abuse Center of Butler County, Inc. is a non-profit organization incorporated in the Commonwealth of Pennsylvania, serving 1,015 victims of domestic violence in 1991. The Volunteers Against Abuse Center of Butler County, Inc. believes that reproductive choice is critical to women's safety, autonomy and equality. The requirement of spousal notification of a woman's decision to terminate pregnancy impermissibly abridges a woman's right to reproductive choice, egregiously

invades her right to privacy, and places her at grave personal risk. Therefore, we join in this brief to assist the Supreme Court in its deliberations on this critical issue of reproductive justice.

WASHINGTON COALITION OF SEXUAL ASSAULT PROGRAMS

The Washington Coalition of Sexual Assault Programs (WCSAP) is a coalition of over 40 rape crisis, sexual assault programs throughout Washington State. We have an additional 100 associate members, including individuals and other agencies working with both adult and child victims of sexual assault and abuse. WCSAP acts as a professional resource for rape crisis and sexual assault programs, providing training and technical assistance. The organization provides information, referrals and education to the public at large, schools, churches, government organizations and other professionals and agencies. WCSAP also acts as an advocate for the rights of sexual assault and sexual abuse victims in the legislative and criminal justice systems.

A WOMAN'S PLACE

A Woman's Place is a non-profit organization incorporated in the Commonwealth of Pennsylvania to provide advocacy and services to battered women and their children in Bucks County as well as educational and prevention programs and advocacy of efforts to end this crime. In 1991, the agency served 2,791 victims of domestic violence and 340 children, family members or friends of victims of domestic violence. A Woman's Place believes that reproductive choice is critical to women's safety, autonomy and equality. The requirement of spousal notification of a woman's decision to terminate pregnancy compromises a woman's right to reproductive choice, invades her right to privacy and, especially in the case of a battered woman, places her at grave personal risk. Therefore, we join in this brief to assist the Supreme Court in its deliberations on this critical issue of reproductive justice and women's safety.

WOMEN AGAINST ABUSE, INC. AND WOMEN AGAINST ABUSE LEGAL CENTER, INC.

Women Against Abuse (WAA) is a non-profit organization founded in 1976 for the purpose of providing service and advocacy to victims of domestic violence and their children. Since that time, WAA has provided shelter, transitional housing, legal services, counseling and advocacy to more than 100,000 battered women in the Philadelphia area.

Our work has taught us that battered women are at high risk for sustaining unwanted pregnancies, as they are often denied access to contraceptives and coerced into intercourse. Forcing women to become pregnant and carry pregnancies to term is a method batterers frequently use to maintain physical, emotional and financial control over their victims. For example, one woman represented by our Legal Center made the following statement: "I have lived with [my abusive husband] off and on for eight years. I have been beaten by him repeatedly over this period of time. Recently he has become more abusive and threatens to kill me. He has hit me with belts, with a shoe, and with his fists. I am pregnant but I am not gaining weight. He forced me to get pregnant by throwing away my birth control pills. I am afraid for my life and for my children's psychological well being. . . [He has] threatened to cause a miscarriage." At the time this statement was being made, our client was 25 years old and had six children.

In another case currently being handled by our Legal Center, we represent a battered woman who became pregnant after she was raped by her batterer. Subsequently, the batterer attempted to force her to sign a paper giving him custody of the baby when it is born and has threatened to make her life "a living hell" if she has an abortion.

Additionally, violence often escalates in frequency and severity during pregnancy. Our experience is that women are more likely to be beaten when pregnant and are at particular risk for abdominal assaults. For these reasons, mandatory disclosure to husbands of both the pregnancy and the choice to abort jeopardizes the lives and safety of battered women. The fear of

violence following disclosure interferes with the battered woman's fundamental right to choose abortion in a timely fashion or at all.

For many battered women, the right to an abortion means the difference between being trapped permanently in violent and abusive situations and achieving lives free of violence. Because WAA believes that the judgment of the District Court protects the reproductive and safety rights of battered women and children, we join with the plaintiffs and offer this brief to assist the U.S. Supreme Court in its deliberation on this critical issue of reproductive justice.

WOMEN'S CENTER & SHELTER OF GREATER PITTSBURGH

The Women's Center and Shelter of Greater Pittsburgh is a non-profit organization incorporated in 1974 in the Commonwealth of Pennsylvania for the purposes of providing emergency shelter and supportive services to victims of domestic violence and their minor children, and of providing community education on the problems of domestic violence.

Annually, the Women's Center and Shelter provides over 10,000 nights of shelter to more than 700 battered women and their children, handles over 14,000 hotline calls, provides legal advocacy and court accompaniment to more than 3,300 victims of domestic violence, and provides individual or group counseling to more than 1,000 abused women and their children.

The Women's Center and Shelter's work with survivors of abuse in the last sixteen years has shown that many batterers engage in reproductive coercion and violence. We also have learned that both sexual and physical violence often sharply increase once a batterer hears of a pregnancy. Violence during pregnancy is often focused on the abdomen, while otherwise the violence is more typically directed at the head or torso of battered women. A high percentage of the women sheltered at WC&S are pregnant.

It is the belief of the Women's Center and Shelter (WC&S) that statutorily mandated disclosure to husbands of the

pregnancy and the choice to abort risks the lives and welfare of battered women. Further, when battered women seek to separate from batterers, few husbands permit their wives independence; and they continue their violence, controlling tactics and terrorism against wives through the exercise of their parental rights, particularly during child visitation. For many battered women, the right to an abortion means the difference between being trapped permanently in violent and abusive situations and achieving lives free of violence.

Because the Women's Center and Shelter believes that the judgment of the District Court protects the reproductive and safety rights of battered women and children, we join with the plaintiffs in offering this *amicus* brief to assist the U.S. Supreme Court in its deliberations on this critical issue of reproductive justice in *Planned Parenthood v. Casey*, where husband notification under the Abortion Control Act is at issue.

WOMEN'S CENTER OF MONTGOMERY COUNTY

The Women's Center of Montgomery County is a non-profit organization incorporated in the Commonwealth of Pennsylvania, serving 2,723 victims of domestic violence in 1991. The Women's Center of Montgomery County believes that reproductive choice is critical to women's safety, autonomy and equality. The requirement of spousal notification of a woman's decision to terminate pregnancy impermissibly abridges a woman's right to reproductive choice, egregiously invades her right to privacy, and places her at grave personal risk. Therefore, we join in this brief to assist the Supreme Court in its deliberations on this critical issue of reproductive justice.

WOMEN'S CENTER OF WARREN AND FOREST COUNTIES, INC.

The Women's Center of Warren and Forest Counties, Inc. is a non-profit organization incorporated in Pennsylvania, serving 800 victims of domestic violence in 1991. The Women's Center of Warren and Forest Counties, Inc. believes that reproductive choice is critical to women's safety, autonomy and equality. The

requirement of spousal notification of a woman's decision to terminate pregnancy impermissibly abridges a woman's right to reproductive choice, egregiously invades her right to privacy, and places her at grave personal risk. Therefore, we join in this brief to assist the Supreme Court in its deliberations on this critical issue of reproductive justice.

WOMEN'S COALITION OF ST. CROIX, VIRGIN ISLANDS

The Women's Coalition of St. Croix, founded in 1981, is dedicated to ending violence in the lives of women and children. We provide crisis intervention, support, and emergency services for victims of domestic violence, rape and other crime.

We are deeply concerned about the problems of battered women and know first-hand that many battered women become pregnant as a result of spousal rape and/or the batterers' refusal to allow women to use birth control.

This organization supports the plaintiffs in the case of *Planned Parenthood of Southeastern Pennsylvania et al v. Casey* now pending in the United States Supreme Court.

WOMEN'S HELP CENTER, INC.

The Women's Help Center, Inc. is a non-profit organization incorporated in the Commonwealth of Pennsylvania, serving more than 1,200 victims of domestic violence in 1991. The Women's Help Center believes that reproductive choice is critical to women's safety, autonomy and equality. The requirement of spousal notification of a woman's decision to terminate pregnancy impermissibly abridges a woman's right to reproductive choice, egregiously invades her right to privacy, and places her at grave personal risk. Therefore, we join in this brief to assist the Supreme Court in its deliberations on this critical issue of reproductive justice.

WOMEN'S RESOURCES OF MONROE COUNTY, INC.

Women's Resources of Monroe County, Inc. is a non-profit organization incorporated in the Commonwealth of Pennsylvania, serving in fiscal year 90/91, 839 victims of

domestic violence and 240 victims of sexual assault. Women's Resources of Monroe County, Inc. believes that reproductive choice is critical to women's safety, autonomy and equality. The requirement of spousal notification of a woman's decision to terminate pregnancy impermissibly abridges a woman's right to reproductive choice, egregiously invades her right to privacy, and places her at grave personal risk. Therefore, we join in this brief to assist the Supreme Court in its deliberations on this critical issue of reproductive justice.

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In The
Supreme Court of the United States
October Term, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *ET AL.*,
Petitioners,

v.

ROBERT P. CASEY, *ET AL.*,
Respondents.

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Petitioners,

v.

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Brief *Amici Curiae* of the Alan Guttmacher Institute, *et al.*, in Support of Planned Parenthood of Southeastern Pennsylvania, *et al.*

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF CASES AND OTHER AUTHORITIES	iii
INTEREST OF AMICI	1
BACKGROUND STATEMENT	4
SUMMARY OF ARGUMENT	13
ARGUMENT	15
I. THE RIGHT OF REPRODUCTIVE PRIVACY IS ONE OF OUR MOST CHERISHED AND FUNDAMENTAL RIGHTS	15
A. Classifying "Privacy" As A "Limited" Fundamental Right Misconstrues Decades Of This Court's Jurisprudence	18
B. Allowing States, Under The "Undue Burden" Standard, To Define "Fetus" And "Life" In A Scientifically Incorrect Manner Threatens All Reproductive Rights	28

1. The Undue Burden Standard Would Allow Severe Restrictions On The Right To Use Contraceptives 37

2. Laws Defining Protectable Life As The Fertilized Ovum Unconstitutionally Restrict The Use Of Reproductive Technologies 46

CONCLUSION 54

TABLE OF CASES AND OTHER AUTHORITIES

CASES **Page**

Carey v. Population Services International, 431 U.S. 678 (1977) 15, 23

Charles v. Carey, 627 F.2d 722 (7th Cir. 1980) 45

Charles v. Daley, 749 F.2d 452 (7th Cir. 1984, appeal dism'd sub nom. 46

City of Akron v. Center for Reproductive Health, 462 U.S. 416 (1983) 20, 24 46

City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) 36

Cruzan v. Director, Missouri Department of Health, ___ U.S. ___, 110 S. Ct. 2841 (1990) 16

Diamond v. Charles, 476 U.S. 54 (1986) 46

Eisenstadt v. Baird, 405 U.S. 438 (1972) . . . . . passim

Grayned v. City of Rockford, 408 U.S. 104 (1972) 35

Griswold v. Connecticut, 381 U.S. 479 (1965) . . . . . passim

Lifchez v. Hartigan, 735 F. Supp. 1361, (N.D. Ill. 1990) 47

Loving v. Virginia, 388 U.S. 1 (1967) 14

Maher v. Roe, 432 U.S. 464 (1977) 46

Olmstead v. United States, 277 U.S. 438 (1928) 22

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 17

Planned Parenthood of Southeastern Pennsylvania v. Casey, 947 F.2d 682 (3d Cir. 1991) . . . . . passim

Roe v. Wade, 410 U.S. 113 (1973) . . . . . passim

Safley v. Turner, 482 U.S. 78 (1987) 17

Skinner v. Oklahoma, 316 U.S. 535 (1942) 15, 17

Smith v. Cote, 513 A.2d 341 (N.H. 1986) 52

Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) 16, 23 25

Union Pacific Railway Co. v. Botsford, 141 U.S. 250 (1891) 16

United States v. Carolene Products Co., 304 U.S. 144 (1938) 19

Webster v. Reproductive Health Services, 492 U.S. 490 (1989) 45

Whalen v. Roe, 429 U.S. 589 (1977) 17

STATUTORY PROVISIONS

Ill. Rev. Stat. ch 38, § 81-22 (1989) 10

Ky. Rev. Stat. § 311.720 (1990) 10

La. Rev. Stat. Ann. § 40:1299.35.1 (West 1991) . . . 10

Mass. Ann. Laws ch. 112, § 12K (West 1983) 10

Minn. Stat. Ann. § 144.343 (West 1989) 10

Mo. Ann. Stat. § 188.015 (Vernon 1992) 10

Neb. Rev. Stat. § 28-326 (1989) 10

Okla. Stat. Ann. tit. 63, § 1-730 (West 1984) 10

18 Pa. Cons. Stat. Ann. § 3203 (Purdon 1991) . . . . . passim

Pa. Cons. Stat. Ann. § 3208.1 (Purdon 1991) 34

Pa. Cons. Stat. Ann. § 3213(e) (Purdon 1991) 49

Pa. Cons. Stat. Ann. § 3216(c) (Purdon 1991) 52

Pa. Cons. Stat. Ann. § 3216(e) (Purdon 1991) 50

S.C. Code Ann. § 44-41-10 (Law Co-op 1991) 11

Wisconsin, Wis. Stat. Ann. § 940-04 (West 1982) 11

Wyo. Stat. Ann. § 35-6-101 (1990) 11

OTHER AUTHORITIES

Adashi, The Morning After: novel hormonal approaches postcoital interception, 39 Fertil. & Steril. (1983) 41

Alan Guttmacher Institute, Teenage Pregnancy: The Problem That Hasn't Gone Away (1981) 8

American Fertility Society, In vitro fertilization-embryo transfer in the United States: 1989 results from IVF-ET Registry, 55 Fertil. and Steril. (1991) 47

American Medical Association, Data Assessment of IUD, 261 J. A.M.A. 2127 (1989) 38

American College of Obstetricians & Gynecologists, Standards for Obstetric-Gynecologic Services (7th ed. 1989) 11

Balieu, RU 486 as an Antiprogesterone Steroid: From Receptor to Contragestion and Beyond, 262 J. A.M.A. 1808 (1989) 44

Brahams, Abortion and assisted parenthood in the USA, 337 The Lancet 228 (1991) 42

Burgess & Homstrom, Rape: Crisis and Recovery 214 (1979) 41

Centers for Disease Control Surveillance Summaries, Special Focus on Reproductive Health Surveillance (1991) . . . 7, 9

Cook, et al., Pregnancy Prophylaxis: Parenteral Postcoital Estrogen, 67 Obstet. & Gynecol. (1986) 41

Creasy and Resnik, Maternal-Fetal Medicine: Principles and Practice 113 (2d ed. 1989) 33

Cunningham, F. & MacDonald, P. & Gant, N., Williams Obstetrics, (18th ed. 1989) . . passim

Dawson, Fertilization and moral status: A scientific perspective, in Embryo Experimentation 49 (P. Singer et al. eds., 1990) 31, 32

Dawson, Introduction: An Outline of scientific aspects of human embryo, in Embryo Experimentation (D. Singer, et al., eds. 1990) 48

Drugan, et al., Determinants of Parental Decisions To Abort For Chromosome Abnormalities, 10 Prenat. Diag. 483 (1990) 53

Duke, et al., Women's Reproductive Health: A Chronic Crisis 266 J. A.M.A. 1846, (1991) 3, 6

Fasoli, et al., Post-coital contraception: an overview of published studies, 39 Contraception 459 (1989) 41

Forrest, et al., U.S. Women's Contraceptive Attitudes and Practice: How Have They Changed in the 1980s? 20 Fam. Plan. Persp. 112 (1988) 6

Glass, "Egg Transport and Fertilization," in 5 Gynecology and Obstetrics ch. 46 at 1-3 (J. Sciarra, ed., rev. ed. 1985) 29, 30

Gold, R., Abortion and Women's Health: A Turning Point for America (1990) 9

Goldsmith, As Data on Antiprogesterone Compounds Grow, Societal and Scientific Aspects are Scrutinized, 265 J. A.M.A. 1628, 1628 (1991) 44

Hatcher, R., et al., Contraceptive Technology (15th ed. (1990)) 38, 39 40

Hutchings, et al., The IUD After 20 Years: A Review, 17 Fam. Plan. Persp. 244 (1985) 38

Jones, Cryopreservation and its Problems, 53 Fertil. and Steril. 780, 783 (1990) 48

Kaeser, Contraceptive Development: Why the Snail's Pace?, 22 Fam. Plan. Persp. 131 (1990) 42

Koonin, et al., Pregnancy Associated Deaths due to AIDS in the United States, 261 J. A.M.A. 1306 (1989) 9

Michael & Buckle, Screening for genetic disorders: therapeutic abortion and IVF, 16 J. Med. Ethics 43 (1990) 52

Milunsky, "Genetic Counseling: Prelude to Prenatal Diagnosis", in Genetic Disorders and the Fetus: Diagnosis, Prevention and Treatment (1986) 11, 54

Mishell, Intrauterine Devices, 22 Clinics in Obstet. and Gynecol. 679 (1984) 38

Ory, et al., Making Choices: Evaluating the Health Risks and Benefits of Birth Control Methods (Alan Guttmacher Institute 1983) . . . 5, 6 39

Potts, Birth Control Methods In The United States 20 Fam. Plan. Persp. 288 (1988) 43

Roberts, U.S. Lags on Birth Control Development 247 Science 909 (1990) 42

Sacker & Neuhoff, "Medical and Psychological Risk Factors in the Pregnant Adolescent," in Pregnancy and Adolescence: Needs, Problems and Management 107 (I. Stewart, et al., eds. 1982) 8

Saxena, Measurement and clinical significance of preimplantation blastocyst gonadotrophins, J. Reprod. & Fertil. 115 (1989) 33

Shoupe & Mishell, Norplant: Subdermal Implant System For Long Term Contraception, 160 Am. J. Obstet. Gynecol. 1286 (1989) 38

Tribe, L., American Constitutional Law (2d ed. 1988) 19, 21

Ulmarn, et al., RU 486, 262 Scientific American 42 (1990) 44

U.S. Dept. of HHS, "IUDs: Guidelines for Informed Decision-making and Use," (1987) 38

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IN THE
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OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, et al.,

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PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, et al.,

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On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF AMICI CURIAE OF THE ALAN GUTTMACHER INSTITUTE, et al. IN SUPPORT OF PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, et al.

INTEREST OF AMICI CURIAE

Amici curiae, the Alan Guttmacher Institute, the Los Angeles Regional Family Planning Council, the International Women's Health Coalition, the National Association of Nurse Practitioners in Reproductive Health, the National Family Planning and Reproductive Health Association, the National Society of Genetic Counselors, and the individual members of the associational amici, are integrally involved in women's reproductive health care: they provide or supervise reproductive medical care; they teach in medical schools; and they provide information and counseling about reproductive health care matters, including contraception and genetics.[1]

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[1] A more complete description of each amicus is set forth in Appendix A to this brief.

The interest of amici stems from their obligation to provide medical care of the highest quality. Amici file this brief on behalf of petitioners, after securing the consent of petitioners and respondents,[2] and submit that that part of the Court of Appeals' decision classifying the right to privacy as a "limited" fundamental right and upholding the Pennsylvania law should be reversed.

Women's reproductive health care is in crisis. High rates of maternal and infant mortality, increased incidences of breast cancer, unintended pregnancies, declining contraceptive options, restrictions on abortion, increased infertility, and an epidemic

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[2] See Appendix B for copies of these letters of consent.

of sexually transmitted diseases, including the HIV virus, all threaten the well-being of women.[3] Although the solutions to many of these problems are well known, health professionals' remedial efforts are stymied by restrictive laws -- such as the Pennsylvania statute -- which endanger both women and reproductive health care providers.[4]

The sound practice of reproductive health care requires the ready availability of the full range of modern medical services, including contraceptives, genetic screening, and safe and legal abortion. Amici's

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[3] R. Duke, et al., Women's Reproductive Health: A Chronic Crisis, 266 J. A.M.A. 1846 (1991) (hereinafter cited as "Women's Reproductive Health").

[4] See id. at 1847.

professional experience is that obstructing or delaying the availability of appropriate reproductive health care will severely impair medical practice and will result in serious injury or death to many women and their children.

Amici are particularly concerned that any further erosion of the woman's fundamental right of privacy articulated in Roe v. Wade, 410 U.S. 113 (1973), as applied to abortions, inevitably will have an adverse impact on the right of privacy in every other aspect of reproductive health care, including contraception, genetic testing, and medically-assisted conception such as in vitro fertilization.

BACKGROUND STATEMENT

Amici include the primary health care providers of many of the 55 million

women of reproductive age in the United States.[5] Each of these women has unique needs and medical conditions which influence her decisions about whether and when to become pregnant.

It is difficult to overestimate the importance to a woman of controlling her own fertility: the power to plan each pregnancy often foretells the woman's educational attainment, economic stability, and very health and longevity. With safe and accessible contraceptives, women live longer, healthier lives.[6]

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[5] Ory, et al., Making Choices: Evaluating the Health Risks and Benefits of Birth Control Methods 10 (Alan Guttmacher Institute 1983) (hereinafter cited as "Making Choices").

[6] See F. Cunningham, P. MacDonald & N. Gant, Williams Obstetrics 4 & Table 1-2 (18th ed. 1989) (hereinafter cited as "Williams Obstetrics").

No contraceptive method, however, is perfect. Although more than 92 per cent of sexually active women use some contraceptive method,[7] every year more than three million American women face an unintended pregnancy. Approximately 45 per cent of women in the United States will have an abortion during their lives.[8]

Even in the age of modern obstetrics, women face considerable risks from pregnancy, especially those that are unintended. Mentally retarded

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[7] Forrest, et al., U.S. Women's Contraceptive Attitudes and Practice: How Have They Changed in the 1980s? 20 Fam. Plan. Persp. 112, 116 (1988).

[8] Making Choices, at 10. It is estimated that in the United States, "about two thirds of women will have an unintended pregnancy in their lifetime and about 45 per cent will have an abortion." Women's Reproductive Health, at 1847.

women unable to understand how they became pregnant experience elevated health risks, as do women with other medical conditions such as coronary artery disease, diabetes, and hypertension. Even healthy women over 30 have a higher risk of maternal death than do younger women.[9]

Pregnant women younger than age 15 particularly face elevated medical perils. Teens suffer higher incidences of toxemia, anemia, miscarriage, and premature and prolonged labor. The maternal mortality rate for mothers

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[9] Centers for Disease Control Surveillance Summaries, Special Focus on Reproductive Health Surveillance 9 (July 1991), (hereinafter cited as "CDC Special Focus on Reproductive Health"). Women between the ages of 35-39 are almost four times more likely to die than women ages 20-24; this risk is almost ninefold for women over 40. Id. at 9 and Table 2.

under 15 is 1000 times higher than for women in their 20's and 200 times higher for women between 15 and 19.[10]

Some medical difficulties arise during the pregnancy. These include problems caused by the pregnancy itself, such as toxemia or preeclampsia, which may elevate the woman's risk of death or injury if the pregnancy continues.[11] Pregnancy often accelerates the progress

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[10] Sacker & Neuhoff, "Medical and Psychological Risk Factors in the Pregnant Adolescent," in Pregnancy and Adolescence: Needs, Problems, and Management 107, 127 (I. Stewart et al., eds. 1982). Children born to teens suffer, too. Teens who give birth at an age younger than 15 particularly risk low birth weight infants and premature deliveries. Alan Guttmacher Institute, Teenage Pregnancy: The Problem That Hasn't Gone Away 29 (1981). Low birth weight and premature labor are the leading causes of infant mortality and childhood disease. Williams Obstetrics at 4.

[11] Williams Obstetrics at 3.

of the HIV infection (AIDS), jeopardizing the life of the woman and any child she might have.[12]

Effective contraception and legal abortion present less of a threat to women's health and lives than does childbirth. More than 51 per cent of maternal deaths occur in connection with a live birth; only 4.7 per cent of maternal deaths occur in connection with legal abortions.[13] Thus, forcing even healthy women of optimal age to carry an unintended pregnancy to term increases

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[12] Koonin, et al., Pregnancy Associated Deaths due to AIDS in the United States, 261 J. A.M.A. 1306, 1308 (1989).

[13] CDC Special Focus on Reproductive Health at 11. Similarly, the ratio of deaths per 100,000 live births for the years 1979 to 1986 was 9.1, id. at 9; the ratio of deaths per 100,000 abortions for 1981-85 is 0.6. R. Gold, Abortion and Women's Health: A Turning Point for America 28-29 (1990).

their risk of death and disease. State laws which impede access to legal abortion and effective contraception inevitably will force some women to turn in despair to illegal abortion.

For millions of women who want to conceive and bear a child, complete reproductive health care must include the option of genetic counseling, prenatal testing, and diagnosis, all of which are threatened by statutes -- like Pennsylvania's -- defining protected life as beginning at fertilization.[14]

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[14] At least 11 states define protected life as the equivalent of the fertilized ovum. Those states include Illinois, Ill. Rev. Stat. ch 38, § 81-22 (1989); Kentucky, Ky. Rev. Stat. § 311.720 (1990); Louisiana, La. Rev. Stat. Ann. § 40:1299.35.1 (West 1991); Massachusetts, Mass. Ann. Laws ch. 112, § 12K (West 1983); Minnesota, Minn. Stat. Ann. § 144.343 (West 1989); Missouri, Mo. Ann. Stat. § 188.015 (Vernon 1992); Nebraska, Neb. Rev. Stat. § 28-326 (1989); Oklahoma, Okla. Stat.

Prenatal diagnosis is especially essential for women who have an increased risk of giving birth to a child with a serious disease or genetic condition.

Once a physician learns that the fetus has a genetic anomaly, professional medical standards mandate that, within appropriate time limitations, the woman be informed of her option to terminate the pregnancy.[15]

Ann. tit. 63, § 1-730 (West 1984); South Carolina, S.C. Code Ann. § 44-41-10 (Law Co-op 1991); Wisconsin, Wis. Stat. Ann. § 940-04 (West 1982); and Wyoming, Wyo. Stat. Ann. § 35-6-101 (1990).

[15] See American College of Obstetricians & Gynecologists, Standards for Obstetric-Gynecologic Services 62, 64-65 (7th ed. 1989) (hereinafter cited as "ACOG Standards"); see also A. Milunsky, "Genetic Counseling: Prelude to Prenatal Diagnosis", in Genetic Disorders and the Fetus: Diagnosis, Prevention and Treatment 4, 20-21 (1986) (hereinafter cited as "Milunsky, Genetic Counseling").

State laws -- like Pennsylvania's -- that force those women to receive certain information about the developing fetus and to wait a specified time period after they have already decided to terminate the pregnancy only increase the severe emotional trauma of such tragedies.

Finally, for the millions of couples who want children but experience fertility problems,[16] medical assistance in achieving pregnancy is indispensable. Technological advances used to help women desiring children become pregnant include: in vitro fertilization, and its variations of gamete intrafallopian transfer ("GIFT") and zygote intrafallopian transfer ("ZIFT"); the flushing of an embryo from the uterus of

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[16] Williams Obstetrics at 920.

one woman for subsequent insertion into the uterus of another woman; and the cryopreservation of any excess embryos produced. By defining the fertilized ovum as a person with legal rights, the states inhibit research that advances their stated goal of fostering childbirth.

SUMMARY OF ARGUMENT

If upheld, the Pennsylvania statute and others like it, unquestionably will disrupt the delivery of the full range of reproductive health care to millions of American women. The Pennsylvania definition of fetus as the equivalent of "fertilization" and of "conception" -- "the fusion of a human spermatozoan with a human ovum"[17] -- and similar

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[17] 18 Pa. Cons. Stat. Ann. § 3203 (Purdon 1991).

definitions adopted by at least 11 other states contravene science and modern medical practice. By upholding a statute premised upon this definition and by devaluing reproductive privacy to the status of a "limited" fundamental right, the Court of Appeals has opened the door to government interference not only in decisions about abortion, but also in such inherently personal matters as decisions about contraception, assisted conception, and other uses of reproductive technology. Such interference, if sustained by this Court, will strike at the heart of basic concepts of individual liberty in our free society. See Griswold v. Connecticut, 381 U.S. 479 (1965); Loving v. Virginia, 388 U.S. 1 (1967); Eisenstadt v. Baird, 405 U.S. 438

(1972); see also Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

ARGUMENT

I. THE RIGHT OF REPRODUCTIVE PRIVACY IS ONE OF OUR MOST CHERISHED AND FUNDAMENTAL RIGHTS.

Central to our Constitution's concept of ordered liberty is the right of individuals to make informed decisions about "whether to bear or beget a child." Eisenstadt, 405 U.S. at 453. This constitutional right of privacy, whose heritage is "older than the Bill of Rights," Griswold, 381 U.S. at 486, resolutely "protects individual decisions in matters of childbearing," Carey v. Population Services International, 431 U.S. 678, 687 (1977) (White, J., concurring in pertinent part and concurring in result), because "such decisions are none of government's

business." Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 792 n.2 (1986) (White, J., dissenting). Indeed, no right can be more fundamental or more firmly rooted in this nation's history and tradition than the right to personal bodily integrity and autonomy.[18]

The fundamental right of reproductive privacy enunciated in Griswold, Eisenstadt, and Roe was the culmination of a long continuum of cases stemming back at least as far as Union Pacific Railway Co. v. Botsford, 141

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[18] See Cruzan v. Director, Missouri Department of Health, ___ U.S. ___, 110 S. Ct. 2841, 2856 (1990) (O'Connor, J., concurring) ("[b]ecause our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause").

U.S. 250, 251 (1891)(citation omitted), in which this Court stated:

> No right is held more sacred or is more carefully guarded, than the right of every individual to the possession and control of his own person[.] . . . "The right to one's person may be said to be a right of complete immunity; to be let alone."

This right, which has come to be known as the right of privacy, protects a broad spectrum of individual decisionmaking from governmental interference, Whalen v. Roe, 429 U.S. 589, 599-600 (1977), including decisions about: marriage, Safley v. Turner, 482 U.S. 78, 95-96 (1987); child rearing and education, Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); procreation, Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942); contraception, Griswold, 381 U.S. at 486, and Eisenstadt, 405 U.S. at 453; and abortion, Roe, 410 U.S. at 150-

54. To snip at even one thread of the carefully woven fabric of constitutional privacy, as the Third Circuit does by severing abortion from this continuum, threatens to unravel the entire doctrine.

A. Classifying "Privacy" As A "Limited" Fundamental Right Misconstrues Decades Of This Court's Jurisprudence.

The Third Circuit's notion that a woman's privacy right to choose an abortion is but a "limited" fundamental right, and that only an "undue burden" on the exercise of that right may be found unconstitutional, Planned Parenthood of Southeastern Pennsylvania v. Casey, 947 F.2d 682, 688, 694-98 (3d Cir. 1991), is inaccurate and propounds an illegitimate and unworkable standard of constitutional litigation. There is no such thing as a limited fundamental

right, and no right has ever been so designated in this Court's jurisprudence. (See Brief of Plaintiffs-Petitioners for a comprehensive discussion of the problems created by such a standard.)

Classification of a right as "fundamental" reflects a judgment that the right is so important in our constitutional constellation that the government's power to regulate or limit the exercise of that right must, of constitutional necessity, narrowly be constrained. See United States v. Carolene Products Co., 304 U.S. 144, 152 n. 4 (1938). For the past half-century, this Court's decisions have delineated between rights which are considered fundamental, and those which are not. See L. Tribe, American Constitutional

Law §§ 11-1 - 11-5, at 769-84 (2d ed. 1988) and cases cited therein.

In creating the "limited" fundamental rights classification, 947 F.2d at 688, the Court of Appeals misconstrues this Court's fundamental rights jurisprudence as well as its privacy and abortion jurisprudence.[19] One searches the annals of constitutional law in vain to find a decision of a majority of this Court

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[19] Neither this Court's majority opinion nor Justice O'Connor's dissent in City of Akron v. Center for Reproductive Health, 462 U.S. 416 (1983), create the separate classification of "limited" fundamental right. To the contrary, in her Akron dissent, Justice O'Connor specifically embraces the fundamental rights classification, albeit disagreeing with the result reached by the majority. Akron, 462 U.S. at 452-53 (O'Connor, J., dissenting).

creating a third category of rights -- "limited" fundamental rights.[20]

The Third Circuit's analysis has profound implications for all of the other rights which this Court has long deemed fundamental and has evaluated under the strict scrutiny standard. The practical effect of the Third Circuit's "limited" fundamental right/undue burden analysis could be to evaluate nearly all state restrictions on all fundamental rights under the rational basis test.

The Court of Appeals' designation of privacy as a "limited" fundamental

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[20] Notwithstanding the foregoing, the Constitution does not deny government all authority to enact laws that may touch upon or even limit certain exercises of fundamental rights. But, in such cases, the government must show a compelling state interest and that the statute at issue is narrowly tailored to advance that interest. See L. Tribe, American Constitutional Law § 11-1, at 770 and cases cited therein.

right, 947 F.2d at 688, also profoundly misconceives the nature of the privacy right in such cases as Griswold and Eisenstadt. Constitutional protection for the right of privacy does not depend on the absence of the fetus, but rather is a right "as against the Government . . . to be let alone," Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) to make procreative decisions. As this Court acknowledged in Roe, the presence of the fetus does not undercut the "fundamental" nature of the privacy right, but instead invokes the countervailing state interests of maternal health and fetal life at various stages of the pregnancy. Roe, 410 U.S. at 162-63.

Indeed, the right of privacy may be more critical after conception given the profound and inevitable effect of bearing a child on a woman's future life. A pregnant woman has no choice but abortion to avoid bearing a child against her will, whereas a woman denied the use of contraceptives can avoid pregnancy by abstaining from sexual intercourse. Carey, 431 U.S. at 713 (Stevens, J., concurring).[21]

Thus, any attempt to limit the privacy right based on the "potentiality" of the life of the fetus must fail. Although perhaps "potential

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[21] See also Thornburgh, 476 U.S. at 776 (Stevens, J., concurring): "I fail to see how a decision on childbearing becomes less important the day after conception than the day before. Indeed, if one decision is more 'fundamental' to the individual's freedom than the other, surely it is the postconception decision that is the more serious."

life is no less potential in the first weeks of pregnancy than it is at viability or afterward," Akron, 462 U.S. at 461 (O'Connor, J., dissenting), for that matter, life is no less "potential" at the point at which a man and a woman engage in sexual intercourse. Nor is it any less "potential" at fertilization, the point at which Pennsylvania would protect life. However, protecting all such "potential" life could eviscerate modern contraceptive practice. See infra at 37-45.

It is not the abstract "potential" for life that the Court in Roe recognized as compelling enough to justify narrow restrictions on post-viability abortions. Rather, it is the probability of a live-born person that Justice Blackmun's viability

determination addressed as the point at which the state's interest in the life of the fetus becomes compelling. Roe, 410 U.S. at 164-65. As Justice Stevens stated in his concurrence in Thornburgh, 476 U.S. at 778 (citations omitted):

> I should think it obvious that the state's interest in the protection of an embryo -- even if that interest is defined as "protecting those who will be citizens," ibid. -- increases progressively and dramatically as the organism's capacity to feel pain, to experience pleasure, to survive, and to react to its surroundings increases day by day. The development of a fetus -- and pregnancy itself -- are not static conditions, and the assertion that the government's interest is static simply ignores this reality.

To deny the fundamental nature of the privacy right and to lower the standard of review from "strict scrutiny" to "undue burden" could, if the Court of Appeals is upheld, eviscerate not only the right to

abortion, but every other aspect of the right to privacy. This case demonstrates that the practical effect of the Third Circuit's "limited" fundamental rights/undue burden analysis on restrictions on reproductive privacy is to almost always find no undue burden and to uphold nearly all such restrictions under the rational basis test; the Court of Appeals itself concedes that the relevant challenged provisions of the Pennsylvania statute would fail to pass constitutional muster under the strict scrutiny standard. Casey, 947 F.2d at 697, 706 and n.20.

Under the Court of Appeals' analysis, restrictions on the right to use contraception and technology-assisted methods of conception arguably could be sustained under the rational

basis standard of review, absent a showing of undue burden. Given this deferential standard, could government, in a time of overpopulation, force a pregnant woman to use Norplant, or, given today's concerns over AIDS, could government compel every man to wear a condom?

The consequences of a decision upholding the Court of Appeals would be dire indeed. At a minimum, women in at least eleven other states could be stripped of the right to use effective, post-fertilization contraception; and women in the remaining states could face protracted legislative and judicial battles over the scope of their now-limited right of reproductive privacy.

B. Allowing States, Under The "Undue Burden" Standard, To Define "Fetus" And "Life" In A Scientifically Incorrect Manner Threatens All Reproductive Rights.

Neither the undue burden test nor the rational basis test, also used by the Court of Appeals, achieves in any principled manner the state's purported goal of protecting potential life. The practical effect of both tests could be to permit state legislatures to inaccurately define the fetus and life, and thereby place such restrictions on abortion, contraception, and other reproductive health care as to all but ban them.

All of the challenged Pennsylvania provisions are premised on the definitions in section 3203. Contrary to Pennsylvania's attempt to define the fetus as the equivalent of

"fertilization" and "conception," conception is not a single stage or one-step process, let alone something as simplistic as the mere "fusion of the spermatozoan with a human ovum." Fertilization of the ovum by the sperm, the first stage in conception, is itself a continuum of multiple interdependent steps before the first cell division (cleavage).[22] Only if a normal first

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[22] R. Glass, "Egg Transport and Fertilization," in 5 Gynecology and Obstetrics ch. 46 at 2-3 (J. Sciarra, ed., rev. ed. 1985).

The fertilization period of the human ovum is estimated to range between 12 and 24 hours. During this period, a sperm cell must penetrate the zona pellucida, an acellular glycoprotein, which surrounds the ovum at ovulation. The head of the sperm cell that has penetrated the zona pellucida makes initial contact with a second membrane, the vitelline (egg) membrane. The egg membrane engulfs the sperm head resulting in a fusion of egg and sperm membrane. The chromatin material of the sperm head then decondenses, forming the

cleavage does occur, has fertilization been successful.

Implantation also is a multi-stage continuum. The fertilized ovum -- zygote -- undergoes a slow cleavage into a blastocyst. After the blastocyst is transported into the uterus, the zona pellucida dissolves, a prerequisite to successful implantation. The blastocyst then adheres to the surface of the endometrium (lining of the uterus) in the first stage of implantation. After a process in which the epithelium (a sheetlike layer of tissue) of the endometrium erodes, the blastocyst sinks

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male pronucleus. Subsequently, the female and male pronuclei move toward each other. As this happens, the limiting membranes surrounding each nucleus break down, and a spindle is formed on which the chromosomes become arranged. The cell (called a zygote) is now ready for the first cell division. See Glass at 3.

into the endometrium and, finally, becomes totally encased.[23] When this staged process is complete, approximately six to seven days after the fertilization process set forth above, implantation has finally occurred.[24]

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[23] Williams Obstetrics at 40.

[24] Even then, the formation of a single individual with a unique immutable genetic blueprint (and thus a single "soul") is not assured. There is a possibility that twins may develop from the blastocyst until at least 12 days after fertilization. Dawson, Fertilization and moral status: A scientific perspective, in Embryo Experimentation 49 (P. Singer et al. eds., 1990) (hereinafter cited as Fertilization and moral status). Conversely, a chimera may be formed when two or more pre-embryos fuse and contribute to the development of a single prenate. Id.at 56. Also, even after implantation, the growing mass of cells can become a hydatidiform mole (tumor) rather than a fetus, a medically dangerous condition for the woman which will never produce a live birth. Williams Obstetrics at 540-42.

At each of the various and complicated stages described above, development may stop. It is estimated that "for up to 78 per cent of fertilizations the endpoint is loss rather than progression to the next developmental stage."[25]

Defining pregnancy and the fetus as the equivalent of the fertilized ovum, and then defining abortion as terminating a clinically diagnosable pregnancy, brings post-fertilization birth control methods within the ambit of Pennsylvania's criminal abortion statute because it now is possible to detect fertilization even prior to implantation and thereby act early on to

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[25] Fertilization and moral status at 49.

prevent it.[26] Recognizing that, since Griswold, this Court has not upheld any state law shown to restrict birth control, Pennsylvania attempts to save its law by cosmetic surgery that on the surface is appealing but that doesn't solve the problem. Pennsylvania attempts this charade by exempting certain methods of post-fertilization birth control from the definition of abortion in section 3203, namely the birth control pill and the intrauterine

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[26] Although all pregnancy tests test for the presence of human chorionic gonadotrophin (hCG), a hormone produced by the blastocyst, new experimental tests are being designed to detect hCG after fertilization but even before implantation occurs. See, e.g., Saxema, Measurement and clinical significance of preimplantation blastocyst gonadotrophins, J. Reprod. & Fertil. 115, 118 (1989). See also R. Creasy and R. Resnik Maternal-Fetal Medicine: Principles and Practice 113 (2d ed. 1989).

device ("IUD"), and, more generally in section 3208.1, by prohibiting any interference with "medically appropriate methods of contraception." Those attempts, however, must fail as must those of any statute whose definition of abortion is premised on an erroneous and irrational definition of the fetus as the fertilized ovum.

First, by specifically exempting only the IUD and the birth control pill, Pennsylvania ostensibly could ban other well-established methods of post-fertilization contraception such as Norplant and some uses of RU 486. Other post-fertilization methods of contraception not presently available or developed also apparently would be banned by section 3203. Section 3208.1 does not vitiate the ban because a

physician must guess at his or her peril what Pennsylvania considers "medically appropriate methods of contraception." Such vagueness and uncertainty offends even the most elemental concept of due process of law because, at a minimum, criminal laws must be drafted so clearly as to leave no uncertainty as to what conduct is prohibited. Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

Second, the Pennsylvania statute, as well as every other state statute premised on the erroneous definition of protectable life as the fertilized ovum, must also fall because it is irrational. It is irrational because there is no scientific, medical, or moral basis for creating a legal distinction between fertilized ova, enforced by criminal

sanctions, based solely on the method used to prevent the ovum from developing into a term pregnancy. There is no moral distinction between preventing a fertilized egg from implanting by chemical means such as a pill or preventing implantation by mechanical means such as menstrual extraction. Line drawing by a state legislature must at least meet the standard of rationality, see, e.g., City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 446-47 (1985), and any statute premised on an erroneous definition is, a fortiori, irrational.

The consequence of the definitional errors made by Pennsylvania, and at least 11 other states, have profound implications for women's reproductive health care. Faced with an inaccurate

definition of when protectable life begins, a reproductive health care provider is left to flounder in a sea of legal uncertainty when prescribing well-accepted contraceptives that may prevent implantation of the blastocyst, and when using medical advances aimed at assisting conception and pregnancy.

1. The Undue Burden Standard Would Allow Severe Restrictions On The Right To Use Contraceptives.

Many common methods of contraception, as one possible working mechanism, interfere with the implantation of the blastocyst in the

endometrium. The IUD,[27] Norplant,[28] and certain low dose oral contraceptives[29]

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[27] Hutchings, et al., The IUD After 20 Years: A Review, 17 Fam. Plan. Persp. 244, 245 (Nov./Dec. 1985). See also U.S. Dept. of HHS, IUDs: Guidelines for Informed Decision-making and Use, (1987); R. Hatcher, et al., Contraceptive Technology 377 (15th ed. 1990) (hereinafter cited as "Contraceptive Technology").

Although experts cannot ascertain how the IUD prevents pregnancy in each individual case, it is generally recognized that prevention of implantation is one working mechanism of this contraceptive device. American Medical Association, Data Assessment of IUD, 261 J. A.M.A. 2127, 2128 (1989); D. Mishell, Intrauterine Devices, 22 Clinics in Obstet. and Gynecol. 679, 680 (1984).

[28] As with the IUD, Norplant has several mechanisms of action, including suppressing ovulation. In addition, one of its functions is to inhibit development of the endometrium, thereby preventing implantation. Shoupe & Mishell, Norplant: Subdermal implant system for long-term contraception, 160 Am. J. Obstet.-Gynec. 1286, 1287 (1989).

[29] The newer combined oral contraceptives, in addition to suppressing ovulation, also frustrate

all are thought on occasion to prevent implantation.

By adopting a scientifically invalid definition of when life begins, states interfere with the rights of millions of women who use contraceptive methods that can act after fertilization, forcing them to use barrier contraceptive methods which are less reliable contraceptives. Eighteen per cent of diaphragm users, 12 per cent of condom users, and 28 per cent of sponge users experience an accidental

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conception in other ways, including affecting the transportation of the fertilized ovum through the fallopian tubes, so as to decrease the likelihood of implantation. Making Choices at 5; See Contraceptive Technology at 228-29.

Many women use combined oral contraceptives, which have lower levels of estrogen, because of the perceived health risks of the older, higher estrogen-dose pills. See Contraceptive Technology at 228.

pregnancy within the first year of use.[30] Given these high rates of failure and the millions of unintended pregnancies resulting every year, women using less effective methods of contraception have a heightened interest in abortion when their contraception fails. Similarly, when prescribing a less effective contraceptive, physicians have a responsibility to advise a woman of her option to terminate her pregnancy. Thus, ironically, and somewhat irrationally, the Pennsylvania law and the similar laws of other states, could result in more unintended pregnancies and the need for even more abortions.

Some contraceptives, such as high doses of oral contraceptives, are

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[30] Contraceptive Technology at 134.

administered with the specific intent of preventing implantation after fertilization has occurred, especially in treatment for sexual assault victims. A woman who has been raped is desperate to avoid pregnancy,[31] and it is standard treatment for a physician to administer post-coital contraceptives in such a case. This treatment most likely will prevent implantation,[32] as will post-coital insertion of an IUD.[33]

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[31] See Burgess & Homstrom Rape: Crisis and Recovery 214 (1979).

[32] See C. Cook, M.D., et al., Pregnancy Prophylaxis: Parenteral Postcoital Estrogen, 67 Obstet. & Gynecol. 331-33 (1986); E. Adashi, M.D., The Morning After: novel hormonal approaches to postcoital interception, 39 Fertil. & Steril. 267-69 (1983).

[33] M. Fasoli, M.D., et al., Post-coital contraception: an overview of published studies, 39 Contraception 459, 465-66 (1989).

Used in this manner, post-coital contraceptives spare the woman who has suffered sexual assault the agonizing wait until the onset of the next expected menstrual period to learn whether she is pregnant. She thus is relieved of the need to consider whether to undergo a surgical abortion at that point. Yet, the Pennsylvania law and others like it threaten this humane use of post-coital contraceptives.

Such laws also will restrict research on the development of new contraceptives which are thought to inhibit implantation.[34] The most

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[34] Restricting access to certain contraceptives appears to be the goal of many of the opponents of legal abortion. Kaeser, Contraceptive Development: Why the Snail's Pace?, 22 Fam. Plan. Persp. 131, 132 (1990); Brahams, Abortion and assisted parenthood in the USA, 337 The Lancet 228, 228 (1991); Roberts, U.S. Lags on Birth Control Development, 247

significant new development in post-coital contraceptive technology, RU 486, is considered to have great potential precisely because it can act during the indeterminate period between fertilization and a viable pregnancy. This drug will induce menses in women who are not pregnant and also will block the working action of progesterone -- the hormone which supports implantation of the fertilized ovum -- thus

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Science 909 (1990).

Restrictive contraceptive laws long have had a negative impact on reproductive health care. For example, the two American scientists who developed the first oral contraceptives were barred by state law from performing their clinical trials in the state in which they practiced. They were forced instead to conduct such trials in Puerto Rico. Potts, Birth Control Methods in the United States, 20 Fam. Plan. Persp. 288, 289 (1988).

terminating pregnancy when implantation has occurred.[35]

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[35] Baulieu, RU 486 as an Antiprogesterone Steroid: From Receptor to Constragestion and Beyond, 262 J. A.M.A. 1808, 1811-13 (1989); A. Ulmarn, et al., RU 486, 262 Scientific Am. 42, 46-47 (1990). Similarly, researchers are currently developing a vaccine of anti-sperm antibodies. Instead of testing this vaccine in a limited clinical trial which could result in unwanted pregnancies or abnormalities in subsequent children, the effectiveness of the vaccine is being assessed by blocking fertilization in vitro. Unless the vaccine is 100 per cent effective, pre-embryos will inevitably be created, and ultimately destroyed.

Restrictions on the use of RU 486 as a contraceptive or contragestive also have profound, and negative, implications for its use in treating other conditions such as breast cancer. Preliminary trials, which have not been conducted in this country because of anti-abortion pressure on the political system, strongly suggest that RU 486, is highly effective in treating breast cancer. Goldsmith, As Data on Antiprogesterone Compounds Grow, Societal and Scientific Aspects are Scrutinized, 265 J. A.M.A. 1628, 1628 (1991); Ulmarn, et al., RU 486, 262 Scientific American 42, 48 (1990).

By restricting the use of contraceptives which prevent implantation, such statutes interfere with the fundamental right of privacy to use contraception and thus violate the Constitution. Webster v. Reproductive Health Services, 492 U.S. 490, 523 (1989) (O'Connor, J., concurring) (the use of post-fertilization contraceptive devices is constitutionally protected by Griswold and progeny); 492 U.S. at 564 (Stevens, J., concurring in part, dissenting in part) ("[t]o the extent the Missouri statute interferes with contraceptive choices, . . . it is unconstitutional"); Griswold, 381 U.S. at 485-86; Eisenstadt, 405 U.S. at 453-55.[36]

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[36] See also Charles v. Carey, 627 F.2d 772 (7th Cir. 1980) (striking down Illinois abortion law which defined the

2. Laws Defining Protectable Life As The Fertilized Ovum Unconstitutionally Restrict The Use Of Reproductive Technologies.

The right to privacy includes the right to bear a child, see Maher v. Roe, 432 U.S. 464, 472 n.7 (1977) (right to carry a pregnancy to term is fundamental), and to seek assistance of a physician to effectuate one's reproductive plans. City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 427 (1983) (full vindication of right to make reproductive decisions requires that physician be given room to make "best

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fetus to mean "a human being from fertilization until birth"); Charles v. Daley, 749 F.2d 452, 462 (7th Cir. 1984) (statutory sections which would affect use of post-fertilization contraceptives infringe upon privacy right to use contraceptives), appeal dism'd sub nom., Diamond v. Charles, 476 U.S. 54 (1986).

medical judgment"). Further, the right to privacy includes a right to use reproductive technologies, such as in vitro fertilization (IVF). See Lifchez v. Hartigan, 735 F. Supp. 1361, 1376-77 (N.D. Ill. 1990). State laws defining protectable life as the conceptus unconstitutionally restrict the use of reproductive technology.

IVF for example, provides a unique opportunity for the study of human reproduction and early development with far ranging implications for the treatment of infertility and other areas of research.[37] With IVF or any of its

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[37] Through IVF, gamete intrafallopian transfer (GIFT), and zygote intrafallopian transfer (ZIFT) technologies, 3,472 couples gave birth to children in 1989 alone. The American Fertility Society, In vitro fertilization-embryo transfer in the United States: 1989 Results from the IVF-ET Registry, 55 Fertil. and Steril.

derivative procedures, physicians often fertilize ten or more ova than will be transplanted into the woman's uterus. Because embryos do not survive in the lab more than six days past fertilization,[38] many of the excess embryos ultimately will be discarded. Some embryos may be preserved through cryopreservation for subsequent cycles if the first transfer fails or may be donated to other infertile couples. But even then, 30 per cent of the embryos cannot survive the freezing process.[39]

14, 15 (1991).

[38] Dawson, Introduction: An Outline of scientific aspects of human embryo, in Embryo Experimentation 6 (D. Singer, et al., eds. 1990).

[39] Jones, Cryopreservation and its Problems, 53 Fertil. and Steril. 780, 783 (1990).

Physicians, fearing prosecution for the destruction of pre-embryos under a statute that defines the fertilized ovum as a person with legal rights, may decline not only to perform these life-generating procedures, but also to conduct research into others. Recognizing that its abortion statute thus frustrates rather than advances its stated goal of promoting and protecting live childbirth, Pennsylvania, as with contraception, ostensibly permits in vitro fertilization by setting forth in section 3213(e) specific public reporting requirements for all persons involved in conducting or experimenting in in vitro fertilization. These requirements not only add to the burdens imposed by the other challenged provisions of the statute, but also are

totally irrational because they can serve no purpose but to eliminate technologically-assisted reproduction. What legitimate purpose is served by requiring reproductive health professionals to report the number of eggs fertilized and destroyed or discarded, the number of women implanted with a fertilized egg, and the names and addresses of all persons and facilities involved in technologically-assisted reproduction?

More importantly, all who employ reproductive technology are still left to guess at their peril whether discarding the fertilized egg is "abortion" within the ambit of the statute because section 3216(e) expressly provides that nothing in the statute shall "be construed to condone

or prohibit the performance of in vitro fertilization and accompanying embryo transfer."

The restrictive consequences of state laws defining the conceptus as protectable life are not confined to IVF, but also limit advances in genetic testing, a critical component of modern obstetric care. See note 15, supra. For example, embryo biopsies soon will be able to detect genetic abnormalities in an embryo before implantation. This procedure could eliminate the need for an infertile couple to undergo a possibly emotionally devastating therapeutic abortion. Fertile couples with a high risk of passing a genetic disorder on to their children also could avoid a therapeutic abortion with an

embryo biopsy.[40] The right to obtain genetic information about the zygote so as to make an informed decision about whether to choose to have an abortion because of genetic indications, see generally, Roe, 410 U.S. 113; Smith v. Cote, 513 A.2d 341, 355 (N.H. 1986) (Souter, J., concurring), is restricted by the Pennsylvania law, which would appear to demand compliance with the challenged "informed" consent and mandatory waiting period provisions.[41]

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[40] See Michael & Buckle, Screening for genetic disorders: therapeutic abortion and IVF, 16 J. Med. Ethics 43, 43 (1990).

[41] Once again, section 3216(c) of the Pennsylvania statute forces the reproductive health professional to guess at his or her peril precisely what is prohibited when it specifically provides that "nothing in this section shall be construed to condone or prohibit the performance of diagnostic tests while the unborn child is in utero . . . ."

Carrying a pregnancy to term when the child is destined to be stillborn or to die shortly after birth is emotionally devastating.[42] In a recent clinical trial, 97 per cent of the women carrying a fetus with severe genetic anomalies chose to terminate the pregnancy.[43] The additional requirements of the challenged provisions of the Pennsylvania abortion statute -- such as the 24 hour waiting period -- serve only to increase the emotional trauma experienced by women who have already made the decision to

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[42] Furthermore, many women may not have the financial or emotional ability to care for a seriously ill child. If a woman already has children or a job, she may be forced to neglect the other members of her family and quit her job.

[43] Drugan, et al., Determinants of Parental Decisions to Abort For Chromosome Abnormalities, 10 Prenat. Diag. 483, 486 (1990).

abort because of genetic abnormalities. Furthermore, people who know they are at risk of having a child with a severe genetic anomaly, most often desist from even attempting to have a child unless prenatal diagnosis is available.[44] Thus, once again, laws which erroneously define the conceptus as protectable life frustrate a purported purpose of such laws -- promoting the birth of children.

CONCLUSION

Any further erosion in the fundamental right status of reproductive privacy will open the door to state laws restricting not only abortion, but also contraception and reproductive technology. Such restrictions will exacerbate the existing crisis in

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[44] Milunsky, Genetic Counseling at 2.

reproductive health care, with life-endangering consequences for many of the 55 million American women of reproductive age. For these reasons, amici submit that the Court of Appeals erred in classifying privacy as a "limited" fundamental right, the Pennsylvania statutory scheme is unconstitutional, and this Court should affirm its past decisions recognizing the fundamental nature of the right of reproductive privacy.

Respectfully submitted,

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Dated: March 6, 1992

Special recognition is given to Will Van Lonkhuyzen, Law Student, University of Chicago, for his contributions to this brief.

APPENDIX A

The Alan Guttmacher Institute (AGI)

The Alan Guttmacher Institute (AGI) is an independent, nonprofit corporation for research, policy analysis, and public education in the fields of reproductive health, population, and broadly related areas of health and social policy. AGI's nonpartisan programs and activities are aimed at promoting public understanding, developing sound public policy, and creating workable public and private sector programs that will enhance the ability of all women and men, in freedom and dignity, to exercise their rights and responsibilities with regard to reproduction and family formation.

International Women's Health Coalition (IWHC)

The International Women's Health Coalition (IWHC) is a private North American organization working in alliance with women's health advocates, women's organizations, health professionals, and government officials in Southern countries and Northern institutions. The IWHC promotes women's reproductive health and rights and serves as a catalyst for action. It is concerned with the daily realities of women's lives and with programs and policies that affect their ability to

manage their sexual health and attain their reproductive rights.

Los Angeles Regional Family Planning Council, Inc.

The Los Angeles Regional Family Planning Council (LARFPC) is a non-profit health care management agency which includes a network of over seventy clinic sites located throughout Los Angeles County. In 1991, the LARFPC clinics provided comprehensive contraceptive services to approximately 170,000 low-income individuals. In addition to serving as an umbrella agency for the clinics, LARFPC also provides extensive training and educational programs for health care professionals and conducts clinical research on contraceptive products.

National Association of Nurse Practitioners in Reproductive Health

The National Association of Nurse Practitioners in Reproductive Health (NANPRH) was founded in 1980 for the purpose of assuring accessible quality family planning services which guarantee reproductive freedom to all women, and to promote and protect the delivery of family planning services by nurse practitioners. NANPRH is committed to the principle that decisions about reproductive health, including abortion, should be made by women and qualified clinicians.

National Society of Genetic Counselors

The National Society of Genetic Counselors (NSGC) was founded in 1978 and represents approximately 1000 genetic counselors in the United States. In 1987, the NSGC adopted a policy which states: "The NSGC, as an organization, publicly supports a woman's right to reproductive freedom, including her right to prenatal diagnosis and access to safe and legal abortion."

National Family Planning and Reproductive Health Association (NFPRHA)

The National Family Planning and Reproductive Health Association (NFPRHA) is a nonprofit membership corporation designed to improve and expand the delivery of comprehensive family planning and reproductive health care information and services throughout the United States. NFPRHA represents over eighty-five percent of the agencies and organizations that operate family planning programs with funds received under Title X of the Public Health Services Act of 1970.

APPENDIX B

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

ERNEST D. PREATE, JR.
ATTORNEY GENERAL

March 3, 1992

Reply To

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Via Express Mail

Kathryn Kolbert, Esquire
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Re: Planned Parenthood of Southeastern Pennsylvania v. Casey, No. 91-744

Dear Ms. Kolbert:

On behalf of respondents in the above-referenced case, I consent to the filing of briefs amici curiae in support of petitioners on behalf of the groups and individuals in the attached list.

Sincerely,

JOHN G. KNORR, III
Chief Deputy Attorney General
Chief, Litigation Section

JGK:je

Brief in Support of Birth Control

Alan Guttmacher Institute
International Women's Health Coalition
Los Angeles Regional Family Planning Council, Inc.
National Association of Nurse Practitioners in Reproductive Health
National Family Planning & Reproductive Health Association
National Society of Genetic Counselors

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ACLU

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March 4, 1992

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RE: Planned Parenthood of Southeastern Pennsylvania, et al. v. Casey, et al., (Nos. 91-744 and 91-902).

Dear Ms. Connell:

On behalf of petitioners in the above-referenced case, I hereby consent to the filing of a brief amicus curiae in support of petitioners by the Allan Guttmacher Institute, et al., as indicated on the attached list.

Sincerely yours,

Kathryn Kolbert

Kathryn Kolbert
Counsel of Record

KK:am

BEST AVAILABLE COPY

No. 91-744 and No. 91-902

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1991

PLANNED PARENTHOOD OF
SOUTHEASTERN PENNSYLVANIA

v.

ROBERT CASEY, ET AL

ROBERT CASEY, ET AL

v.

PLANNED PARENTHOOD OF
SOUTHEASTERN PENNSYLVANIA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MOTION TO ALLOW COUNSEL TO REPRESENT CHILDREN UNBORN AND BORN ALIVE

ALAN ERNEST
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CONTENTS

Interest of Counsel.....1

Summary of Argument.....1

Argument.....2

THE UNBORN HAVE A CONSTITUTIONAL RIGHT TO BE ESPECIALLY REPRESENTED BY COUNSEL TO PROVE THEIR LIVES ARE PROTECTED BY THE U.S. CONSTITUTION...2

1.
THIS COURT EFFECTED AND MAINTAINS THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY REFUSING TO ALLOW COUNSEL TO REPRESENT THE UNBORN AND DEFEND THEIR RIGHT TO LIFE UNDER THE U.S. CONSTITUTION.....2

2.
THIS COURT EFFECTED THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY REFUSING TO ALLOW PRIOR NOTICE OF THE CONSTITUTIONAL STANDARDS, THE BURDENS, OR THE EVIDENCE WHICH IT USED TO INFER THAT THE LIVES OF THE UNBORN ARE NOT PROTECTED BY THE U.S. CONSTITUTION...5

3.
THIS COURT EFFECTED THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY USING A SECRET EVIDENTIARY PROCESS TO FIND EVIDENCE TO INFER THAT THE LIVES OF THE UNBORN ARE NOT PROTECTED BY THE U.S. CONSTITUTION.....9

4.
THIS COURT EFFECTED AND MAINTAINS THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY REFUSING TO ALLOW ITS EVIDENCE, WHICH IT USED TO INFER THAT THE LIVES OF THE UNBORN ARE NOT PROTECTED BY THE U.S. CONSTITUTION, TO BE CONFRONTED AND CROSS-EXAMINED....11

5.
THIS COURT EFFECTED AND MAINTAINS THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY REFUSING TO ALLOW EVIDENCE TO BE PRESENTED ON BEHALF OF THE UNBORN TO ESTABLISH THEIR RIGHT TO LIFE UNDER THE U.S. CONSTITUTION.....13

Issues Raised by Counsel for the Unborn, Not Raised by the Parties.....17

1. THE UNIVERSAL GUARANTEE OF LIFE TO "ANY PERSON," MADE IN THE U.S. CONSTITUTION, DOES INCLUDE THE UNBORN.....17

2. THERE IS A GOVERNMENT CONSPIRACY TO IMPOSE ON THIS NATION THE EXACT LEGAL DOCTRINES WHICH THE UNITED STATES ITSELF CONDEMNED AS MURDER AT NUREMBERG.....17

Conclusion.....26

TABLE OF AUTHORITIES

Cases:

Dred Scott v. Sanford, 19 How. 393.....6

Ernest v. United States Attorney for the Eastern District of Virginia, cert. denied 475 U.S. 1084 (1986).....20,21

Ernest v. Rehnquist, Brennan, White, Marshall, Blackmun, Stevens, O'Connor, Scalia, Kennedy, U.S. District Court in Alexandria, Civil No. 89-732.....22,24

Goldberg v. Kelly, 397 U.S. 254.....4

Imbler v. Pachtman, 424 U.S. 409 5

In Re Gault, 387 U.S. 1.....4

United States v. Altstoetter [The Justice Case], 3 Trials of War Criminals Before the Nuernberg Military Tribunals (1951)..5,16,18

Books:

4 Collected Works of Abraham Lincoln (Basler ed. 1953).....6

Briefs Filed In This Court:

Amicus Curiae Brief by the Legal Defense for Unborn Children, filed in this case....17,18

Petition for Rehearing, Doe v. Bolton, 410 U.S. 179 (1973).....2,8,10,12,15

Articles:

"WASHINGTON LAWYER CHARGES U.S. SUPREME COURT WITH MASS MURDER," published in The Washington Post, September 12, 1979, Page A6.....30

U.S. Constitution:

Sixth Amendment-"Assistance of Counsel"....4

Fifth Amendment-"Due Process" 4

MOTION TO ALLOW COUNSEL TO REPRESENT CHILDREN UNBORN AND BORN ALIVE

The Court is moved to allow Alan Ernest to represent the victims being killed by Roe v. Wade, 410 U.S. 113, as counsel or guardian ad litem, for the purpose of defending their right to life under the U.S. Constitution.

INTEREST OF COUNSEL

Alan Ernest is a lawyer in the District of Columbia and a member of the bar of this Court. His purpose is to prove that the guarantee of life to "any person," made in the U.S. Constitution, does include the unborn.

This is effectively a motion to allow retained counsel since there will be no expense to this Court, or to the taxpayers.

SUMMARY OF ARGUMENT

The unborn have a constitutional right to be especially represented by counsel to prove that their lives are specifically guaranteed by the U.S. Constitution.

Argument

THE UNBORN HAVE A CONSTITUTIONAL RIGHT TO BE ESPECIALLY REPRESENTED BY COUNSEL TO DEFEND THEIR RIGHT TO LIFE.

1.

THIS COURT EFFECTED AND MAINTAINED THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY REFUSING TO ALLOW COUNSEL TO REPRESENT THE UNBORN AND DEFEND THEIR RIGHT TO LIFE UNDER THE U.S. CONSTITUTION.

Counsel did not especially represent the unborn in the U.S. District Court, or at any stage in Roe v. Wade. An original party objected that the unborn should be represented by counsel in this Court:

> (T)he Court should have every benefit of a complete record and the representation of a guardian ad litem for that fetal entity and for its natural right to develop to birth.[1]

But this Court refused to allow counsel to represent the unborn and defend their right to life under the U.S. Constitution. Thus the killings commenced.

And the Supreme Court has maintained its killings by steadfastly refusing (in all its abortion cases) to allow counsel to represent

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1. Petition for Rehearing 5, Doe v. Bolton, 410 U.S. 179 (1973), denied 410 U.S. 959.

the unborn, and defend their right to life under the U.S. Constitution.[2]

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2. Some are: Colautti v. Franklin, 439 U.S. 379, motion to allow counsel for the unborn denied 437 U.S. 902; Anders v. Floyd, 440 U.S. 445, motion to allow counsel for the unborn denied 439 U.S. 890; Bellotti v. Baird, 443 U.S. 622, motion to allow counsel for the unborn denied 439 U.S. 1065; Ashcroft v. Freiman, affirmed 440 U.S. 941, motion to allow counsel for the unborn denied 440 U.S. 941; United States v. Zbaraz, 448 U.S. 358, motion to allow counsel for the unborn denied 444 U.S. 1030; Harris v. McRae, 448 U.S. 297, motion to allow counsel for the unborn denied 445 U.S. 941; H.L. v. Matheson, 450 U.S. 398, motion to allow counsel for the unborn denied 445 U.S. 959; Simopoulos v. Virginia, 462 U.S. 506, motion to allow counsel for the unborn denied 458 U.S. 1104; Planned Parenthood of Kansas City v. Ashcroft, 462 U.S. 476, motion to allow counsel for the unborn denied 458 U.S. 1104; Akron Center for Reproductive Health v. Akron, 462 U.S. 416, motion to allow counsel for the unborn denied 458 U.S. 1104; Diamond v. Charles, 476 U.S. 54, motion to allow counsel for the unborn denied 473 U.S. 932; Thornburgh v. American College of Obstetricians, 476 U.S. 747, motion to allow counsel for the unborn denied 473 U.S. 931; Hartigan v. Zbaraz, 484 U.S. 171, motion to allow counsel for the unborn denied 479 US 1003; Webster v. Reproductive Health Ser., 492 U.S. 490, motion to allow counsel for the unborn denied 489 U.S. 106; Ohio v. Akron Center for Reproductive Health, 111 L Ed 2d 405, motion to allow counsel for the unborn denied 493 U.S. 802; Hodgson v. Minnesota, 111 L Ed 2d 344, motion to allow counsel for the unborn denied 492 U.S. 803; Rust v. Sullivan, 114 L Ed 2d 233, motion to allow counsel for the unborn denied 111 L Ed 2d 746.

The unborn have a constitutional right to be represented by counsel in this case to defend their right to life under the U.S. Constitution.[3] Judges who willfully

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3. Even in civil proceedings, where crucial deprivations are threatened, such as loss of welfare, due process guarantees (1) prior notice of the factual and legal bases; (2) the right to be represented by counsel; (3) the right to confront and cross-examine adverse evidence; (4) the right to present evidence. Goldberg v. Kelly, 397 U.S. 254, 268-271 (1970). See also, In Re Gault, 387 U.S. 1 (1967).

Could it be possible that procedures, which could not be used to deprive a mother of welfare, could be used to exclude her from the protection of the U.S.Constitution so that she could be killed with impunity from criminal laws? This is preposterous.

The Constitution would not permit any court to condemn even one single Jew to death in a criminal case, but deny any of these procedural rights. Then neither can it permit any court to condemn all Jews in the United States to death, but deny any of these procedural rights, by calling it a civil proceeding, and decreeing the lives of all Jews are not protected by the U.S. Constitution, and it is "liberty" to kill all Jews with impunity from criminal laws.

Any victim is entitled to all these procedural protections before any court can decree that the victim's life is not protected by the Constitution, and the victim can be killed with impunity from criminal statutes. The rule for one is the rule for all; these are the sacred truth-seeking procedures which protect the lives of all Americans.

deny this right are guilty of crime.[4] This denial makes Roe v. Wade void.

2.

THIS COURT EFFECTED THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY REFUSING TO ALLOW PRIOR NOTICE OF THE CONSTITUTIONAL STANDARDS, THE BURDENS OF PROOF, OR THE EVIDENCE WHICH IT USED TO INFER THAT THAT THE LIVES OF THE UNBORN ARE NOT PROTECTED BY THE U.S. CONSTITUTION.

The District Court in Roe v. Wade did not even look to see if the lives of the unborn were protected by the Constitution. This question was argued for the first time after the case reached this Court. Since this Court had never previously excluded anyone from the protection of the U.S. Constitution so they could be killed with impunity from criminal statutes, the parties had no prior notice of the factual and legal bases for such an exclusion.

Moreover in the aftermath of Dred Scott v. Sanford, legitimate public

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4. "Even judges ... could be punished criminally for willful deprivations of constitutional rights." Imbler v. Pachtman, 424 U.S. 409 (1976).

expectation rested on the assurance that this Court would never again attempt another exception to the universal terms "any person."[5]

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5. This Court's decision in Dred Scott v. Sanford appears to be the only precedent in American history in which this Court has implied an exception to the universal terms "any person" in the Fifth or Fourteenth Amendments. The Court there ruled that the universal words "any person" did not include Negroes, there was a constitutional right to own a slave, and Congress could not prohibit slavery in the free territories. This decision triggered a civil war. Candidate Abraham Lincoln vowed he would not obey Dred Scott. Opponents said their states would withdraw from the Union rather than be deprived of their assumed constitutional right to own slaves and take them to the free territories. 4 Collected Works of Abraham Lincoln 267 (1953). But President Abraham Lincoln responded that if he were bound by Dred Scott, "the people will have ceased to be their own rulers." Id., at 268. Thus the war commenced.

A purpose of the Fourteenth Amendment was to overrule Dred Scott, and place it beyond the power of judges to ever again produce convulsions by implying an exception the universal words "any person." For over a century legitimate public expectation rested on the assurance that this Court would never again attempt an exception to the universal terms "any person."

But without any prior notice, this Court once again, in the precise manner of Dred Scott, attempted to imply an exception to the universal words "any person." In Roe v. Wade, this Court thus combined both total surprise and violent defiance of the long standing legitimate public expectation that never again would this Court violate the universal words "any person."

In particular, this Court gave the parties in Roe v. Wade no prior notice of the constitutional standards, the burdens of proof, or the evidence, which the Court used to infer that the universal words "any person," as used in the Fourteenth Amendment, did not include the unborn.

The first time the parties had notice was when Roe v. Wade was published, and the victims were already condemned to death. An original party objected that it lacked the prior notice needed to defend the unborn:

> (N)ot only did the Court set a new constitutional standard, but at the same moment the Court applied the standard without giving the Appellees notice or opportunity to present evidence with respect to the point in gestation at which such standards, if they be correct as a matter of law in the first place, should be applied. "Viability", "meaningful life" or existence, "fetal life": all presumably have medical meaning which should be subject to medical testimony before a decision of constitutional import becomes solidified in concrete. These concepts are not even necessarily the appropriate ones.[6]

But this Court refused to allow the original parties to have prior notice. Thus the killings commenced.

And this Court has maintained the killings despite repeated objections that the unborn had no prior notice in Roe v. Wade of the factual and legal basis needed to defend the unborn's right to life under the U.S. Constitution.[7]

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6. Petition for Rehearing 6, Doe v. Bolton, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973). (emphasis added).

7. See cases in note 2, supra.

The unborn have a constitutional right to prior notice of all the factual and legal bases before they can be excluded from the protection of the Constitution so they can be killed with impunity from criminal statutes.[8] Judges who willfully deny this right are guilty of crime.[9] This denial makes Roe v. Wade void.

3.

THIS COURT EFFECTED THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY USING A SECRET EVIDENTIARY PROCESS TO FIND EVIDENCE TO INFER THAT THE LIVES OF THE UNBORN ARE NOT PROTECTED BY THE U.S. CONSTITUTION.

This Court used some secret evidentiary process, not open to the parties, to find evidence to infer that the lives of the unborn were not protected by the U.S. Constitution. The Court conducted these evidentiary proceedings in its back rooms; the parties were not allowed to be present; no public record was made of these proceedings. The purpose of these

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8. See note 3, supra.

9. See note 4, supra.

proceedings was to find evidence to infer that the lives of the unborn were not protected by the U.S. Constitution. An original party objected to these secret judicial proceedings:

> The Court has taken judicial notice of innumerable facts and factors, some which are expressly referred to in the Court's decision and some which are unknown to the parties but which apparently were extricated from various sources by the Court's diligent research, which facts nevertheless should be subject to refutation and counter-evidence since they form the foundation for the Court's opinion ... of constitutional stages of fetal growth.[10]

But the Court permitted the killings to commence despite this objection to its secret evidentiary proceedings.

And this Court has maintained the killings despite repeated objections that it used secret evidentiary proceeding in Roe v. Wade.[11]

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10. Petition for Rehearing 4, Doe v. Bolton, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973).

11. See cases in note 2, supra.

The unborn have a constitutional right not to be excluded from the protection of the U.S. Constitution by secret evidentiary proceedings.[12] Judges who willfully deny this right are guilty of crime.[13] This denial makes Roe v. Wade void.

4.

THIS COURT EFFECTED AND MAINTAINED THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY REFUSING TO ALLOW ITS EVIDENCE, WHICH IT USED TO INFER THAT THE LIVES OF THE UNBORN ARE NOT PROTECTED BY THE U.S. CONSTITUTION, TO BE CONFRONTED AND CROSS-EXAMINED.

Since the Court used a secret process, the original parties had not seen all the evidence which the Court used to infer that the lives of the unborn are not protected by the U.S. Constitution. An original party asked permission to cross-examine the evidence which the Court used to infer that the lives of the unborn were not protected by the U.S. Constitution:

> The Court has taken judicial notice of innumerable facts and factors, some

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12. See note 3, supra.

13. See note 4, supra.

> which are expressly referred to in the Court's decision and some which are unknown to the parties but which apparently were extricated from various sources by the Court's diligent research, which facts nevertheless should be subject to refutation and counter-evidence since they form the foundation of the Court's opinion .... of constitutional stages of fetal growth.[14]

But the Supreme Court refused to allow the original parties to cross-examine its evidence in Roe v. Wade, which it used to infer that the lives of the unborn were not protected by the U.S. Constitution. Thus the killings commenced.

And this Court has maintained the killings by steadfastly refusing to allow its evidence, which it used to infer that the lives of the unborn were not protected by the U.S. Constitution, to be confronted and cross-examined.[15]

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14. Petition for Rehearing 4, Doe v. Bolton, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973) (emphasis added).

15. See cases in note 2, supra.

The unborn have a constitutional right to confront and cross-examine the evidence which this Court used to infer that their lives are not protected by the U.S. Constitution.[16] Judges who willfully deny this right are guilty of crime.[17] This denial makes Roe v. Wade void.

5.

THIS COURT EFFECTED AND MAINTAINED THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY REFUSING TO ALLOW EVIDENCE TO BE PRESENTED ON BEHALF OF THE UNBORN TO ESTABLISH THEIR RIGHT TO LIFE UNDER THE U.S. CONSTITUTION.

In Roe v. Wade, the Court invented new constitutional standards on the protection of life by the U.S. Constitution, which the parties did not see until after Roe v. Wade was decided. The parties never had opportunity to present evidence under these new standards. An original party asked permission to present evidence under the new constitutional standards, which it had not seen before, to show that the lives of

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16. See note 3, supra.

17. See note 4, supra.

the unborn are protected by the U.S.

Constitution:

> We are dealing here with a procedure long considered outlawed and which has suddenly become become legal.
> ....
> The Court has selected a point in time at which states may protect fetal life, without any record of facts upon which to base the conclusion that only at "viability," as that term is defined by the Court, do the people of a state have authority to demand caution before a prenatal infant is destroyed.
> ....
> Appellees have had no opportunity to show by evidence in a traditional judicial trial setting at what gestational stage the separate life of the fetus is "meaningful" medically; in addition, the Court overlooked the significance of Georgia's legal recognition of meaningful human life as found in case law and statute.
> ....
> With no opportunity for Appellees to demonstrate the factual basis, in terms of current medical science, that its interest attaches at a particular point in the natural development of a human fetus, the Court has seized upon the convenient point of "viability" and crystallized constitutional command which bars State action.
> ....
> In the medical concept of "life," with its current body of technological knowledge, including such advances as fetal electrocardiography and fetal electroencephalography, legal "life" should not be cemented at an event in a judicial conclusion which does not have the benefit of medical evidence.
> ....
> At any rate, Appellees should have an opportunity to present evidence and testimony to support the State's claim of medically and scientifically sound interest in requiring a cautious approach to the extinguishment of fetal life.[18]

But the Court refused to allow the original parties to present evidence to show that the lives of the unborn were protected by the U.S. Constitution. Thus the killings commenced.

And this Court has maintained the killings by steadfastly refusing to allow evidence to be presented on behalf of the unborn to prove that their lives are protected by the U.S. Constitution.[19]

The unborn have a constitutional right to present evidence in this case to prove that their lives are protected by the U.S.

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18. Petition for Rehearing 3,4,5,6,8, Doe v. Bolton, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973).

19. See cases in note 2, supra.

Constitution.[20] Judges who willfully deny this right are guilty of crime.[21] This denial makes Roe v. Wade void.

The procedures used by the Court to effect and maintain the Roe v. Wade killings are essentially the same procedures cited by the Nuremberg Court as part of the evidence to convict the Nazi judges of complicity in extermination and murder.[22]

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20. See note 3, supra.

21. See note 4, supra.

22. "In many instances they were denied the right to introduce evidence, to be confronted by witnesses against them.... They were ... denied the right of counsel of their own choice....(T)he accused learned only a few moments before trial of the nature of the alleged crime for which he was to be tried. The entire proceedings from beginning to end were secret and no public record was allowed to be made of them." United States v. Altstoetter, 3 Trials of War Criminals Before the Nuernberg Military Tribunals 1046-1047 (1951). "Such a mock trial is not a judicial proceeding but a murder." Id., at 1164. "The dagger of the assassin was concealed beneath the robe of the jurist." Id. at 985.

II.
ISSUES RAISED BY COUNSEL NOT RAISED BY THE PARTIES

1. THE UNIVERSAL GUARANTEE OF LIFE TO "ANY PERSON," MADE BY THE U.S. CONSTITUTION, DOES INCLUDE THE UNBORN.

The parties have not raised the question of whether the lives of the unborn are protected by the U.S. Constitution, which disposes of all issues in this case.

The unborn have a right to assistance of counsel, to present evidence and arguments not presented by the parties, to show that the universal guarantee of life to "any person," made in the U.S. Constitution, does include the unborn.[1]

2. THERE IS A U.S. GOVERNMENT CONSPIRACY TO IMPOSE ON THIS NATION BY DECREE THE EXACT DOCTRINES WHICH THE UNITED STATES ITSELF CONDEMNED AS MURDER AT NUREMBERG.

At Nuremberg the Nazi judges claimed they could not be held accountable for the murder of millions of Jews, because "the

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1. This evidence and arguments are presented in the amicus curiae brief by the Legal Defense For Unborn Children, filed herein, and incorporated by reference.

supreme judge" of Nazi Germany had decreed those killings to be legal, and under Nazi law, which they had to obey, those killings were legal.[2] The United States prosecuted such obedience as murder, and the Nuremberg court convicted Nazi judges of complicity in a government conspiracy to murder: "The dagger of the assassin was concealed beneath the robe of the jurist."

Yet the record proves that the U.S. Supreme Court conspires to impose those exact doctrines on America by decree. This Court decreed killings to be "liberty" which the people had defined by their homicide statutes to be "murder."[3] This Court decreed mass murder to be legal, just as "the supreme judge" of Nazi Germany decreed mass murder to be legal. By merely changing the names of the victims, this Court has

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2. United States v. Altstoetter [The Justice Case], supra, at 983-985, 1011-1014.

3. See amicus brief by Legal Defense for Unborn Children, supra note 1, pages 10-22.

duplicated the decree of "the supreme judge" of Nazi Germany.

When the U.S. Supreme Court was accused of mass murder in U.S. District Courts, the U.S. Government defended it by claiming that the Supreme Court had the power to decree the mass murder of anyone to be legal. The U.S. Government expressly argued that the U.S. Supreme Court must be obeyed even if it decreed a liberty to kill Jews with impunity from murder statutes:

> [U.S. District Judge]: Let me ask you to respond to this question. The plaintiff argues in his brief that the Supreme Court in Roe v. Wade took a discrete group of entities and said that these entities have no right to live, and thus may be killed .... And he said if you take Roe v. Wade and remove the word "fetus" and just substitute most any other word you want of another discrete group, that we wouldn't be here discussing this at all. Let's say that instead of "fetus," they said "Jews." That is the one he used in his brief.
>
> Would you argue stare decisis to me if, under Roe v. Wade, at the whim of neighbors Jews could be put to death?

> [U.S. Govt. Lawyer]: (I) would have to agree with the doctrine of stare decisis and advance it to the court.[4]

It was undisputed that in Roe v. Wade the Supreme Court decreed killings to be "liberty" which legislatures had defined to be "murder." It was undisputed that the victims were being killed in violation of murder statutes. And in defending the Justices against accusations of mass murder, the U.S. Government expressly claimed that the Supreme Court has the power to decree the mass murder of Jews, or anyone, to be liberty, and all courts must obey.

Although the U.S. District Judge objected that Roe v. Wade was "the worst decision by the Supreme Court in the history of the Court," the U.S. District Judge adopted the U.S. Government's arguments that

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4. Ernest v. United States Attorney for the Eastern District of Virginia, U.S. District Court in Richmond, Civ. No. 84-0858, transcript of proceedings at 21-22, cert. denied 475 U.S. 1084 (1986).

he must obey the U.S. Supreme Court no matter who it decreed a liberty to kill.[5]

The petition for review in the U.S. Supreme Court accused it of mass murder:

> For the 67th time, the U.S. Supreme Court is accused in its own Court with mass murder in violation of state and federal statutes.[6]

The U.S. Government waived its right to oppose the petition for review, and thus the U.S. Supreme Court was accused of mass murder in its own court and the accusations were unopposed. Yet this Court neither denied that it was guilty of mass murder, nor objected to the trial court ruling that it must obey this Court even if this Court decreed the mass murder of Jews, or anyone, to be liberty. If any Justice had believed that the U.S. Supreme Court did not have the

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5. Petition for Cert. at A1, Ernest v. United States Attorney for the Eastern District of Virginia, cert. denied without comment, 475 U.S. 1084 (1986).

6. Petition for Cert. at 50, supra note 5.

power to decree the mass murder of Jews or anyone to be liberty, he would certainly have noted his objection. But no such objection was noted.

This record proves a conspiracy by the executive and judicial departments of the government of the United States to impose on this nation the very doctrines which the United States itself condemned as murder at Nuremberg. Only the names of the victims have been changed.

Moreover, each Justice of the U.S. Supreme Court was named as a defendant in a civil suit, and accused in a State court of mass murder and treason.[7] The State court was asked to "Declare that there was probable cause to believe that the U.S. Supreme Court had conspired to commit murder" in violation of the State murder law.[8] Such a

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7. Ernest v. Rehnquist, Brennan, White, Marshall, Blackmun, Stevens, O'Connor, Scalia, Kennedy, et al, filed in the Circuit Court of Fairfax, Virginia, Civil No. 90367.

8. Complaint, supra note 7, page 44, para 5.

ruling could have been tantamount to the start of the criminal prosecution process against the Justices for mass murder.

History had never seen a moment when it was more imperative to meet charges, and, if possible, deny them. But the Justices did not deny that in Roe v. Wade they decreed killings to be "liberty" which the State had defined to be "murder." Nor did the Justices deny that the victims were being killed in violation of the State murder statute. Nor did the the Justices deny that they had been accused of mass murder and extermination almost one hundred times in the U.S. Supreme Court, but they had never denied the charges, much less attempt to prove them to be false. Nor did the Justices deny that they were seeking to impose the doctrines on the United States which the United States itself condemned as murder at Nuremberg. To the contrary, this would be their defense.

The U.S. Government removed the case to the U.S. District Court in Alexandria.[9] Even though accused of mass murder and treason, the Justices did not attempt to show one single allegation in the complaint to be wrong in fact or law. The record shows the charges to be true.

Rather the Justices, through their U.S. Government lawyers, claimed that the Supreme Court has the power to decree mass murder of anyone to be liberty, and all lower courts must obey.[10] The Justices also claimed that

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9. Ernest v. Rehnquist, Brennan, White, Marshall, Blackmun, Stevens, O'Connor, Scalia, Kennedy, et al, removed to the U.S. District Court in Alexandria, Civil No. 89-732-A.

10. The Justices claimed that the District Court "is prohibited by stare decisis from granting the relief requested in this action." Although a trial court was asked to find probable cause that the Justices had conspired to commit mass murder, the Justices defended themselves by claiming "a precedent of [the Supreme] Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." Ernest v. Rehnquist, Brennan, White, Marshall, Blackmun, Stevens, O'Connor, Scalia,

after the Supreme Court had decreed (without any trial) mass murder to be liberty, the victims being killed in violation of murder laws could not appear in court and challenge the validity of the decree.[11] And the U.S. District Judge adopted these claims as law by summary decree, without even permitting a hearing in the cause, or being able to show even one single allegation in the complaint to be wrong in fact or law.

Thus, to defend themselves against accusations of mass murder and treason, each Justice of the U.S. Supreme Court boldly claimed the absolute power to decree mass murder to be liberty, by mere decree without trial, no matter who the victims might be, and this claim is now accepted by all courts

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Kennedy, supra, Govt. Memorandum in Support of Motion to Dismiss, page 3.

11. Ernest v. Rehnquist, Brennan, White, Marshall, Blackmun, Stevens, O'Connor, Scalia, Kennedy, supra, Govt. Memorandum in Support of Motion to Dismiss, at page 4.

of the United States, the U.S. Congress, and the U.S. President, as the law of the land.

Moreover this has been the steadfast policy of the United States, asserted in court after court, for almost two decades.[12] All the lower judges, who have upheld this Court's claim of power to condemn millions to death by decree, are here accused of complicity in capital mass murder and treason to the U.S. Constitution.[13]

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12. Some of these cases are: U.S. District Court in Alexandria (Civ. No. 89-732); U.S. District Court in Salt Lake City (Civ. No. 85-0026; U.S. District Court in Richmond (Civ. No. 84-0858); U.S. District Court in Portland (Civ. No. 81-0272).

13. U.S. DISTRICT JUDGES: Albert V. Bryan, Jr.; Emmett R. Cox; Edward T. Gignoux; Harold H. Greene; J. Thomas Greene; William B. Hand; Joseph C. Howard; Martin F. Loughlin; Robert Earl Maxwell; Louis F. Oberdorfer; Raymond J. Pettine; Aubrey E. Robinson, Jr.; John J. Sirica; James R. Spencer; James C. Turk; D. Dortch Warriner; Don J. Young. U.S. CIRCUIT JUDGES: D.C. Circuit- David L. Bazelon; Carl McGowan; Roger Robb; George E. MacKinnon; Spotswood Robinson III; J. Skelly Wright; Edward A. Tamm; Malcolm R. Wilkey. First Circuit- Levin H. Campbell; Frank M. Coffin; Hugh H. Bownes; Stephen G. Breyer. Fourth Circuit- Harrison L. Winter; Donald S. Russell; H. Emory Widener, Jr.; Kenneth K. Hall; James D. Phillips, Jr.; Francis D. Murnaghan, Jr.;

And while the victims were being killed in violation of murder statutes, President George Bush (and several former U.S. Presidents) permitted his lawyers to evoke these Nazi doctrines, which the Nuremberg Court adjudged to be murder, to defend the Justices, despite notices that he could be implicated in mass murder. Thus U.S. Presidents have contributed to this giant conspiracy to kill victims in violation of murder statutes, and to impose on the United States the doctrines which the United States itself condemned as murder at Nuremberg. A jury could find that this amounts to complicity in mass murder and treason.

James M. Sprouse; Sam J. Ervin, II; Robert F. Chapman. Eleventh Circuit- John C. Godbold; Paul H. Roney; Gerald B. Tjoflat; James C. Hill; Peter T. Fay; Robert S. Vance; Phyllis A. Kravitch; Frank M. Johnson, Jr.; Albert J. Henderson, Jr.; Joseph W. Hatchett; R. Lanier Anderson, III; Thomas A. Clark. AND the judges in Roe v. Wade and Doe v. Bolton who decreed a "liberty" to kill the unborn without any investigation to see if their lives were protected by the Constitution: Circuit Judges Morgan and Goldberg; District Judges Smith, Henderson, Hughes and Taylor.

Leaders of the U.S. Congress have also helped this conspiracy.[14] By acts of commission or omission, leaders of the U.S. Congress have helped the federal judicial and executive departments in this gigantic conspiracy to kill victims in violation of murder statutes, and to impose on the United States the exact doctrines which the United States itself condemned as murder at Nuremberg.[15] A jury could find that this

14. The complaint, supra note 7, para. 6, page 3, alleged that various members of the committees on the Judiciary, whose particular duty was to control the courts, were a part of the conspiracy: "The co-conspirators include ex-Chairman Peter Rodino, Chairman Rep. Jack Brooks, sub-committee chairman Rep. Don Edwards, sub-committee chairman Rep. Robert Kastenmeier; Chairman Sen. Joseph Bidden, ex-Chairman Sen. Edward Kennedy. A jury could find this conspiracy to be murder." A jury might also convict other leaders of the U.S. Congress, such as Rep. Thomas Foley, Speaker of the House; Sen George Mitchell, Senate Majority Leader; and numerous members of the House and Senate Judiciary Committees.

15. When the U.S. Congress held hearings on Roe v. Wade, it conspired to allow all the false evidence in Roe v. Wade to be presented, but refused to allow the rebuttal to be presented, and thus Congress conspired to present falsehood to the nation as if it were the truth. Moreover leaders of

amounts to complicity in mass murder and treason.

The leaders of all three branches of the government of the United States escape the accusation that they conspired to commit capital mass murder - to kill children in violation of murder statutes - by merely claiming the same defense which the United States itself condemned as mass murder at Nuremberg. This is surely the signal event in the history of mankind's search for a government of laws, and not of men.

This is a conspiracy by leaders of the judicial, executive and legislative branches of the government of the United States: (1) to claim the absolute power to decree the mass murder of anyone to be legal; (2) to actually kill victims in violation of murder

Congress have deliberately defied their constitutional duty to control this Court, knowing full well that their defiance would directly contribute to the death of the victims in violation of murder statutes. And many leaders of Congress have publicly endorsed Roe v. Wade and thus its killings.

statutes; and (3) to supplant the U.S. Constitution as the supreme law of the land, and to impose the legal system on the United States by judicial fiat, which was adjudged to be murder at Nuremberg.

Leaders of the national news media have also helped this conspiracy. Even though the U.S. Supreme Court was accused of mass murder in The Washington Post,[16] and the Court has never attempted to prove a word of the accusation to be wrong, that newspaper continued its policy of editorially advocating the Roe v. Wade killings despite repeated notices that its encouragement could amount to complicity in mass murder.[17]

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16. "WASHINGTON LAWYER CHARGES U.S. SUPREME COURT WITH MASS MURDER," published in The Washington Post, Sept 12, 1979, page A6.

17. The Washington Post, The New York Times, The Los Angeles Times, and The Wall Street Journal, have been warned almost 100 times that advocacy of murder is not free speech; that even a sincere belief that Roe v. Wade is good law is no defense, since ignorance of the law is no defense, and the narrow exception of reasonable reliance on a court decision does not apply in homicide cases. See authorities in amicus brief (supra note 1) at p.62 n.6. And while they

Even as the United States defended its officials against charges of mass murder by claiming the absolute power to decree the mass murder of anyone to be liberty, that newspaper covered up the news, and continued to advocate the killings. Since words of encouragement can amount to complicity in murder, (mass murder is not free speech), a jury could surely find such advocacy to be complicity in mass murder and treason.

Nor can we forget that there is formidable precedent for such giant conspiracies in the United States.[18]

In explaining how the monstrous crimes of the Nazi regime went unchecked, Winston

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advocated the killings, these news giants covered up the most catastrophic news in world history - that the U.S. Government officially claimed the power to decree (without any trial) the mass murder of Jews, or anyone, to be liberty.

18. Abraham Lincoln accused the U.S. Supreme Court, several U.S. Presidents, leaders of the U.S. Congress, and leading newspapers of conspiring to make slavery legal everywhere and to overturn the foundation of the U.S. Government. See "A House Divided" speech, 2 Collected Works of Abraham Lincoln 461 (Basler ed. 1953).

Churchill merely quoted Machiavelli: "Men avenge slight injuries, but not grave ones." In this manner America is ruled by a giant conspiracy to kill victims in violation of murder statutes. The words of the Nuremberg Court also describe this conspiracy: "The dagger of the assassin was concealed beneath the robe of the jurist." That the United States can be ruled for two decades by such a giant conspiracy is the most catastrophic crime in the history of the world, which draws a terrifying darkness over the future of all mankind.

CONCLUSION

The Court is moved to allow counsel to represent the unborn and defend their right to life under the U.S. Constitution, and to prove that the universal words "any person," as used in the Fifth and Fourteenth Amendments, do include the unborn. Thus the States have a duty to protect unborn life.

Alan Ernest, Counsel

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MAR 3 1992

No. 91-744 and No. 91-902

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1991

PLANNED PARENTHOOD OF
SOUTHEASTERN PENNSYLVANIA

v.

ROBERT CASEY, ET AL

ROBERT CASEY, ET AL

v.

PLANNED PARENTHOOD OF
SOUTHEASTERN PENNSYLVANIA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE WITH BRIEF BY LEGAL DEFENSE FOR UNBORN CHILDREN IN SUPPORT OF NEITHER PARTY

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Interest of Amicus

The amicus curiae brief, which does not support any party, defends the constitutional right to life of the unborn, which the parties have not done.

Argument

The amicus proves that the the Fifth and Fourteenth Amendments' guarantee of life to "any person" does include the unborn. Thus this Court must not only overrule Roe v. Wade, 410 U.S. 113, it must rule that the States have a duty to protect unborn life. The parties have not raised this issue; it disposes of all issues in this case.

Consent

By time of printing, neither party had provided written consent to file the brief.

Conclusion

The universal guarantee of life to "any person" is the most important right in the Constitution. The lives of millions of

children depend on their being permitted to present all relevant evidence and arguments to prove that the universal guarantee of life to "any person," made in the U.S. Constitution, does include the unborn.

Alan Ernest
Counsel

Contents

Interest of Amicus Curiae.....1

Summary of Argument.....1

Argument

I.

THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" DOES INCLUDE THE UNBORN.

1. THE LETTER OF THE LAW (THE GUARANTEE OF LIFE TO "ANY PERSON," THE TWO MOST IMPORTANT WORDS EVER ENACTED INTO LAW) ON ITS FACE INCLUDES THE UNBORN.....1

2. THE MODIFIER "ANY" INVOKES A VIRTUALLY IRREBUTTABLE PRESUMPTION THAT THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" DOES INCLUDE THE UNBORN.....4

3. THE SPIRIT OF THE LAW, THE PROMISE THAT "ALL MEN ARE CREATED EQUAL," SHOWS THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" DOES INCLUDE THE UNBORN.....5

4. HISTORY SHOWS THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" DOES INCLUDE THE UNBORN.....6

II.

ROE v. WADE IS VOID BECAUSE IT CRIMINALLY DEFIED THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" AND CONDEMNED TO DEATH MILLIONS OF VICTIMS WHOM THE CONSTITUTION ENDEAVORS TO PRESERVE.

1. ROE v. WADE CRIMINALLY DEFIED THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" BECAUSE THIS COURT DECREED KILLINGS TO BE "LIBERTY" WHICH THE PEOPLE HAD DEFINED TO BE "MURDER." THE COURT DECREED "MASS MURDER IS LIBERTY." 10

2. ROE v. WADE CRIMINALLY DEFIED THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" BECAUSE THIS COURT FABRICATED EVIDENCE TO FALSELY IMPLY THAT THE WORDS "ANY PERSON" DO NOT INCLUDE THE UNBORN.....23

3. ROE v. WADE CRIMINALLY DEFIED THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" BECAUSE THIS COURT DEFIED THE RULINGS OF JOHN MARSHALL AND USED A "GUILTY UNTIL PROVEN INNOCENT" BURDEN OF PROOF TO IMPLY THAT THE WORDS "ANY PERSON" DO NOT INCLUDE THE UNBORN...39

4. ROE v. WADE CRIMINALLY DEFIED THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" BECAUSE THIS COURT USED "IRON CURTAIN" PROCEDURES TO IMPLY THAT THE WORDS "ANY PERSON" DO NOT INCLUDE THE UNBORN; IT USED THESE PROCEDURES TO MAINTAIN ITS ROE v. WADE KILLINGS...47

5. DUE PROCESS OF LAW HAS COMPELLED THE U.S. SUPREME COURT TO CONFESS IN COURT THAT IT IS GUILTY OF MASS MURDER, AND TO ADMIT THAT THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" DOES INCLUDE THE UNBORN.....54

Conclusion.....64

TABLE OF AUTHORITIES

Cases:

Baxter v. Palmigiano, 425 U.S. 308.....56

Clarke v. State, 117 Ala. 1 13,14

Cohens v. Virginia, 6 Wheat. 264 41,54

Craig v. Missouri, 3 Pet. 410 22

Dartmouth College v. Woodward, 4 Wheat. 518.....40

Dred Scott v. Sandford, 19 How. 393.....6-8

Ernest v. U.S. Attorney, etc., cert. denied 89 L Ed 2d 721 (1986).....21

Goldberg v. Kelly, 397 U.S. 254.....51

Gulf, Colo. and S. Fe RR v. Ellis, 165 U.S. 150.....5

Hamilton v. United States, 26 App. D.C. 382.....13

Imbler v. Pachtman, 424 U.S. 409.....51

In Re Gault, 387 U.S. 1.....51

Lamb v. State, 67 Md. 524 24

Marbury v. Madison, 1 Cranch 137.....57

Martin v. Hunter's Lessee, 1 Wheat. 305 41

McCulloch v. Maryland, 4 Wheat. 316.....55

Mills v. Comm. 13 Pa. 631 24,34

Ogden v. Saunders, 12 Wheat. 213 54

Passenger Cases, 7 How. 282.....58

Pollard v. Dwight, 4 Cranch 421.....15

Porter v. Lasiter, 87 S.E. 2d 100 14

Regina v. West, 2 C & K 784.....12-13

Ross v. Oregon, 227 U.S. 150.....62

Santa Clara v. So. Pac. RR,
118 U.S. 394.....39

Smith v. State, 33 Me. 48.....30

State v. Anderson, 343 A. 2d 505 15

State v. Reed, 45 Ark. 333 24

State v. Slagle, 83 N.C. 544 24

Sturges v. Crowninshield,
4 Wheat. 122.....40

United States v. Altstoetter, 3 Trials
of War Criminals before the Nuernberg
Military Tribunals (1951).....20,50,62

United States v. Hale,
422 U.S. 171.....56,58

Yick Wo v. Hopkins, 118 U.S. 356.....39

Texts:

Archbold, Complete Treatise on Criminal
Procedure, Pleading and Evidence
(1860).....13

Berger, Government by Judiciary: The
Transformation of the Fourteenth
Amendment (1977).....52

Bishop, Commentaries on the
Criminal Law (4th ed. 1865).....14

Black's Law Dictionary 45

Blackstone, Commentaries.....11,23,63

Carroll, Alice in Wonderland 44

Coke, Institutes.....11,12

Denman, Introduction to the Practice
of Midwifery (1808).....26,27

Hawkins, Pleas of the Crown.....11

Hodge, Principles and Practice
of Obstetrics (1860).....27,34,35

Holmes, The Common Law (1963).....63

McCormick, The Law of Evidence (1972)....56

Model Penal Code.....62

Orwell, 1984 (1949).....19

Perkins, Criminal Law
(2d ed. 1969).....14,57,62

Plato (Jowett transl. 1942).....56

Ramsbotham, Principles and Practice of
Obstetric Medicine (1856).....27

Russell, Treatise on Crimes and
Misdemeanors (4th ed. 1865) 13

Schwartz, Statutory History of the United
States: Civil Rights (1970).....8

Speer, Inside the Third Reich 57

Storer, On Criminal Abortion
in America (1860).....31

Taylor, Manual of Medical Jurisprudence (Penrose Am. ed. 6th ed. 1866).....11,14

Velpeau, M.D., Complete Treatise on Midwifery (4th Am. ed. 1854).....27

Wharton, Treatise on the Criminal Law of the United States (1874).....30

Wharton, Treatise on the Law of Homicide in the United States (1855).....14

Wharton and Stille, Treatise on Medical Jurisprudence (1860).....24

Wigmore, Evidence (Chadborn Rev. 1972)...56

Writings of Thomas Jefferson (A. Bergh ed. 1907).....12

Articles, Reports & Briefs:

Amicus Curiae Brief by the Legal Defense Fund for Unborn Children, filed in Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983).....60

Destro, Abortion and the Constitution: The Need for a Life Protective Amendment, 63 Cal. L. Rev. 1250 (1975).....3,38

Hearings on the Proposed Constitutional Amendments on Abortion, Before the Subcommittee on Civil and Constitutional Rights of the Committee of the Judiciary, House of Representatives, 94th Cong., 2d Sess., Ser. 46, Part 1 (1976).....17

Jeffries and Edmonds, Abortion: The Dreaded Complication, The Philadelphia Inquirer, August 2, 1981 17

Joynes, Va. Med. J. (1856).....33

Landers, To a Traditionalist, Mr. Ron Sounds So Good, Wall Street Journal.....52

Quay, Justifiable Abortion, Medical and Legal Foundations, 49 Geo. L.J. 395 23

Transactions of the American Medical Association (1860).....34

U.S. Constitution and Statutes:

Fourteenth Amendment- "Any Person".....1-9

Fifth Amendment- "Any Person".....1-9

Fifth Amendment- Due Process 47-53

18 U.S.C. § 242 64

Interest of Amicus

The amicus defends the right to life of the unborn, which the parties have not done.

Summary of Argument

The unalienable guarantee of life to "any person," made in the Fifth and Fourteenth Amendments, includes the unborn.

Argument

I.

THE GUARANTEE OF LIFE TO "ANY PERSON," MADE BY THE CONSTITUTION, INCLUDES THE UNBORN.

1. THE LETTER OF THE LAW (THE GUARANTEE OF LIFE TO "ANY PERSON," THE TWO MOST IMPORTANT WORDS EVER ENACTED INTO LAW) ON ITS FACE INCLUDES THE UNBORN.

The 5th and 14th Amendments guarantee that not "any person" can be deprived of "life ... without due process of law." The words "any person" are universal, admit of no exceptions for anyone, make no distinction between born and unborn life, and thus on their face include the unborn, the same as everyone else. The obvious purpose of guaranteeing life universally to "any person" was to forbid making exceptions so some persons could be exterminated.

The Court admitted that if the word "person" included the unborn, then Roe v. Wade "collapses," because the unborn's lives would be "guaranteed" by the Constitution.[1] In ruling "the word 'person' ... does not include the unborn,"[2] the Court hit the Constitution head on, did what is expressly forbidden, and directly defied the letter of the law of its most important guarantee.

The words "any person" are the two most important words ever written into law. The guarantee of life to "any person" is the single most important guarantee because it protects the lives of everybody from government sanctioned extermination, as happened in Nazi Germany.

And the words "any person" give legal body to the spirit that "all men are created equal" and endowed with an "unalienable" right to life. The words "any person" exactly summarize what America stands for,

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1. Roe v. Wade, 410 U.S. at 156-157.

2. Roe v. Wade, 410 U.S. at 158.

its unique contribution to civilization. As Abraham Lincoln said, what made America great was the promise "not alone to the people of this country, but hope to the world for all future time ... that ALL should have an equal chance."

The words "any person" are the very words which guarantee that equal chance to "ALL"; they stand as the supreme political achievement of the human race, the prize of milleniums of struggle. If the Constitution had stated it protected the life of "any person - except the unborn," then its words would support Roe v. Wade. But its words say "any person," without any exceptions at all.

The Supreme Court of West Germany held that the words, "Everybody has the right to life," did include the unborn; it explained that the word "everybody" is universal.[3]

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3. R. Destro, Abortion and the Constitution The Need For A Life Protective Amendment, 63 Cal. L. Rev. at 1341-51 (1975). In 1975 the Supreme Court of West Germany ruled that the phrase in its Constitution, "Everybody has the right to life," did include the unborn, that "Abortion is an act of homicide," and

The Constitution extends its guarantee of life to "any person." The letter of the law permits no exceptions; on their face the words "any person" do include the unborn.

2. THE MODIFIER "ANY" INVOKES A VIRTUALLY IRREBUTTABLE PRESUMPTION THAT THE GUARANTEE OF LIFE TO "ANY PERSON" INCLUDES THE UNBORN.

The Court never studied the letter of the law - the universal words "any person." Instead the Court focused on the isolated word "person," and ignored its modifier "any," which invokes a virtually irrebuttable presumption in favor of life that the words "any person" do include the unborn.[4]

By reading the guarantee of life to "any person" as if it merely said "some persons," the Court did the most forbidden

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the state had a "duty ... to protect unborn life." It noted "Everybody" is universal:

> The right to live is guaranteed to everybody who is "alive." No distinction can be made among the several stages of developing life before birth, or between prenatal or postnatal life. "Everybody" ... means every "living person,"... therefore, "everybody" in this sense also includes unborn human beings.

4. See burden of proof, infra p. 39.

thing and reduced to nothing what is deemed the most important law in the history of political institutions.

3. THE SPIRIT OF THE LAW, THAT "ALL MEN ARE CREATED EQUAL," SHOWS THE GUARANTEE OF LIFE TO "ANY PERSON" INCLUDES THE UNBORN.

Roe v. Wade violates the spirit of the law, as well as its letter. The promise that "all men are created equal" and endowed with an "unalienable" right to "life" is the guiding spirit of American law. The Supreme Court itself ruled it is the spirit of the Fourteenth Amendment:

> "The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life...' While such declaration of principles may not have the force of organic law ... yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than ... to secure the equality of rights which is the foundation of free government." Gulf, Colo. & S. Fe Ry v. Ellis, 165 U.S. at 159-160 (1896).

There is no real medical dispute that the unborn have been created.[5] Reading the letter of the Constitution, the guarantee of life to "any person," in the spirit that "all" are "created equal," and "all" shall get their equal chance to live, proves that the words "any person" do include the unborn. Concerning the right to life, the unborn are the equal of anyone.

4. HISTORY SHOWS THE GUARANTEE OF LIFE TO "ANY PERSON" DOES INCLUDE THE UNBORN.

The last time this Court attempted to imply an exception to the words "any person" was Dred Scott v. Sandford, 19 How. 393 (1857). The 13th and 14th Amendments were intended to overrule this decision that the words "any person," as used in the 5th Amendment, did not include Negroes; there was a constitutional right to own a slave; the phase "all men are created equal" did

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5. The uncontradicted medical evidence in the Texas brief in Roe v. Wade showed the fetal heart begins "pulsations at 24 days"; and "brain waves have been noted at 43 days"; and the unborn child is "alive."

not include Negroes; Congress could not prohibit slavery in the territories; and Negroes could not sue in federal court to see if they were slave or free.

Abraham Lincoln was a leading opponent of Dred Scott. If officials can say all men are created equal except Negroes, he asked, "where will it stop?" He denounced Dred Scott as based on "falsehood," and he alleged a conspiracy by the U.S. Supreme Court, two Presidents, and leading members of Congress, to make slavery legal everywhere and overturn the foundation of our government. Explaining why he would not obey it, President Lincoln said that Dred Scott resulted in "the rule of minority, as a permanent arrangement" which was "wholly inadmissible" and if the President were bound by Dred Scott, "the people will have ceased, to be their own rulers."

Dred Scott triggered a civil war, and President Lincoln defied the Court's decision, that there was a constitutional

right to own a slave, when he emancipated slaves and declared them to be "forever free." He reminded us at Gettysburg that we were fighting to see whether a nation dedicated to the principle that "all men are created equal" could "long endure."

The Fourteenth Amendment was intended to rededicate this nation to this original proposition. One of its framers explained:

> "It establishes equality before the law, and it gives to the humblest ... the most despised ... the same protection before the law as it gives to the most powerful.... Without this ... there is no republican government."
> Rep. Jacob Howard, quoted in 1 B. Schwartz, Statutory History of the United States: Civil Rights 262 (1970).

The framers intended to prevent another Dred Scott catastrophe of judges ever again implying exceptions to the words "any person" to exclude anyone; they employed the universal words most suited for this purpose. And the people had already enacted criminal abortion laws to protect all stages of unborn life, showing the guarantee of life to "any person" means what it says.

Roe v. Wade is simply another Dred Scott disaster which rests on historical contradictions so insane that to permit it is to confess that men cannot be governed by truth, reason, or laws.[6] The Court did the most forbidden thing, and defied the "unalienable" guarantee of life to "any person," the two most important words ever written into law.

The letter of the law, its spirit, its history, its presumption in favor of life, the medical facts known to the 19th century, as well as the 20th, unite to permit only one lawful conclusion: the guarantee of life to "any person" does include the unborn.

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6. Roe v. Wade rests on the contradiction that without one word of explanation, the framers intended their very promise of life to all, to "any person," to sweep away all their abortion statutes, and make killings, which they had already condemned as criminal, a fundamental "liberty" ranked along with free speech. Roe v. Wade further pretends that the framers somehow silently connived to repudiate a major point of the civil war, so that, in the manner of Dred Scott, judges would be at liberty to again produce more convulsions by implying more exceptions to the words "any person."

II.

ROE v. WADE IS VOID BECAUSE IT CRIMINALLY DEFIED THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" AND CONDEMNED TO DEATH MILLIONS OF VICTIMS WHOM THE CONSTITUTION ENDEAVORS TO PRESERVE.

1.

ROE v. WADE CRIMINALLY DEFIED THE GUARANTEE OF LIFE TO "ANY PERSON" BECAUSE THIS COURT DECREED KILLINGS TO BE "LIBERTY" WHICH THE PEOPLE HAD DEFINED TO BE "MURDER." THE COURT DECREED "MASS MURDER IS LIBERTY."

When the Fourteenth Amendment was adopted in 1868, an abortion was murder if the child was "born alive." And a child could be "born alive" long before the Court's arbitrary point of "viability."[1]

An 1859 study by the American Medical Association stated the law of murder throughout the United States:

> If a person, intending to procure abortion, does an act which causes the child to be born earlier than its natural time, and therefore in a state much less capable of living, and it afterwards die in consequence of such premature exposure, the person who by this misconduct brings the child into the world, and puts it into a situation in which it cannot live, is guilty of murder.[2]

Yet in 1973, without any investigation of the law of murder, the Court decreed this very killing to be "liberty" which the American people had universally defined to be "murder." In plainest terms, the Supreme Court decreed: "MASS MURDER IS LIBERTY."

A. THE ENGLISH COMMON LAW WAS THE LAW OF THE LAND IN COLONIAL AMERICA

America's first settlement at Jamestown followed the English common law, as did other colonies. The common law defined an abortion in which a "quick" (about 4 months gestation) child died after being "born alive" to be "murder."[3] So if

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1. This Court arbitrarily set the point, where the law could begin to protect the unborn, at "viability" (about 7 months gestation) "because the fetus then presumably has the capability of meaningful life outside the ... womb." Roe v. Wade, supra, 163. The point is arbitrary, because the Court cannot explain why (in legal and medical precedent) it can be criminal to kill the unborn a few days after viability, but must be "liberty" to kill the unborn a few days before. The Court invented it.

2. Reported in A.S. Taylor, A Manual of Medical Jurisprudence 462 (6th ed. 1866). He described the AMA report as "a complete and comprehensive exhibit of laws of each of the United States." Id., at 460.

3. Coke, 3 Inst. 50; Hawkins, 1 Hawkins Ch. 13, s. 16; Blackstone, 4 Bl. Com. 198.

the child were "born alive" (even if not "viable"), Coke said the abortion is "so horrible an offense" and "this is murder."[4]

Regina v. West involved this very abortion of a quick, but pre-viable child:

> "The prisoner is charged with murder; and the means stated are, that the prisoner caused the premature delivery ... by using some instrument for the purpose of procuring abortion; and that the child so prematurely born was, in consequence of its premature birth, so weak that it died.
> ....
> "A medical witness stated ... that it was a healthy child; but that, being born at that period of gestation, it was impossible that it could live any considerable length of time separated from the womb of the mother. It was incapable of maintaining a separate and independent existence." Regina v. West, 2 C & K 784, 786-788 (1848).

Although not yet viable, the judge cited Coke and instructed the jury that if the child were "born alive," the abortion was

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4. Coke, 3 Inst. 50. "This work is executed with so much learning and judgment, that I do not recollect that a single position in it has ever been judicially denied....(I)t may still be considered as the fundamental code of the English law." 14 The Writings of Thomas Jefferson 57 (Bergh ed. 1907). Jefferson was an authority on colonial law, serving on the 1776 committee which adapted Virginia's laws to republican form, the common law being assigned to him.

murder.[6] The English writers cited this as the correct statement of the law.[7]

Thus Roe v. Wade decreed killings to be "liberty" which had been condemned as "murder" since earliest colonial times.

B. "BORN ALIVE" ABORTIONS WERE MURDER WHEN THE FOURTEENTH AMENDMENT WAS ADOPTED.

The English common law is the dictionary which courts use to construe the state and federal homicide statutes.[8]

By the time the Fourteenth Amendment was adopted, American legal authorities had

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6. Regina v. West, 2 C & K at 788: "I am of opinion (and I direct you in point of law), that if a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, the person who by her misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder."

7. 1 J.F. Archbold, A Complete Treatise on Criminal Procedure, Pleading and Evidence 783 (Waterman Am. ed. 7th ed. 1860); 1 W.O. Russell, A Treatise on Crimes and Misdemeanors 671-672 (4th ed. 1865).

8. Clarke v. State, 117 Ala. 1 (1898); Hamilton v. United States, 26 App. D.C. 382 (1905).

long followed the common law rule that abortions of pre-viable children "born alive" were murder. In 1858 the preeminent legal writer of the 19th century explained:

> "If a person intending to procure abortion, does an act which causes a [quick] child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies, in consequence of its exposure to the external world, the person who by this misconduct, so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder" F. Wharton, A Treatise on the Law of Homicide in the United States 93 (1855).

This was the uncontradicted view in the United States when the Fourteenth Amendment was adopted.[9] Courts applied this law of murder.[10] It was still the law in 1973.[11] In 1975 the New Jersey courts

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9. 2 J.P. Bishop, Commentaries on the Criminal Law 365 (4th ed. 1868); A.S. Taylor, supra, 462, 517.

10. Clarke v. State, 117 Ala. 1 (1898). "In Georgia ... the wilful killing of an unborn child so far developed as to be ... called 'quick,' is considered as murder." Porter v. Lassiter, 87 S.E. 2d 100, 102 (1955).

11. R. Perkins, Criminal Law 30 n.17 (2d ed 1969).

applied this 17th century murder law to the killing of a pre-viable fetus born alive:

> That a fetus may be the victim of murder if it be born alive has long been a part of our common law....Coke, Institutes 58 (1648).[12]

For almost four centuries governments came and went, but the law that born alive abortions are murder, which is binding on the U.S. Supreme Court,[13] remained the law of the land.

Thus Roe v. Wade decreed killings to be "liberty" which had been universally condemned by the framers and adopters of the Fourteenth Amendment to be "murder."

C. THE GUARANTEE OF LIFE TO "ANY PERSON" INCLUDES CHILDREN GUARDED BY THE MURDER LAW

The guarantee of life to "any person" in the Fourteenth Amendment must include

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12. State v. Anderson, 343 A. 2d 505, 508 (1975), affirmed 413 A. 2d 611 (1980). The courts rejected the claim it was not murder because "the infants were never capable of maintaining a separate and independent existence." Id. at 615.

13. Chief Justice Marshall ruled that the Supreme Court must accept the construction given by a state to its own statute. Pollard v. Dwight, 4 Cranch 421, 429.

all persons whose lives were protected by the law of murder when the Amendment was adopted. No dispute is even possible.

If the killing of Jews had been defined to be murder in 1868, it is certain that the framers did not intend to exclude Jews from the guarantee of life to "any person" so it would be "liberty" to kill Jews with impunity from criminal laws. Changing the names of the victims does not change the legal result.

The people who framed and adopted the Amendment had condemned the taking of a crying, pre-viable infant from its mother's womb to be murder. Thus it is certain that they did not intend to exclude the lives of these children from the guarantee of life to "any person" so it would be "liberty" to kill them with impunity from murder laws.

By arbitrarily setting "viability" as the point the law could begin to protect unborn life, the Court decreed the same

killing to be "liberty" which the American people had condemned as "murder."

The words "any person" do indisputably include children protected by the law of murder. And since personhood under the Constitution does not just fade away with time, like some magic disappearing ink, the right to life of these children is still guaranteed by the Fourteenth Amendment.

D. ROE_v._WADE_ALLOWS_HYSTEROTOMY_ABORTIONS

Roe v. Wade hysterotomy abortions, basically Caesareans, result in children "born alive."[14] As explained to Congress:

> With few exceptions, babies aborted by this method will all move, will all breathe, and some will cry.... Almost all were born alive.[15]

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14. Jeffries and Edmonds, Abortion: The Dreaded Complication, Philadelphia Inquirer, August 2, 1981.

15. Hearings on Constitutional Amendments on Abortion, before subcomm. on Civil and Constitutional Rights, of the House Comm. of the Judiciary, 94th Cong., 2d Sess., Ser. 46, Part 1, at 397 (1976) (statement by Dr. John Willke, M.D.). There are about 140,000 second stage abortions each year. Washington Post, April 26, 1985, A11. Most methods can result in a child born alive.

When the Fourteenth Amendment was adopted, these hysterotomy abortions were murder. Thus the lives of the children are still guaranteed by the Amendment, and the killings are still murder.

F. THE DECREE "MASS MURDER IS LIBERTY" OVERTHROWS THE U.S. CONSTITUTION

Is a government of laws founded upon evidence, or the mere naked decrees of men holding office for life? The evidence proves that the lives of these children are guaranteed by the U.S. Constitution.

This evidence for the unborn is exactly the same evidence which many people must rely upon to prove their lives are guaranteed by the U.S. Constitution.[16] If

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16. Suppose it were claimed in federal court that it is "liberty" to kill the insane, or invalids, or Jews. What factual, non-argumentative evidence could be found to establish their right to life under the U.S. Constitution?

As with the unborn, it would do no good to object that no one ever heard of a "liberty" to kill them - or to object that such killings had thereto been criminal.

The Amendment merely states that it protects the life of "any person." So, as with the unborn, it does not expressly

the evidence is ineffective for the unborn, then the Roe v. Wade precedent can grow to a "liberty" to kill virtually anyone. If the Supreme Court decreed it "liberty" to kill Jews, this same evidence would prove it "murder," and not "liberty." Judges may have more sympathy for other victims, but changing the names of the victims will not change the legal result.

Roe v. Wade murders reason itself. In his novel, "1984," Orwell described how a tyranny defrauded its subjects into obedience with the "doublethink" slogan "FREEDOM IS SLAVERY." Although this science fiction appears improbable, the U.S. Supreme Court has defrauded the United

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refer to them; and its legislative history does not appear to expressly refer to them.

The principle that all people are "created" equal, with an "unalienable" right to "life," having been sneered out of court in Roe v. Wade, now provides no assurance for anyone.

As with the unborn, the murder laws don't expressly refer to the insane, or invalids, or Jews; the intention of the legislators is found in the common law.

If the evidence cannot protect the unborn, the lives of many are imperiled.

States into obedience with the ultimate falsehood: "MASS MURDER IS LIBERTY."

Abraham Lincoln ridiculed Dred Scott by reducing it to its plainest terms:

> [We hold these truth to be self-evident, that] all men are created equal - except Negroes.
> That if any one man, choose to enslave another, no third man shall be allowed to object.

The Fourteenth Amendment intended to prevent this forever. Yet Roe v. Wade, reduced to its plainest terms, asserts:

> We hold these truths to be self-evident, that all men are created equal - except those created to be murdered.
> That if any one man, choose to murder another, no third man shall be allowed to object.

By changing the names of the victims, the Supreme Court has duplicated the decree of "the supreme judge" of Nazi Germany who asserted the killing of Jews to be legal.[17]

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17. United States v. Altstoetter, 3 Trials of War Criminals Before the Nuernberg Military Tribunals 1011-1014 (1951). The Nazi judges claimed that they could not be held accountable for complicity in extermination and murder, since they had acted "within the authority" of the "decrees" of "the supreme judge." Id. at

The key doctrines of the Nazi judiciary have been adopted by the courts of the United States: a "supreme judge" which decrees mass murder to be legal; and lower judges who rule they must blindly obey.[18]

The Court did exactly what the guarantee of life to "any person" was intended to prevent, and decreed murder to be legal, by giving "murder" the new name "liberty." But Chief Justice Marshall condemned such sham:

> "Is the proposition to be maintained that the Constitution meant to prohibit names and not things? That a very important act, big with great and ruinous mischief which is expressly forbidden by words most appropriate for its description; may be performed by the substitution of a name? That the Constitution, in one of its most important provisions, may be evaded by giving a new name to an old

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983-85. Their "supreme judge" had decreed killings to be legal which had been defined by statute to be criminal. But the tribunal held, "The dagger of the assassin was concealed beneath the robe of the jurist."

18. Ernest v. U.S. Attorney etc., cert. denied 475 U.S. 1084 (1986). The U.S. District Judge ruled that Roe v. Wade was "the worst decision by the Supreme Court in the history of the Court." But he stated that even if the Supreme Court decreed it liberty to kill Jews, he must obey and permit the killings to continue.

thing? We cannot think so." Craig v. Missouri, 3 Pet. at 433 (1830).

Thus the United States is ruled by the decree "MASS MURDER IS LIBERTY." But murder is still murder, no matter what new name the Court may give it. This is the most catastrophic crime in history. This precedent of judicial alchemy to convert "murder" into "liberty" can be arbitrarily evoked to kill anyone; it cancels the "unalienable" guarantee of life, and makes the life of everybody depend on the mere whim of this Court. Indeed, in defending itself against accusations of mass murder, the Court claimed the power to decree the mass murder of Jews, or anyone, to be liberty. Instead of government by truth and laws, government is now reduced to the mere matter of which murderer can grab power, issue the orders, and be obeyed. Again people must struggle to ensure that the nation dedicated to the proposition that "all men are created equal" shall not "perish from this earth."

ROE v. WADE CRIMINALLY DEFIED THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" BECAUSE THIS COURT FABRICATED EVIDENCE TO FALSELY IMPLY THAT THE WORDS "ANY PERSON" DO NOT INCLUDE THE UNBORN.

The 19th century abortion statutes supplanted the medieval view that unborn life began at "quickening"[1] and expanded protection of law to all stages of unborn life; they prove the guarantee of life to "any person" includes the unborn, that no distinction can be made among the stages of unborn life.

When the Fourteenth Amendment was adopted in 1868, over three-fourths of the ratifying states had already made abortion at any stage of gestation a crime.[2] Within a few years, these statutes were universal.

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1. "Life is the immediate gift of God, a right inherent by nature in every individual: and it begins in contemplation of law as soon as the infant is able to stir in the mother's womb." 1 Bl. Com. 126.

2. The statutes are set out in Quay, Justifiable Abortion, Medical and Legal Foundations, 49 Geo. L. J. 447-520 (1961).

And in those few States still following the common law, judicial revision makes it impossible for this Court to assert with any assurance that it was any different than the prevailing statutes:

> By the ancient common law ... as the life of an infant was not supposed to begin until it stirred in the mother's womb, it was not regarded as a criminal offense to commit an abortion in the early stages of pregnancy. A considerable change in the law has taken place in many jurisdictions by the silent and steady progress of judicial opinion; and it has been frequently held by Courts of high character that abortion is a crime at common law without regard to the stage of gestation.[3]

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3. Lamb v. State, 67 Md. 524 (1887). Some state supreme courts rejected medieval medical views and ruled that the common law made abortion at any stage of gestation a crime. Mills v. Comm., 13 Pa. 631 (1850); State v. Slagle, 83 N.C. 544 (1880); State v. Reed, 45 Ark. 333 (1885).

Wharton, a standard 19th century text, stated that under common law "the protection of the law was cast round an unborn child from its first stage of ascertainable existence, no matter whether 'quickening' had taken place or not." F. Wharton and M. Stille, Treatise on Medical Jurisprudence 927-28 (2d ed. 1860).

And those state supreme courts which ruled that abortion prior to quickening was not a common law crime were immediately

The theory of a "liberty" to kill the unborn faced a fatal contradiction. How could the Court dare to Dred Scott-like imply an exception to the guarantee of life to "any person" in order to declare killings to be "liberty" which the people had defined to be criminal? This absurd contradiction wrecks Roe v Wade.

To resolve this fatal contradiction the Court fabricated the hypothesis that the 19th century criminal abortion statutes were not intended to protect unborn life, but were only intended to protect the mother. This falsely implied that the people never intended the lives of the unborn to be protected by law. This false hypothesis was fabricated as follows.

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overruled by their legislatures which made abortion at any stage of pregnancy a crime. Comm. v. Parker, 50 Mass. 263 (1845), was immediately overruled by Mass. Acts & Resolves ch. 27 (1845). State v. Cooper, 22 N.J.L. 52 (1849), was immediately overruled by N.J. Laws at 266 (1849). Abrahams v. Fosbee, 3 Iowa 274 (1856) was overruled by the next legislature, Iowa Rev. Laws, tit. XXIII, ch. 165. art. 2, sec. 4221 (1860).

A.

The Court first asserted as fact:

> "When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman." Roe v. Wade, 410 U.S. at 148.

The only authority cited was a 20th century medical history book.[4] But this book only described the hazards of major surgery in general prior to Lister's discovery of antiseptics; the abortion operation was not mentioned anywhere in the entire book.

The 19th century obstetric authorities throughout the Western world prove that abortions by physicians were "perfectly safe" to the woman.[5] They prove the Court's assertion of fact to be false.

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4. Haagensen and Lloyd, A Hundred Years of Medicine 19 (1943), cited in Roe v. Wade, supra, at 148 n.43.

5. 2 T. Denman, M.D., An Introduction to the Practice of Midwifery 96 (1802). He was a standard English authority. They based their judgments on their own experience in performing abortions, and from hundreds of cases reported from around the world. In addition to perforation, other procedures were also safe. A French physician wrote "experience has proved that the dangers of the operation are reduced to a small

The Supreme Court never revealed the "hazardous" abortion "procedure" to which it was referring. Actually, the 19th century physicians generally used the ancient method,[6] which one physician traced back 2000 years,[7] and which they described as "perfectly safe" to woman.

The Court did not examine even one 19th century obstetric textbook; and they prove its assertion, "the procedure was a hazardous one for the woman," to be false.

Since abortion was not dangerous to the life of the mother, the only motivating

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matter." A.L.M. Velpeau, M.D., A Complete Treatise on Midwifery 530 (4th Am. ed. 1852). The preeminent American physician wrote "to the mother there is very little danger." H.L. Hodge, M.D., The Principles and Practice of Obstetrics 293 (1864).

6. Dr. Denman, a standard authority in England, wrote in 1802: "the membranes of the ovum are punctured," which permitted "the discharge of the waters," which induced the "action of the uterus," which resulted in the expulsion of the fetus from the womb, which was "perfectly safe" to the woman. 2 Denman, supra, at 96-99.

7. F. Ramsbotham, M.D., The Principles and Practice of Obstetric Medicine 724 (4th ed. 1856).

purpose the abortion statutes could have had was to protect the lives of the unborn from destruction by abortions, even safe abortions by physicians. Had it been the purpose of the legislators to only protect the mother, they would have simply required abortions, which were known all over the western world to be safe to the mother, to be performed only by physicians.

B.

The Court next asserted: "Abortion mortality was high."[8] This is asserted as fact. The Court cited no authority to support it. The 19th century obstetric authorities prove this assertion to be false; their medical texts show that the abortion operation was "perfectly safe."

The purpose of the Court's false assertion of fact is to go beyond the mere theory that abortion was hazardous to the mother, and infer that the carnage was so

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8. Roe v. Wade, 410 U.S. at 149.

great as to call for legislation to protect women from the medical profession.

C.

Upon these two false assertions of fact, the Court next falsely inferred:

> "[A] State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy." Roe v. Wade, 410 U.S. at 149.

This is a false inference, drawn from two false assertions of fact. Moreover, the 19th century treatises on criminal law expressly stated that these abortion statutes were intended to supplant the ancient common law and protect the lives of the unborn during all stages of gestation:

> "The notion that a man is not accountable for destroying the child before it quickens, arose from the hypothesis that quickening was the commencement of vitality with it, before which it could not be considered as existing. This "absurd distinction" ... is now exploded in medicine.... The foetus is certainly ... as much a living being immediately after conception, as at any other time before delivery.
>
> ....
>
> "There is as much vitality ... on one side of quickening as on the other, and ... the infant is as much entitled to

> protection ... a week before it quickens as a week afterwards.... Acting under these views, the legislatures ... passed acts making ante-quickening-foeticide individually penal." 1 F. Wharton, A Treatise on the Criminal Law of the United States 656-57 (5th ed. 1861).

There is no 19th century authority to the contrary. If the purpose of these laws had been to protect the mother, and not the child, these texts would certainly have noted such an important thing.

And State supreme courts ruled that these statutes protected the unborn:

> "(T)he statute ... essentially changed the common law. There is a removal of the unsubstantial distinction, that it is no offense to procure an abortion, before the mother becomes sensible of the motion of the child, notwithstanding it is then capable of inheriting an estate.... It is now equally criminal to produce abortion before and after quickening." Smith v. State, 33 Me 48 (1851).

Since abortions by physicians were known all over the western world to be safe to the mother, the motivating purpose of these abortion laws could only have been to protect the lives of unborn children from destruction from abortions. That

legislatures prohibited safe abortions by physicians, despite the great danger to the mother from abortions by criminals,[9] shows their great respect for unborn life.

D.

The Court next made its irrelevant study of the single word "person," and held it "does not include the unborn":

> "(O)ur observation ... that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." Roe v. Wade, 410 U.S. at 158.

The Court could not find even one 19th century authority to support this result; the whole weight rests on the Court's "major portion - far freer" assertion, which is false.[10] The reverse is closer to

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9. "In thirty-four cases of criminal abortion ... twenty-two were followed...by death, and only twelve were not. In fifteen cases necessarily induced by physicians, not one was fatal." H.R. Storer, M.D., On Criminal Abortion in America 43 (1860)

10. The ancient common law only prevailed in the early 19th century. By mid-century, a majority of the States which ratified the Amendment had already enacted statutes

the truth. The evidence indicates that legal abortion was far freer in 1973, than when the Amendment was adopted.[11]

The Court's "major portion - far freer" doctrine, were it even true, is absurdly irrelevant[12] and ominously skirts

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which punished abortion throughout gestation. (Supra n.2) By 1868, over three-fourths had enacted such statutes; and shortly they were universal. In those few states with no statute, this Court cannot claim with assurance that the common law was any different. (Supra n.3) Thus the "prevailing law" for the last half of the 19th century; it was about the same as existed in most states in 1973; and "legal" abortion was not "far freer" then.

11. The statutes listed in Roe v. Wade, 410 U.S. at 140 n37, show that by 1973 four states permitted abortion on demand, while fourteen permitted abortions for other reasons not allowed in 1868. The statutes prevailing in 1868 only permitted abortions to save the life of the mother or child. Thus legal abortion was far freer in 1973 than in 1868, although in most states it was still about the same as it was in 1868.

12. The same thing could be said about "legal slavery," which really was "far freer" for the "major portion" of the 19th century than it is today. Would this prove a right to own a slave today? If the Court could ignore the events of 1860 to 1866 - it could plausibly reaffirm its Dred Scott rule that there was a right to own a slave.

the central issue of the law existing in 1868, and the reason for the vast change.

The Court's assertion that "legal abortion" was then "far freer" refers to the ancient common law that abortion prior to "quickening" was not a crime, on the theory that life began at "quickening." A physician, who helped draft Virginia's 1848 abortion statute, explained its purpose was to supplant this "exploded error":

> "(T)hat the embryo is endowed with an inherent vitality from the first moment of conception, and is therefore as much entitled to the protection of the law before the period of 'quickening' as after it, every well-informed physician must yield a ready assent. The old doctrine, once held by medical men ... that the foetus first becomes animated, or endowed with distinct vitality, at the moment when the sensation of quickening is experienced by the mother, has been long since banished from the domain of science ... and now only finds a retreat in the dark and ancient caverns of the common law.
> ....
> "(T)he civil rights of the unborn child are perfect from the very commencement of its being." L.S. Joynes, M.D., "Foetus in Utero," Virginia Medical Journal 179-180, 187 (1856).

The 19th century medical and legal authorities, with none to the contrary, condemned this ancient theory of life:

> "(I)t is the duty of every accoucheur earnestly to protest against the ancient theological and legal opinion that, prior to the fourth month, the embryo had no proper existence.... (T)he merest tyro in physiological investigations must be convinced of the falsity of all such opinions." H.L. Hodge, M.D., The Principles and Practice of Obstetrics 78 (1864).

Yet the Court exactly adopted, as constitutional law, a view of unborn life which the 1860 president of the AMA called "a barbarous physiology" and which courts ruled "never ought to have been the law anywhere,"[13] and which 19th century legislatures condemned as criminal. The AMA president said in urging States to protect all stages of unborn life:

> "This relic of a barbarous physiology needs to be exploded, and the truth should be generally promulgated, that, from the moment of conception, a new being is engendered." 13 Transaction of the American Medical Association 56-57 (1860).

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13. Mills v. Commonwealth, supra, 632.

The abortion statutes were urged by America's most eminent medical professors and physicians, and they were intended to protect all stages of unborn life:

> From the moment of fecundation, the new being becomes independent ... its individuality is complete.... (T)here is a progressive ... advancing from one degree of perfection to another. Every protection, therefore, which is extended by human legislation to the young infant ... should be equally effectual in securing the life of the embryo from the earliest period of its existence.[14]

The abortion statutes show the universal guarantee of life to "any person" was not based on "a barbarous physiology"; the Amendment recognizes that there is no time during unborn life that a rational line can be drawn to permit the killings.

But the Court accepted the medieval view, that life began at "quickening"

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14. H.L. Hodge, M.D., The Principles and Practice of Obstetrics 78 (1864). Hodge's "name had become a household word throughout the land" and his book "valued among the very first works on obstetrics ever issued from the American or foreign press." R. Penrose, M.D., Discourse on Life of H.L. Hodge 20-21 (1872)

(about 4 months), and arbitrarily enlarged it to "viability" (about 7 months), making a "liberty" to kill which even its only authority, the ancient common law, condemned as criminal. Thus the basis of the Court's decree that "the word 'person'... does not include the unborn." Thus 20th century constitutional law was founded on medieval medical theory which was rejected as false in the 19th century, and remains false today.

In short, the Court manufactured a constitutional right to kill, out of "an exploded error" that an ante-quick child was not alive, which the "merest tyro" knew to be false, and was universally condemned as "a barbarous physiology" found only in "dark and ancient caverns," which 19th century judges ruled "never ought to have been the law anywhere," and which legislatures condemned as criminal everywhere, in order to Dred Scott-like blast an exception to the guarantee of life to "any person," so

tens of millions of victims could be killed with impunity from criminal laws. Such arbitrary shopping among medieval notions, rejected by the framers as "barbarous," in order to define the unalienable guarantee of life to "any person," is not law; it is murder under ruse of law. This precedent can now be evoked by the Court to destroy anyone. Indeed, in defending itself against accusations of mass murder, this Court has claimed the power to decree the mass murder of Jews, or anybody, to be liberty.

The Court now has bloody precedent for doing the most forbidden act; it directly defied the unalienable guarantee of life to "any person," the two most important words ever written into law, and condemned to death millions of victims whom the U.S. Constitution endeavors to preserve. It can now happen to anyone; the Court has cancelled the "unalienable" guarantee of life to "ALL," and sealed it in blood.

E.

In construing its equivalent word "everybody," the Supreme Court of West Germany ruled it did include the unborn:

> "No distinction can be made among the several stages of developing life before birth, or between prenatal and postnatal life." [Supra page 3 n.3]

The history of the criminal abortion statutes proves the framers made this same conclusion when they universally guaranteed life to "any person" without any exceptions: there is no time during unborn life that the law can withdraw its protection and permit the killings; rather it is the duty of the law to protect the weak.

Without need of assistance from Chief Justice John Marshall's burdens of proof, as described in the next section, history permits only one rational conclusion: the universal and "unalienable" guarantee of life to "any person" includes the unborn during all stages of unborn existence.

3.

THIS COURT CRIMINALLY DEFIED THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" WHEN IT DEFIED THE RULINGS OF JOHN MARSHALL AND USED A "GUILTY UNTIL PROVEN INNOCENT" BURDEN OF PROOF TO INFER THAT THE WORDS "ANY PERSON" DO NOT INCLUDE THE UNBORN.

The Court used the correct burden when it previously construed "any person."[1] Yet when it came to the unborn, it used a "guilty until proven innocent" burden.

A.

THE BURDENS, DESCRIBED BY CHIEF JUSTICE MARSHALL, PROVE THE GUARANTEE OF LIFE TO "ANY PERSON" DOES INCLUDE THE UNBORN.

Chief Justice John Marshall described the conditions the Court must satisfy to lawfully imply an exception to universal terms in the U.S. Constitution.

Before the Court can exclude the unborn from the guarantee of life to "any

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1. The Court properly ruled that the words "any person" included Chinese aliens, saying the words are "universal in their application, to all persons ... without regard to any differences." Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). And this Court was so sure that the words "any person" included "corporations," it refused to even allow counsel to argue against it. Santa Clara v. So. Pac. RR, 118 U.S. 394, 396 (1886).

person," so they can be killed with impunity from criminal laws, the Court must prove that including the unborn within the terms "any person" would be "so monstrous, that all mankind would, without hesitation, unite in rejecting the application."[2]

The Court must prove that if the right to life of the unborn had "been suggested [to the framers] the language would have been so varied, as to exclude it,"[3] and the

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2. Sturges v. Crowninshield, 4 Wheat. 122, 202-203 (1819). When the Constitution uses universal words, and a case is "within the very words of the Constitution," it would be "dangerous in the extreme" to infer the case "is not within its spirit" because "we believe the framers of that instrument could not intend what they say" unless the "absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application."

3. Dartmouth College v. Woodward, 4 Wheat. 518, 644-45 (1819). "It is not enough to say that this particular case was not in the mind of the Convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception. The case being within

framers would have changed the guarantee to read: "Nor shall any state deprive any person, except unborn persons, of life ... without due process of law."

These are the burdens which protect the lives of all Americans from government sanctioned extermination, as happened in Nazi Germany; they carry the life of each American in their hands. The Court bears the heaviest burden of proof to imply an exception to the guarantee of life to "any person" so millions of victims can be killed with impunity from criminal laws.[4]

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the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd ... as to justify those who expound the constitution in making it an exception."

The Court used these burdens when it ruled it could not read its jurisdiction, which includes "all cases" arising under the Constitution, as if it merely said "some cases." Cohens v. Virginia, 6 Wheat 264 (1821); Martin v. Hunter's Lessee, 1 Wheat. at 339 (1816).

4. The truth of this extraordinary burden can be demonstrated by applying it to various cases. Before the Court could imply an exception to the universal terms "any person," so that Jews could be deliberately

Chief Justice Marshall's rules prove the guarantee of life to "any person" does include the unborn because "all mankind" would not unite "without hesitation" to exclude them. And the framers would not have changed the guarantee to read "any person - except the unborn," so it would be liberty to kill them, because the people had already enacted criminal statutes to protect the lives of the unborn by law. Thus the guarantee of life to "any person" does include the unborn.

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killed with impunity from criminal laws, the Court would have to prove that "the absurdity and injustice" of including Jews within the universal terms "any person" would be "so monstrous, that all mankind would, without hesitation, unite in rejecting the application." And the Court must prove that if the case of the Jews had been suggested to the framers, they would have changed the Amendment to read: "No state shall deprive any person, except Jews, of life without due process of law." This same burden protects us all.

B.

THIS COURT EXACTLY DEFIED THE BURDEN DESCRIBED BY CHIEF JUSTICE JOHN MARSHALL.

Instead of placing the burden on the advocates of the killings to prove that including the unborn within the guarantee of life to "any person" would "be so monstrous, that all mankind would, without hesitation, unite in rejecting the application," the Court reversed the burden:

First, the Court declared a "liberty" to kill the unborn with impunity from criminal laws, before it even looked to see if the guarantee of life to "any person" included the unborn.[5]

Second, subsequently, the Court looked to see if the guarantee of life to "any person" included the unborn.[6]

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5. Roe v. Wade, 410 U.S. at 153: "(T)he Fourteenth Amendment's concept of personal liberty ... is broad enough to encompass a woman's decision ... to terminate her pregnancy."

6. Roe v. Wade, 410 U.S. at 156-157. "The appellee ... argue that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment."

Third, the Court admitted that if the words "any person" included the unborn, its predetermined assertion of a "liberty" to kill the unborn "of course, collapses."[7] But the Court decreed a "liberty" to kill the unborn before it looked to see if the unborn had a "guaranteed" right to live.

Thus the Court had passed its sentence of death, before it even looked to see if the Constitution guaranteed a right to live. It is analogous to a court sentencing an accused to be hung before it even heard the evidence. As Alice's Queen demanded: "Sentence first; verdict afterwards."[8]

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7. Roe v. Wade, 410 U.S. at 156-157: "If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment."

8. The vengeful Queen in "Alice in Wonderland" shouted "Off with her head" and when admonished that the jury must first consider its verdict, she said: "No! No! Sentence first- verdict afterwards."
So it was in Roe v. Wade - first the sentence of death; then the verdict whether the law allowed the victim to live.

Fourth, the Court's purpose for first predetermining a "liberty" to kill the unborn, was not only to shift the burden of proof from the advocates of the killings onto the unborn, but also to impose its heaviest "compelling" burden on the unborn, a burden of proof so devastating that state statutes seldom, if ever, survive it.[9]

Fifth, the Court stated that the evidence did not prove "with any assurance" that the guarantee of life to "any person" included the unborn.[10] This confirms that the Court placed the burden on the unborn to prove with "assurance" that the words "any person" included the unborn. This is the heaviest burden which can be imagined.

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9. Roe v. Wade, 410 U.S. at 155: "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest.'" As its compelling state interest, Texas claimed that the lives of the unborn were protected by the Fourteenth Amendment. Id., at 156.

10. Roe v. Wade, 410 U.S. at 157. "Assurance" means: "To make certain and put beyond doubt." Black's Law Dictionary (4th ed. 1968).

Finally, by calling upon its false evidence to raise trifling doubts, the Court said that the unborn had not met their burden of proof and ruled "the word 'person' ... does not include the unborn."

If the Court used such burdens to decree a "liberty" to kill Jews, surely none would deny it would be murder. Judges may have more sympathy for other victims, but changing the name of the victims will not change the legal result. When courts use such burdens to condemn victims to death, it can no longer be pretended it is still the government of the United States - or any government of laws. This is another precedent of murder under ruse of law which this Court can arbitrarily evoke to destroy anyone. It cancels the "unalienable" right to life of "any person" and makes the life of everybody depend on the whim of this Court. The true burdens prove that the guarantee of life to "any person" does include the unborn.

ROE v. WADE CRIMINALLY DEFIED THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" BECAUSE THIS COURT USED "IRON CURTAIN" PROCEDURES TO IMPLY THAT THE WORDS "ANY PERSON" DO NOT INCLUDE THE UNBORN; IT USED THESE PROCEDURES TO MAINTAIN ITS KILLINGS.

The Court effected Roe v. Wade by using unconstitutional "iron curtain" procedures in a mock trial without truth.[1]

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1. A. Denial of Assistance of Counsel
Counsel did not especially represent the unborn in the U.S. District Court in Roe v. Wade. And the U.S. Supreme Court denied a request by an original party to allow counsel to especially represent the unborn and defend their right to life. Thus, counsel did not represent the unborn at any stage of the original proceedings.

B. Denial of Prior Notice
The District Court did not even look to see if the lives of the unborn were protected by the U.S. Constitution; this question was argued for the first time after Roe v. Wade reached the Supreme Court. And the Supreme Court gave the parties no prior notice of the constitutional standards, or the burdens of proof, or the evidence, which the Court used to infer that the lives of the unborn were not protected by the U.S. Constitution. The first time the parties had notice was when Roe v. Wade was published, and the victims were already condemned to death. An original party objected that it lacked the prior notice needed to defend the unborn.

C. Secret Evidentiary Proceedings
The Court used some secret evidentiary process, not open to the parties, to find

And the Court maintains its killings by using "iron curtain" procedures in mock trials without truth, despite continual objection that the Court was using criminal procedures to maintain its killings:

1. The Supreme Court willfully refuses to allow retained (no cost to taxpayers) counsel to represent the victims being

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evidence to infer that the lives of the unborn were not protected by the U.S. Constitution. An original party objected that the Court's facts were "unknown to the parties" and it never had opportunity to cross-examine the Court's evidence.

D. Denial of Right to Cross-Examine
An original party asked permission to cross-examine the evidence which the Court used to infer that the lives of the unborn were not protected by the Constitution. Since the Court found its evidence in secret proceedings, the parties had not previously seen the evidence. But the Supreme Court would not allow its evidence to be cross-examined.

E. Denial of Right to Present Evidence
An original party asked permission to present evidence under the new constitutional standards, which it had not seen before, to show that the lives of the unborn are protected by the Constitution. But the Court refused to allow it. And thus the killings commenced.

killed and defend their right to life.[2]

2. The Supreme Court willfully refuses to allow its evidence in Roe v. Wade, which it used to infer that "the word 'person'...

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2. Some of the cases are: Colautti v. Franklin, 439 U.S. 379, motion to allow counsel for the unborn denied 437 U.S. 902; Anders v. Floyd, 440 U.S. 445, motion to allow counsel for the unborn denied 439 U.S. 890; Bellotti v. Baird, 443 U.S. 622, motion to allow counsel for the unborn denied 439 U.S. 1065; Ashcroft v. Freiman, affirmed 440 U.S. 941, motion to allow counsel for the unborn denied, 440 U.S. 941; United States v. Zbaraz, 448 U.S. 358, motion to allow counsel for the unborn denied 444 U.S. 1030; Harris v. McRae, 448 U.S. 297, motion to allow counsel for the unborn denied 445 U.S. 941; H.L. v. Matheson, 450 U.S. 398, motion to allow counsel for the unborn denied 445 U.S. 959; Simopoulos v. Virginia, 462 U.S. 506, motion to allow counsel for the unborn denied 458 U.S. 1104; Planned Parenthood of Kansas City v. Ashcroft, 462 U.S. 476, motion to allow counsel to for the unborn denied 458 U.S. 1104; Akron Center for Reproductive Health v. Akron, 462 U.S. 416, motion to allow counsel to for the unborn denied 458 U.S. 1104; Diamond v. Charles, 476 U.S. 54, motion to allow counsel for the unborn denied 473 U.S. 932; Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, motion to allow counsel for the unborn denied 473 U.S. 931; Hartigan v. Zbaraz, 98 L Ed 2d 478 (1988), motion to allow counsel for the unborn denied 479 U.S. 1003.

does not include the unborn," to be confronted and cross-examined.[3]

3. The Supreme Court willfully refuses to allow evidence to be presented to show that the Constitution's unalienable guarantee of life to "any person" includes the unborn.[4]

These are basically the procedures cited by the Nuremberg Court as part of the evidence to convict the Nazi judges of complicity in extermination and murder.[5]

The Supreme Court's own rulings on due process of law show these procedures to be

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3. See cases, supra note 2.

4. See cases, supra note 2.

5. "The trials ... did not approach even a semblance of ... justice. The accused ... were denied the right to introduce evidence, to be confronted by witnesses against them.... They were ... denied the right of counsel of their own choice.... (P)roceedings ... were secret." United States v. Altstoetter, supra, at 1046-47 (1951). "Such a mock trial is not a judicial proceeding but a murder." Id., at 1164. "The prostitution of a judicial system for the accomplishment of criminal ends involves an element of evil to the State which is not found in frank atrocities which do not sully judicial robes." Id., at 1086.

unconstitutional,[6] and the willful use of these procedures to be criminal.[7]

If the Court had used these procedures to decree it "liberty" to kill Jews, it

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6. Even in civil proceedings (such as where loss of welfare is threatened) due process guarantees (1) prior notice of the factual and legal bases; (2) the right to assistance of counsel; (3) the right to cross-examine adverse evidence; and (4) the right to present evidence. Goldberg v. Kelly, 397 U.S. 254, 268-271 (1970). See also, In Re Gault, 387 U.S. 1 (1967).

Could it be possible that procedures, which could not be used to deprive a mother of welfare, could be used to exclude her from the protection of the U.S.Constitution so that she could be killed with impunity from criminal laws? This is preposterous.

The Constitution would not permit any court to condemn even one single Jew to death in a criminal case, but deny any of these procedural rights. Then neither can it permit any court to condemn all Jews in the United States to death, but deny any of these procedural rights, by calling it a civil proceeding, and decreeing the lives of all Jews are not protected by the U.S. Constitution, and it is "liberty" to kill all Jews with impunity from criminal laws.

Any victim is entitled to all the procedural protections before any court can decree that the victim's life is not protected by the Constitution, and the victim can be killed with impunity from criminal statutes.

7. "Even judges ... could be punished criminally for willful deprivations of constitutional rights." Imbler v. Pachtman, 424 U.S. 409 (1976).

would be condemned as murder. Judges may have more sympathy for other victims, but changing the names of the victims will not change the legal result.

The Court maintains its decree "MASS MURDER IS LIBERTY" by refusing to allow truth to work in its Court. No truth seeking process was left unbloodied. It is notorious that truth is not permitted to work in this Court, and that the Court falsifies history to achieve its ends.[8]

The record proves the Court used "iron curtain" procedures, a mock trial without

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8. "The Court ... has flouted the will of the framers and substituted an interpretation in flat contradiction of the original design.... Such conduct impels one to conclude that the Justices are become a law unto themselves.... It perilously resembles ... Hitlerism." R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment 408-12 (1977).

"Court had adjourned in the real world and reconvened in Cloud Cuckooland. [The Justices] began to invent a country suited to their purposes.... They have falsified the American past ... and no one in charge seems prepared to do anything about it." T. Landers, To A Traditionalist, Mr. Ron Sounds So Good, Wall St. J., edit. page, Dec. 27, 1984.

truth, to do the most forbidden thing, to defy the guarantee of life to "any person" so millions of victims could be killed with impunity from criminal statutes. And the Court maintains its killings by using mock trials without truth. In the words of the Nuremberg court, "Such a mock trial is not a judicial proceeding but a murder."

These procedures are still another precedent of murder under ruse of law which this Court can arbitrarily evoke to destroy anyone. It cancels the "unalienable" right to life of "any person" and makes the life of everybody depend on the whim of this Court. Indeed, in defending itself against accusations of mass murder, this Court claimed the power to use such procedures to decree the mass murder of Jews, or anyone, to be liberty.[9] Such process is murder and makes Roe v. Wade void.

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9. This is described in the MOTION TO ALLOW COUNSEL TO REPRESENT CHILDREN UNBORN AND BORN ALIVE, filed in this case, and incorporated by reference.

5.

DUE PROCESS OF LAW HAS COMPELLED THE U.S. SUPREME COURT TO CONFESS IN COURT THAT IT IS GUILTY OF MASS MURDER, AND TO ADMIT THAT THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" DOES INCLUDE THE UNBORN.

For the 109th time, the U.S. Supreme Court is accused of criminally defying the guarantee of life to "any person" and exterminating millions of victims whom the U.S. Constitution endeavors to preserve.

For the 85th time, the U.S. Supreme Court is accused of mass murder in violation of state and federal statutes.

For the 89th time, this Court is accused of using criminal procedures to effect and maintain Roe v. Wade killings.

John Marshall would have called Roe v. Wade "treason to the Constitution."[1]

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1. Chief Justice Marshall wrote that this Court could not extend the Constitution "to objects not...contemplated by its framers." Ogden v. Saunders, 12 Wheat. at 332. If the Court usurped such power, it would be "treason to the Constitution." Cohens v. Virginia, 6 Wheat. at 404. By decreeing "liberty" to be the very thing which the framers had condemned to be "murder," the Court has indisputably extended the Constitution to objects not contemplated by its framers. For 15 years, "treason to the

But, for fifteen years, the U.S. Supreme Court has never denied the charges, much less attempted to prove the charges to be false. These facts are unparalleled in the legal history of the world.

Under this Court's own rulings, its silence year after year, while the victims

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Constitution" has masqueraded as "the supreme law of the land."

The Court supplanted the Constitution as the supreme law. Chief Justice Marshall wrote that "the Constitution derives its whole authority" from the consent of the governed. McCulloch v. Maryland, 4 Wheat. at 403. Yet, the Court now defies this consent; it simply invents a dream world and imposes it on the people by decree. A divided Congress is unable to control this Court, which results in rule by minority.

Thomas Jefferson warned that this Court was "the most dangerous" branch because judges were "installed for life, responsible to no authority (for impeachment is not even a scarecrow)"; and judges twist words to make "anything mean everything or nothing, at pleasure" with judges finally becoming "despots." Thus Roe v. Wade fully explained.

People have lost faith in the simple power of facts to prove: falsehood is called truth; murder is called liberty; treason is called law. This defeat of the consent of the governed as the basis of law is the most momentous revolution in human history. The way out was shown by Abraham Lincoln, who would "call things by their right names, no matter who was offended."

are being killed, is an admission that the charges are true.[2] In the Court's words:

> "Failure to contest an assertion, however, is considered evidence of acquiescence only if it would have been natural under the circumstances to object to the assertion in question." United States v. Hale, 422 U.S. 171, 176 (1975).

The circumstances leave no doubt that due process has compelled the U.S. Supreme Court to confess that the charges are true.

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2. Under the tacit confession rule, failure to deny a charge is admissible as a confession that the charge is true. 4 Wigmore, Evidence, § 1071-1072 (Chadborn rev. 1972). "Underlying the rule is the assumption that human nature prompts an innocent man to deny false accusations and consequently a failure to deny a particular accusation tends to prove belief in the truth of the accusation." McCormick on Evidence, § 161 (1972). The Court has often affirmed this rule. "(T)he Court has consistently recognized that ... silence in the face of accusation is a relevant fact.... Silence is often evidence of the most persuasive character." Baxter v. Palmigiano, 425 U.S. 308, 319 (1976). And the rule is ancient. As Socrates cross-examined at his trial 2400 years ago: "(Y)ou are silent, and have nothing to say. But is not this rather disgraceful, and a very considerable proof of what I was saying?" "I may assume that your silence gives consent." Plato 41, 45 (Jowett tr. 1942).

First, the evidence makes it as clear as daylight why the Court is silent in the face of the charges: the charges are proved to be true.[3] Truth cannot be proved false.

Second, the charges were made in cases filed pursuant to the Constitution and laws of the United States. Chief Justice John Marshall ruled that judges who "close their eyes on the Constitution" and "condemn to death those victims whom the Constitution endeavors to preserve" commit "crime."[4]

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3. The Court decreed killings to be "liberty" which States had defined to be "murder." This is mere historical fact; no denial is possible. As John Marshall said, "a fact which has existed cannot be made never to have existed." Marbury v. Madison, 1 Cranch at 167 (1803).

4. Marbury v. Madison, 1 Cranch 137, 179-180 (1803). This correctly states the criminal law. Where there is an affirmative duty to act, the deliberate omission to do that duty, which results in death to others, can be prosecuted as homicide. Perkins, Criminal Law 604 (2nd ed. 1969).

The only Nazi to plea guilty at Nuremberg cited this law. When warned of Auschwitz, Speer wrote: "I did not investigate - for I did not want to know what was happening there.... From fear of discovering something which might have made me turn from my course, I closed my eyes." A. Speer, Inside the Third Reich 375-76

The Court had a legal duty to fully hear allegations that Roe v. Wade was wrongly decided. The Court affirmed its duty:

> "(I)ts opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported." The Passenger Cases, 7 How. 282, 470 (1849).

Third, the Court's steadfast silence for fifteen years in the face of the scores of accusations is unparalleled in the legal history of the world; the Court cited this very circumstance as making confession by silence more trustworthy.

> "Silence gains more probative weight where it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation." United States v. Hale, 422 U.S. 171, 176 (1975).

Fourth, not only has the Court's silence persisted in the face of repeated accusations, but it has persisted even in

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(1970). This "deliberate blindness" is complicity in criminal extermination.

the teeth of warnings that its silence was being taken as an admission that the charges are true.

Fifth, the charges described judicial crimes not surpassed in all history, that (1) judges had done the most forbidden thing, and defied the unalienable guarantee of life to "any person," the two most important words ever written into law, and criminally exterminated millions of children; (2) the United States was being ruled by the most corrupt decree which the human mind could even imagine: "MASS MURDER IS LIBERTY"; (3) due process of law had compelled the judges to confess to guilt of mass murder; and (4) the judges schemed to reaffirm the legitimacy of their murders in mock trials designed to keep truth from working in all state and federal courts.[5]

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5. In Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983), the Court reaffirmed Roe v. Wade by stare decisis in a mock trial without truth.

The parties did not ask the Court to overrule Roe v. Wade. This was done by the amicus curiae brief by the Legal Defense

The United States being ruled by the decree "MASS MURDER IS LIBERTY" is the most catastrophic crime in the history of civilization; it smashes the hopes of the whole human race for a government of laws, and

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Fund for Unborn Children, as follows: "For the 52nd time, the U.S. Supreme Court is accused in its own court with mass murder." The amicus brief laid out the evidence, and concluded: "THE U.S. SUPREME COURT HAS CONFESSED IN COURT TO GUILT OF CRIMINAL EXTERMINATION, INCLUDING MASS MURDER, AND THIS IS THE LEGAL EQUIVALENT OF THE EXPRESS OVERRULING OF ROE v. WADE." But this Court responded to these arguments by saying:

> And arguments continue to be made, in these cases as well, that we erred in interpreting the Constitution. Nonetheless, the doctrine of stare decisis, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law. We respect it today, and reaffirm Roe v. Wade.

Thus, the Court's response to "arguments" that it was guilty of mass murder. When a court rules that its decree "MASS MURDER IS LIBERTY" must be obeyed without a hearing or even a question, then history could not reveal a more murderous mockery of "the rule of law." The Court hid behind stare decisis in a mock trial and used this ruse of law to defraud all lower courts into obeying Roe v. Wade without question.

reduces government to the matter of which murderer can grab power and be obeyed.

Never in the legal history of the world was it more imperative to deny charges if they were untrue. Judges, under solemn legal duty to uphold the law, are accused of mass murder. The evidence is laid out in court. The judges have done the most forbidden thing, and defied the guarantee of life. Little children are being killed. The killings violate criminal statutes. Pictures of the dead are shown to the judges. But for 15 years the judges do not meet the evidence; do not prove it false.

A government of laws can permit only one conclusion to be drawn from these facts: The U.S. Supreme Court was met in court with the truth; truth worked in the only manner in which it was permitted to work; and due process of law compelled this Court to admit, in the most emphatic manner which the mind can imagine, that the words "any person" do include the unborn.

Any judge who closes his eyes on these facts, and chooses to take part in a national scheme to kill little children, in defiance of the guarantee of life to "any person," and criminal statutes, to maintain the decree "MASS MURDER IS LIBERTY," knows he is guilty of complicity in mass murder and criminal defiance of the Constitution.[6]

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6. Roe v. Wade asserted to legalize killings which statutes had made criminal. Since Roe v. Wade is a mistake of law, all the killings since 1973 can be prosecuted.

The ex post facto provisions of the U.S. Constitution do not apply to judicial decisions which are a mistake of law. Ross v. Oregon, 227 U.S. 150, 161 (1912).

The general rule is that mistake of law is no excuse for breaking the law. R. Perkins, Criminal Law 920 (2d ed. 1969).

The limited affirmative defense of reasonable reliance on an official judicial opinion, thereafter determined to be a mistake of law, does not apply to homicide cases. Model Penal Code, Tentative Draft No. 4, Comments Sec. 2.04, page 138; R. Perkins, Criminal Law 928 (2d ed. 1969).

Thus, the law applied at Nuremberg applies to this case. Obedience to the orders of judicial superiors is no excuse for complicity in murder. United States v. Altstoetter, supra, at 983-985.

Perhaps judges responsible for the Roe v. Wade murders did not believe they were breaking the law. But as Oliver Wendell Holmes wrote: "Ignorance of the law is no excuse for breaking it.... It is no doubt true that there are many cases in which the

In explaining how the Nazi regime got away with its monstrous crimes, Winston Churchill quoted Machiavelli: "Men avenge slight injuries, but not grave ones." The Court knows that truth well; the legal foundation of the United States now rests on the assumption that the gravest crime in history cannot be avenged.

The photo on the last page shows a second stage abortion under Roe v. Wade. If the child were born alive, this Court would be guilty of murder. If the child were born

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criminal could not have known that he was breaking the law, but ... the lawmaker has determined to make men know and obey." O.W. Holmes, The Common Law 41 (1963).

Even if the Supreme Court held a gun to the head of a lower judge, and threatened death unless he obeyed Roe v. Wade, it would not be a defense to murder, for "he ought rather to die himself than escape by the murder of an innocent." 4 Bl. Com. 30.

The law makes a mortal distinction between killing and not killing: (1) any judge who stopped the Roe v. Wade killings, and made a mistake of law, could only be overruled on appeal; (2) but any judge who allows the killings to continue and makes a mistake of law, can be convicted of murder, and be sentenced to death. The law of capital murder is a hard school, where lessons are taught only one time, and mistakes of law are not forgiven.

dead, this Court would be guilty of extermination under 18 U.S.C. § 242.

Truth has worked in this Court; judges cannot stop it. Due process has compelled this Court to admit that the unalienable guarantee of life to "any person" does include the unborn.

CONCLUSION

Merely overruling Roe v. Wade will simply continue its crimes, perhaps on a less extensive scale. The Court misguided this nation and the entire world.

Now the Court must promulgate the truth, that the universal and unalienable guarantee of life to "any person," made in the Fifth and Fourteenth Amendments of the U.S. Constitution, do include the unborn, and States have a duty to protect unborn life.

Alan Ernest
Counsel

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *et al.*,
Petitioners and Cross-Respondents,

v.

ROBERT P. CASEY, *et al.*,
Respondents and Cross-Petitioners.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF UNIVERSITY FACULTY FOR LIFE AS *AMICUS CURIAE* IN SUPPORT OF STATE OF PENNSYLVANIA

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. THE COMPARATIVE CLAIMS OF SOCIAL SCIENCE ABOUT ABORTION DEMONSTRATE THE RATIONAL BASIS FOR ABORTION LAWS 2

II. RESTRICTIVE ABORTION LAWS ARE ASSOCIATED WITH POSITIVE TRENDS IN PREGNANCY, ABORTION AND BIRTH RATES 5

A. Laws Requiring Parental Involvement Are Associated With Reductions In Teen Pregnancy Rates 6

1. Minnesota's teen pregnancy rate dropped after its parental notice law took effect 6

2. Massachusetts' teen pregnancy rate dropped after its parental consent law took effect 11

B. Abortions, Births And Pregnancies Among Medicaid-eligible Women Dropped In States That Cut Off Public Funding For Elective Abortions 13

III. STUDIES OF WOMEN DENIED ABORTION SHOW THAT A HIGH PERCENTAGE OF WOMEN AND CHILDREN HAVE POSITIVE OUTCOMES AND THAT DENIED ABORTION IMPOSES NO LONG-TERM, NEGATIVE OUTCOMES ON ANY SIGNIFICANT PERCENTAGE OF WOMEN OR THEIR CHILDREN 15

TABLE OF CONTENTS—Continued

	Page
A. Denied Abortion Has No Long-term Or Severely Negative Impact On The Vast Majority Of Women	16
B. Denied Abortion Has No Long-term Or Severely Negative Impact On The Vast Majority Of Children	18
CONCLUSION	30

TABLE OF AUTHORITIES

CASES	Page
Beal v. Doe, 432 U.S. 438 (1977)	15
Bellotti v. Baird, 443 U.S. 622 (1979)	11, 16
Brown v. Board of Education, 347 U.S. 483 (1954)	2
Buck v. Bell, 274 U.S. 200 (1927)	2-3
Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1932)	2
Harris v. McRae, 448 U.S. 297 (1980)	13
Hodgson v. Minnesota, 648 F. Supp. 756 (D. Minn. 1986), *aff'd and rev'd in part*, 853 F.2d 1452 (8th Cir. 1988), *aff'd*, 110 S.Ct. 2972 (1990)	6, 10, 20
Jane L. v. Bangerter, No. 91-345 (D. Utah)	20
Maher v. Roe, 432 U.S. 464 (1977)	16
McRae v. Califano, Nos. 76C1804, 76C1805 (E.D.N.Y.)	13
Muller v. Oregon, 208 U.S. 412 (1907)	2
Planned Parenthood League of Mass. v. Bellotti, 499 F. Supp. 215 (D. Mass. 1980), *aff'd in part*, *vac'd in part on other grounds and remanded*, 641 F.2d 1006 (1st Cir. 1981)	11
Plessy v. Ferguson, 163 U.S. 537 (1896)	2
Roe v. Wade, 410 U.S. 113 (1973)	*passim*
Skinner v. Oklahoma, 316 U.S. 535 (1942)	3
Webster v. Reproductive Health Services, 492 U.S. 490 (1989)	15
STATUTES	
Mass. Ann. Laws ch. 112, § 12S (Michie/Law. Co-op. 1985)	11
Mass. Gen. Laws Ann. ch. 112, § 12S (West Supp. 1979)	11
Minn. Stat. Ann. 144.343 (2)-(7) (West 1989)	6
Minn. Stat. Ann. 145.413 (West 1989)	6
Minn. Stat. Ann. 645.451 (West 1989)	7
N.D. Cent. Code 14-02.1-03.1 (1981 & 1989 Supp.)	9
MISCELLANEOUS	
Arfwidsson & Ottosson, *Pregnancy and Delivery of Unwanted Children*, Acta Psychiat. Scand. Supp. No. 221, 77 (1971)	16

TABLE OF AUTHORITIES—Continued

Page

Associated Press, "Abortion Plaintiff, Daughter Reunited," Los Angeles Times, Dec. 10, 1989 15

L. Baker, *The Justice from Beacon Hill: The Life and Times of Oliver Wendell Holmes* (1991) 3

Benedict, *Maternal Perinatal Risk Factors and Child Abuse*, 9 Child Abuse and Neglect 217 (1985) 18

Blomberg, *Influence of maternal distress during pregnancy on complications in pregnancy and delivery*, 62 Acta Psychiat. Scand. 399 (1980) 16

Blum, *et al.*, *The Impact of a Parental Notification Law on Adolescent Abortion Decision-Making*, 77 Am. J. Pub. Health 619 (1987) 10

Cartoof & Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 76 Am. J. Pub. Health 397 (1986) 11-12

H. David, Z. Dytrych, Z. Matejeck & V. Schuller, eds., *Born Unwanted: Developmental Effects of Denied Abortion* (1988) .... *passim*

H. David, *Population and Mental Health* (1964) 20

Dytrych, *Children Born to Women Denied Abortion*, 7 Fam. Plan. Perspect. 165 (1975) .... *passim*

Forssman & Thuwe, *One Hundred and Twenty Children Born After Application for Therapeutic Abortion Denied*, 42 Acta Psychiat. Scand. 71 (1966) 16

Garbarino, *Some Ecological Correlates of Child Abuse: The Impact of Socioeconomic Stress on Mothers*, 47 Child Development 178 (1976) 18

Gardner, *et al.*, *Asserting Scientific Authority: Cognitive Development and Adolescent Legal Rights*, American Psychologist 895 (June 1989) 3

Gold & Cates, *Restriction of Federal Funds for Abortion: 18 Months Later*, 69 Am. J. Pub. Health 929 (1979) 15

Alan Guttmacher Institute, *Teenage Pregnancy in the United States: The Scope of the Problem and State Responses* (1989) 10

TABLE OF AUTHORITIES—Continued

Page

Hook, *Refused Abortion*, 168 Acta Psychiat. Scand. Supp. No. 168, 1 (1963) 17, 22

Hultin & Ottosson, *Perinatal Conditions of Unwanted Children*, Acta Psychiat. Scand. Supp. 221, 59 (1971) 16

Illinois Department of Public Health, *Vital Statistics Illinois 1981* (March 1984) 4

Kalven, *A Special Corner of Civil Liberties: A Legal View I*, 31 N.Y.U.L. Rev. 1223 (1956) 3

Kotelchuck, *Child Abuse and Neglect: Prediction and Misclassification*, in R. Starr, Jr., ed., *Child Abuse Prediction: Policy Implications* (1982) 18

J. Langmeier and Z. Matejcek, *Psychological Deprivation in Childhood* (3d ed. 1975) 28

Means, *The Law of New York Concerning Abortion*, 14 N.Y.L.F. 411 (1968) 4

Means, *The Phoenix of Abortional Freedom*, 17 N.Y.L.F. 335 (1971) 4

Ney, *Relationship Between Abortion and Child Abuse*, 24 Can. J. Psychiat. 610 (1979) 18

Petitti & Cates, *Restricting Medicaid Funds for Abortions: Projections of Excess Mortality for Women of Childbearing Age*, 67 Am. J. Pub. Health 860 (1977) 14

Pohlman, *Unwanted Conceptions: Research on Undesirable Consequences*, 14 Eugenics Quarterly 143 (1967) 18

W. Reid & A. Smith, *Research in Social Work* (1981) 19, 20, 22

Richardson, "Child of 'Jane Roe' found, searcher says," Washington Times, June 29, 1989 15

Rogers, *Inner-city Birth Rates Following Enactment of the Minnesota Parental Notification Law*, Law and Human Behavior (forthcoming 1992) 10

Rogers, *Utilization of Data in the Ongoing Public Debate Over Abortion*, 25 Family Perspective 179 (1991) 3

TABLE OF AUTHORITIES—Continued

	Page
Rogers, *et al., Impact of the Minnesota Parental Notification Law on Abortion and Birth*, 81 Am. J. Pub. Health 294 (1991)	*passim*
Rogers, *et al., Psychological Impact of Abortion: Methodological and Outcomes Summary of Empirical Research Between 1966 and 1988*, 10 Health Care for Women Inter'l 347 (1989)	5
Sharpe, "Child from Roe v. Wade Located," Cincinnati Enquirer, June 26, 1989	15
South Dakota Vital Statistics (1982-1987)	9
Trussell, *et al., The Impact of Restricting Medicaid Financing for Abortion*, 12 Fam. Plan. Persp. 120 (1980)	13, 14
Wardle, *"Time Enough": Webster v. Reproductive Health Services and the Prudent Pace of Justice*, 41 Fla. L. Rev. 881 (1989)	5
Werner, "Children of the Garden Island," *Scientific American* 106 (April 1989)	19
E. Werner & R. Smith, *Vulnerable But Invincible: A Longitudinal Study of Resilient Youth* (1982)	19
Zimlich & Watson, *Maternal Attitudes of Acceptance and Rejection during and after Pregnancy*, 23 Am. J. Orthopsychiat. 570 (1953)	18

INTEREST OF THE *AMICUS CURIAE* [1]

University Faculty for Life (UFL) is a multidisciplinary, educational association formed in 1989 of more than 340 faculty members from 80 colleges and universities across the country. UFL sponsors national and international educational conferences on social and philosophical issues to foster support for the sanctity of human life. UFL members publish books and articles in peer-review journals on these issues. Among UFL's purposes are the encouragement and dissemination of scholarly research on bioethical issues. To that end, UFL desires to see that social science is used reliably in the formulation of public policy on abortion.

SUMMARY OF ARGUMENT

This Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), cannot be justified on legal, medical or historical grounds. Nor, in the judgment of this *amicus*, can it be based on sociological grounds. In purporting to find a right to choose abortion in the Constitution, this Court in *Roe* primarily emphasized the deleterious social and familial consequences of unwanted pregnancy. In so doing, the Court made two key assumptions: first, that restrictive abortion laws have no positive effect on the behavior of men and women, and second, that the "unwanted pregnancies" of women who have been denied abortion will result in "unwanted children" who will suffer various dysfunctions.

As this brief demonstrates, neither assumption is warranted. First, parental consent and notice laws, like the Pennsylvania law, are associated with positive trends in teen pregnancy prevention. During the four and one-half years that the Minnesota parental notice law was in effect, adolescent pregnancy, birth, and abortion rates declined significantly, without an increase in late-term abortions. This experience was largely replicated in Massachusetts when its parental consent law was in effect. At the same

[1] This brief is filed with the written consent of the parties. Letters of consent have been filed with the Clerk of this Court.

time, states which cut off public funding for abortion also experienced fewer pregnancies, births, and abortions among Medicaid-eligible women. Second, assumptions that denied abortion predictably results in women abusing their children or in children suffering severe social or psychological dysfunction—like suicide, homicide, delinquency, or educational failure—are erroneous. Studies of women denied abortion show that a high percentage of women and children have positive outcomes and that denied abortion imposes no long-term or severely negative outcome on any significant percentage of women or children. Therefore, research and experience have confirmed the positive effect of restrictive laws in supporting responsible behavior and in inhibiting self-destructive behavior, and have shown the resilience of women and children in overcoming the "unwantedness" of untimely pregnancies to establish fulfilling lives and positive, enduring relationships.

ARGUMENT

I. THE COMPARATIVE CLAIMS OF SOCIAL SCIENCE ABOUT ABORTION DEMONSTRATE THE RATIONAL BASIS FOR ABORTION LAWS.

At least since *Muller v. Oregon*, 208 U.S. 412 (1908), this Court has explicitly relied on social science to decide constitutional cases. However, when the basis for those decisions has been called into question, this Court has "bow[ed] to the lessons of experience and the force of better reasoning. . . ." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407-408 (1932) (Brandeis, J., dissenting). Thus, in *Plessy v. Ferguson*, 163 U.S. 537 (1896), this Court relied on contemporary assumptions about inherent racial inferiority to uphold a "right" to segregation in American society, assumptions that have been thoroughly rejected. *Id.* at 551; *Brown v. Board of Education*, 347 U.S. 483 (1954). And in *Buck v. Bell*, 274 U.S. 200 (1927), this Court upheld a statute providing for the involuntary sterilization of Carrie Buck, based on assumptions about heredity and mental disabilities

which were subsequently rejected. *Id.* at 205-207.[2] *Cf. Skinner v. Oklahoma*, 316 U.S. 535 (1942). As Harry Kalven observed:

> The legal career of sterilization is thus a useful example, first, of the law too quickly adopting a popularized scientific premise without exposing it to adequate scrutiny, and second, of the law's consequent difficulty in keeping abreast of the revisions of scientific hypotheses.

Kalven, *A Special Corner of Civil Liberties: A Legal View I*, 31 N.Y.U.L. Rev. 1223, 1234 (1956).[3]

Roe v. Wade, 410 U.S. 113 (1973), and its progeny are a tragic example of the problems Kalven identified. *Roe* was predicated upon social science propositions that were subject to considerable dispute at the time, continue to be questioned, and, in some cases, have been entirely refuted. First, this Court in *Roe* reached decisive con-

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[2] These assumptions were not borne out in the life of Carrie Buck. "Shortly after the Court's opinion was announced, Carrie Buck was sterilized. She was eventually discharged from the Virginia Colony for Epileptics and Feebleminded. She married twice—her first husband died after twenty-four years of marriage—sang in the Methodist Church choir, and took work helping a family in Front Royal, Virginia, to care for an elderly relative. She died in a state-operated nursing home near Waynesboro, Virginia, in 1983, at the age of seventy-seven.

Considerable doubt surrounds her imbecility today. In fact, she was said to display substantial intelligence as well as kindness, to be an avid reader and a lucid conversationalist, even in her last days. Her daughter, Vivian, lived only eight years, but she, too, contradicted institutional and judicial estimates of her mental capacities. She went through the second grade in school and was considered by her teachers to be 'very bright.'" L. Baker, *The Justice from Beacon Hill: The Life and Times of Oliver Wendell Holmes* 603 (1991).

[3] For example, briefs by abortion advocates, concerning the maturity of minors to consider abortion without parental guidance, have been criticized for overstating the findings of social science. Gardner, et al., *Asserting Scientific Authority: Cognitive Development and Adolescent Legal Rights*, American Psychologist 895 (June 1989). *Cf.* Rogers, *Utilization of Data in the Ongoing Public Debate Over Abortion*, 25 Family Perspective 179 (1991).

clusions about the history of abortion based almost exclusively on two law review articles. 410 U.S. at 136-162.[4] Those conclusions have been exploded by more recent scholarship which has been sensitive to the law's limited ability to protect the unborn child in historical eras of primitive medical science.[5] Second, *Roe* was predicated on the conclusion that abortion was safer (for the mother) than childbirth. *Id.* at 149, 163. Yet, in this century, both childbirth and abortion have become safer (for women) through advances in medical science.[6] This issue, however, has become superfluous: the data used are far from reliable; the difference in safety is negligible in terms of the number of individual cases; and the relative safety of the two is wholly immaterial in the counsel that doctors provide, or the reasons that women give, for 95% of the abortions now performed.[7]

Finally, the Court in *Roe* made negative assumptions about the impact on women and children of prohibiting elective abortion. The Court concluded that human behavior cannot be positively influenced by abortion law, that even if abortion is restricted it will not affect the number of women who experience undesired pregnancies or seek abortions, that the restriction of abortion results in more unwanted births, and that children who are unwanted during pregnancy will be unwanted

[4] Means, *The Phoenix of Abortional Freedom*, 17 N.Y.L.F. 335 (1971); Means, *The Law of New York Concerning Abortion*, 14 N.Y.L.F. 411 (1968).

[5] *See* the Brief of the American Academy of Medical Ethics as *Amicus Curiae* and the Brief of Certain American State Legislators as *Amici Curiae* in Support of Pennsylvania.

[6] In Illinois, for example, maternal deaths (defined as deaths attributed to "complications of pregnancy, childbirth, and the puerperium") dropped from 1,141 in 1920, to 699 in 1930, to 114 in 1950, to 40 in 1972 (the last full year before *Roe*). Between 1972 and 1981, however, maternal deaths dropped from 40 to 27, and the rate dropped from 2.2 to 1.5. Illinois Dept. of Public Health, *Vital Statistics Illinois 1981* I.11 (March, 1984) (Table A).

[7] *See* Brief of the American Association of Prolife Obstetricians and Gynecologists, *et al.*, as *Amicus Curiae*.

during childhood, resulting in serious social dysfunctions. 410 U.S. at 153, 165. These conclusions are not supported by the experience since *Roe*.[8] In fact, the impact of those few abortion regulations enforced since *Roe* demonstrate that restrictions on access to abortion are associated with a reduction in both the abortion and the pregnancy rate. This supports the determination that abortion restrictions actually encourage personal responsibility and reduce the number of women who experience the stress of an unwanted pregnancy.

The comparative claims of social science about the relative effects of abortion, or restrictive abortion laws, on women and children do not support a "fundamental" right to elective abortion. Abortion laws do have a rational basis in protecting the unborn child, inhibiting unplanned pregnancy and abortion, and protecting women from social pressure to abort and the physical or mental injury that some women will suffer. Rogers, *et al.*, *Psychological Impact of Abortion: Methodological and Outcomes Summary of Empirical Research Between 1966 and 1988*, 10 Health Care for Women Inter'l 347 (1989).

II. RESTRICTIVE ABORTION LAWS ARE ASSOCIATED WITH POSITIVE TRENDS IN PREGNANCY, ABORTION AND BIRTH RATES.

This Court's abortion decisions have left almost no regulatory authority to the States. Nevertheless, the experience in those States that have exercised that authority

[8] Counsel for the abortion clinic in *Webster* claimed that an abortion rate of thirty percent (of all pregnancies) "has not changed one whit from the time that the Constitution was enacted through the 1800's and through the 1900's." Wardle, *"Time Enough": Webster v. Reproductive Health Services and the Prudent Pace of Justice*, 41 Fla. L. Rev. 881, 948 (1989). Yet, since *Roe*, "the number of [induced] abortions has more than doubled, the rate of [induced] abortion has nearly doubled, and the ratio of [induced] abortions has increased by over fifty percent." *Id.* at 948, 985. And the nineteen years since *Roe* legalized elective abortion nationwide have seen a significant increase in the rate of repeat (two or more) abortions—from 15.2% to 42.9%. *Id.* at 985.

discloses that abortion regulations may result in lower pregnancy, abortion and birth rates. The following evidence suggests that returning full authority to the States to regulate abortion will have positive public health consequences by reducing the incidence of unwanted pregnancies.

A. Laws Requiring Parental Involvement Are Associated With Reductions In Teen Pregnancy Rates.

1. *Minnesota's teen pregnancy rate dropped after its parental notice law took effect.*

During the four and one-half years the Minnesota parental notice law was in effect and enforced (August 1, 1981 to March 2, 1986), teen abortion and pregnancy rates dropped substantially; and the teen birth rate continued its slow decline.[9] This brief presents an analysis of the pregnancy,[10] abortion, and birth rates [11] in Minnesota for two periods—one before the law took effect (the pre-enactment period 1978-1980) and one during its enforcement (the post-enactment period 1982-1985). *See* Rogers, *et al., Impact of the Minnesota Parental Notification Law on Abortion and Birth*, 81 Am. J. Pub. Health 294 (1991). The Rogers analysis relied upon demographic data the Minnesota Department of Health collected from Minnesota abortion providers under mandatory statutory reporting requirements. *Id.* at 295; Minn. Stat. Ann. 145.413 (West 1989). These data include the number of teen pregnancies, abortions and births to Minnesota resi-

[9] Minn. Stat. Ann. 144.343 (2)-(7) (West 1989); *Hodgson v. Minnesota*, 648 F.Supp. 756, 760, 781 (D. Minn. 1986), *aff'd and rev'd in part*, 853 F.2d 1452, 1455 (8th Cir. 1988), *aff'd*, 110 S.Ct. 2926 (1990).

[10] Pregnancies are approximated by the sum of induced abortions, live births and fetal deaths.

[11] Rates, as opposed to the raw numbers, take into account changes in the population. In this study, rates equal the occurrence (incidence) of a given phenomenon per 1000 females. Thus, for any particular age category, the numerator represents the incidence of the phenomenon and the denominator is the population in thousands (phenomenon/population).

dents and the gestational age at which the abortions have been performed.[12] Rogers at 295.

For the Rogers analysis, the data are organized in age-specific groupings appropriate for an evaluation of the law—ages 15-17, 18-19, and 20-44. The researchers assumed that any change in the incidence of pregnancy, abortion and childbirth due to the notice law would fall most heavily on teens age 15-17, who were directly affected by the notice law (Minn. Stat. Ann. 645.451 (West 1989)). They further assumed that the law would impact less heavily on teens age 18-19 who recently would have been subject to the law.[13] Although a few women who fell in the 20-44 age group in later years would have been subject to the law in the earlier years of its enforcement, proportionately the numbers of such women are very small; and these women were further removed from the effect of the law than the 18-19 year-olds. Therefore, the researchers assumed that this 20-44 age group would be least affected by the law. *Id.*

[12] The data analyzed by Rogers do not include females whose ages were unknown or non-Minnesota residents. Live births to and fetal deaths of Minnesota residents are included regardless of whether they occurred inside or outside of Minnesota. Induced abortions reflect only those performed in the state since the Department of Health does not collect data on abortions performed on Minnesota residents outside the state. Because yearly population data by sex and appropriate age group were not available from the Census Bureau, the Department provided official population estimates. Rogers at 295.

[13] Some teens who gave birth at 18 might have been 17 at the time they became pregnant and thus were directly affected by the law. Those who were 18 in 1985 were subject to the law from 1981-1984; and the group as a whole reasonably could have been influenced by the law through socialization, including schooling and peer contacts. Additionally, it is possible that behaviors "learned" as a result of the law may have remained with the young women even when they were no longer under the law's influence. For instance, a girl who was encouraged to practice abstinence or contraception as a minor may continue to practice that behavior in her adult years.

Significantly, the analysis of the data reveals that between the pre- and post-enactment years, pregnancy and abortion rates declined substantially for the teenage groups. Birth rates continued to decline slowly in line with long-term trends.

a. *Teen Pregnancies (age 15-17) fell by more than 20%.*

For the 15-17 age group, the average pregnancy rate during the post-enactment period (29.3 per 1000 between 1982 and 1985) was 20.4% lower than the average rate during the pre-enactment period (36.8 between 1978 and 1980). More specifically, between 1978 and 1980, the pregnancy rate hovered around 37 per 1000. After the law took effect, it declined to a low of 27.5 in 1983 and then rose slightly to 29.7 in 1985. *See* Table 2 in the Appendix to this Brief.

For the 18-19 age group, the pregnancy rate rose from 91.8 in 1978 to a high of 100.2 in 1980. It fell to 93.5 in 1982 and stabilized near 83 between 1983 and 1985. Thus, the average pregnancy rate declined 11.1% (from 96 to 85.3) between the pre-enactment and post-enactment periods. By contrast, the 20-44 age group experienced almost no change in its pregnancy rate between the two time periods—only a 1.3% drop. *See* Table 2.

b. *Teen Abortions (15-17) fell by more than 28%.*

After the notice law took effect, the abortion rate declined for 15-17 and 18-19 year-olds. Significantly, the decline was substantially greater for teens age 15-17 than for those age 18-19. The abortion rate actually increased for women age 20-44 who were not subject to the law. Rogers at 295. Table 2 shows that for 15-17 year-olds, the average abortion rate dropped 28.4% (from 19.0 to 13.6) between the pre- and post-enactment periods. Prior to the law, the abortion rate for these teens rose from 18.25 in 1978 to a high of 19.57 in 1980. In 1982, it fell to 14.25, reached a low of 12.80 in 1983 and then rose to 14.54 in 1985.

The abortion rate also fell for the 18-19 age group while the notice law was in effect. Although the rate rose from 35.71 in 1978 to a high of 40.26 in 1980, it fell to 36.45 in 1982 and then to 34.07 in 1985. Thus, the average abortion rate for 18-19 year-olds fell 9.4% (from 38.2 to 34.6) between the two time periods. For the 20-44 age group, it increased 4.5% (from 13.3 to 13.9).

Critics of parental involvement laws claim that these laws delay minors from having abortions, pushing them into later gestational periods, thereby increasing the risk of abortion.[14] However, Rogers found that after the notice law went into effect, the late abortion rate (after 12 weeks) actually *declined* for teens age 15-17. It increased for women age 20-44 and remained nearly constant for women age 18-19. *Id.* at 296. "The early abortion rate (those performed at 12 weeks or less) "closely track[ed] the overall abortion rate[,]" which declined for both groups of teenagers.[15] *Id.*

Moreover, there is no evidence that significant numbers of teens left or migrated from Minnesota to evade the law. Four states border Minnesota: North Dakota, South Dakota, Iowa and Wisconsin. North Dakota has had a parental consent law in effect since 1981. N.D. Cent. Code 14-02.1-03.1 (1981 & 1989 Supp.). South Dakota reports only 5, 19, 20, 30, 20 and 17 abortions performed on Minnesota teens age 19 and under during 1981-1986, respectively. *South Dakota Vital Statistics* (1982-1987).

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[14] In fact, *Amici* NAACP Legal Defense and Educational Fund, *et al.*, claim that the Minnesota parental notice requirement "increased the number of minors who obtained second trimester abortions by 26.5%." Br. at 28. The data from Minnesota establish that this claim is patently false.

[15] In all age groups, the late-to-early abortion ratio (late abortion rate/early abortion rate, *i.e.*, the number of late abortions for every early abortion) increased after the law took effect. The increase for ages 15-17 was greater than that for women age 20-44, but not significantly greater than that for 18-19 year-olds. When examined closely, the data reveal that a steep decline in early abortions, and not an increase in late abortions, accounts for the increased ratio in 15-17 year-olds. *Id.*

Iowa had no parental or reporting law in effect. Wisconsin had no mandated reporting before 1987. However, an independent researcher concluded that "there is little evidence to indicate large numbers of Minnesota youth [were] leaving the state for abortion. . . ." Blum, *et al.*, *The Impact of a Parental Notification Law on Adolescent Abortion Decision-Making*, 77 Am. J. Pub. Health 619, 620 (1987). This is confirmed by data from the Alan Guttmacher Institute (AGI), which have been adjusted to reflect state residence, that show a sharp decline in the abortion and pregnancy rates for 15-17 year-olds in Minnesota after the parental notice law went into effect. AGI, *Teenage Pregnancy in the United States: The Scope of the Problem and State Responses* 38 (1989).

c. ***Teen Births continued their decline.***

Birth rates decreased for all age groups after the notice law took effect.[16] However, the decline was substantially greater for teens in the 15-17 and 18-19 age groups than for women age 20-44. Rogers at 296. For

[16] In *Hodgson v. Minnesota*, the plaintiffs claimed that the notice law caused a 38.4% increase in the birth rate to teens age 15-17 by relying only on statistics for residents of the City of Minneapolis between 1980 and 1984. *See* Brief *Amicus Curiae* of the Association of American Physicians and Surgeons in *Hodgson* at 25-29. However, statistics throughout the state show that this increase was unique to teens in Minneapolis, who represent only 6% of the state's population of 15-17 year-olds, and did not occur in the greater metropolitan area of Minneapolis or in the state as a whole. *Id.* Also, when the Minneapolis population is examined in more detail, the increase in births to girls under 18 is largely confined to the minority population, specifically the population of Asian-Pacifics. Since it is implausible that the notice law would selectively affect Asian-Pacifics more than other ethnic groups in Minneapolis, other explanations for that city's increase in teen birth rate need to be explored. One explanation that is supported by available data is that there was a substantial increase in the population of Asian-Pacific teens between 1980 and 1987 in Minneapolis and in the percentage of births to minors for this population. *Id.*; Rogers, *Inner-city Birth Rates Following Enactment of the Minnesota Parental Notification Law*, Law and Human Behavior (forthcoming 1992).

the 15-17 age group, the birth rate fell 1.8% between 1978 and 1980 (right before the law took effect), but the average rate fell 12.4% (from 17.7 to 15.5) between the pre- and post-enactment periods. The average birth rate also fell 12.4% (from 57.3 to 50.2) for 18-19 year-olds. For the 20-44 age group, it fell only 2.3% (from 78.0 to 76.2) between the two periods.

An evaluation of these pregnancy, abortion and birth rates between the pre- and post-enactment years strongly supports the conclusion that the notice law effectively caused a decrease in the teen pregnancy rate. It seems undisputed that the notice law did directly decrease abortion rates. Since birth rates simultaneously decreased, the law must have decreased abortion rates by affecting pregnancy rates. Obviously, when the abortion rate falls 28.4% for 15-17 year-olds and 9.4% for 18-19 year-olds, while the birth rate simultaneously falls 12.4% for both age groups, the pregnancy rate has declined. Thus, the notice law apparently changed adolescent behavior by encouraging teens to prevent pregnancy.

2. ***Massachusetts' teen pregnancy rate dropped after its parental consent law took effect.***

Similarly, the teen pregnancy rate in Massachusetts declined significantly after its parental consent law went into effect on April 23, 1981.[17] In fact, the average pregnancy rate for minors decreased 16.6% between the time immediately before and after the law took effect. *See* Cartoof & Klerman, *Parental Consent for Abortion: Im-*

[17] This law requires the consent of both parents or a Superior Court judge before an unmarried woman under age 18 can obtain an abortion. Mass. Ann. Laws ch. 112, § 12S (Michie/Law. Co-op. 1985). The former parental consent provision (Mass. Gen. Laws Ann. ch. 112, § 12S (West Supp. 1979)) was declared unconstitutional by the Supreme Court in *Bellotti v. Baird*, 443 U.S. 622 (1979). The current provision amended the original to cure the defects and, as amended, was upheld. *See Planned Parenthood League of Mass. v. Bellotti*, 499 F. Supp. 215 (D. Mass. 1980), *aff'd in part, vacated in part on other grounds and remanded*, 641 F.2d 1006 (1st Cir. 1981).

pact of the Massachusetts Law, 76 Am. J. Pub. Health 397 (1986).

Table 3 reports the impact of the Massachusetts law on Massachusetts minors age 12-17 based on the data in Cartoof and Klerman's article.[18] With regard to the birth rate for these minors, it peaked in 1979 at 8.9 per 1000. In 1980, when the consent law was passed, it dropped to 8.4 and then remained fairly constant through 1982. *Id.* at 399. The abortion rate also peaked in 1979 at 18.2. Then it dropped to 15.5 in Jan.-April 1981, just prior to the law's implementation. From May-Dec. 1981, when the law was in effect, it hit a low of 13.1 and then remained fairly constant. The pregnancy rate followed a similar pattern. It hit a high of 27.1 in 1979. In 1980, it dropped to 25.8 and then down to 23.7 during the first part of 1981. After the law went into effect, it dropped again to 21.4 and then stayed fairly stable.

Table 3 also provides the average birth, abortion and pregnancy rates for two time periods—one prior to the law's implementation (1978-1980) and one afterwards (May 1981-1982)—and then compares the change that took place. It shows that the average birth rate dropped 3.4% from 8.7 to 8.4; the average abortion rate fell

[18] Cartoof & Klerman obtained data on the number of abortions performed in the state each month from August 1977 through December 1982 from the Massachusetts Department of Public Health. They also collected monthly records of the number of Massachusetts minors who obtained abortions in five surrounding states—New Hampshire, Rhode Island, Connecticut, Maine and New York—during 1980-82. *Id.* at 397. Data on abortions performed in Maine on Massachusetts minors were not available until April 1981. *Id.* at 398. Unfortunately, the researchers could not get data on the number of Massachusetts minors who went out of the state for abortions prior to the law's implementation. However, they concluded that "the effect of the omission of out-of-state abortions to Massachusetts minors in the preintervention period is compensated for by the inclusion of in-state abortions to non-Massachusetts minors during these 45 months." *Id.* at 399. The Department provided data on births to Massachusetts minors from 1970-82. *Id.* at 397.

22.7% from 17.2 to 13.3; and the average pregnancy rate fell 16.6% from 25.9 to 21.6.

This drop in the pregnancy rate is especially remarkable since Massachusetts is a small state surrounded by other states that did not have parental involvement laws at the time. These factors probably account for the marked and immediate shift in the number of minors that left Massachusetts to get abortions in the surrounding states after the law required parental consent. *Id.* at 398. Nevertheless, even though more teens left the state to get abortions after the law went into effect, the total number of Massachusetts teens getting abortions (in and out of state) declined even more. As a result, both the teen abortion and pregnancy rates declined.[19]

B. Abortions, Births And Pregnancies Among Medicaid-eligible Women Dropped In States That Cut Off Public Funding For Elective Abortions.

In 1977 and 1978, the Hyde Amendment limited the use of federal Medicaid dollars that could pay for abortions to those done when the life of the mother was endangered by continuation of the pregnancy, when severe and long-lasting physical health damage could result from the continued pregnancy, and when the pregnancy resulted from rape or incest. *See Harris v. McRae*, 448 U.S. 297, 300-306 (1980) (discussion of historical background of Hyde Amendment). Although originally passed in 1976, the Hyde Amendment did not take effect until August 4, 1977, because of a multitude of court challenges.[20]

The impact of this funding cutoff was studied and reported on by Trussell, *et al.*, in *The Impact of Restricting Medicaid Financing for Abortion*, 12 Fam. Plan. Persp.

[19] Therefore, the data presented by Cartoof and Klerman contradict their own conclusion that "Massachusetts minors continue to conceive, abort, and give birth in the same proportions as before the law was implemented." *Id.* at 400.

[20] Order entered in open court by Judge Dooling lifting his injunction against the enforcement of the Hyde Amendment in *McRae v. Califano*, Nos. 76C1804, 76C1805 (E.D.N.Y.).

120 (1980). Trussell studied the number of abortions and births to Medicaid-eligible women in Ohio, Georgia and Michigan before and after the Hyde Amendment went into effect (1977 and 1978). *Id.* at 122-123. Although Ohio and Georgia adopted the federal restrictions on abortion funding, Michigan continued to pay for abortions for Medicaid-eligible women with state funds. *Id.* at 122, 128-29. Since Michigan continued to fund abortions publicly, Trussell expected and found very little change in the number of abortions or live births among Medicaid-eligible women from 1977 to 1978. As Table 1 shows, the number of abortions went down by 150 from 7213 to 7063. There were 6 additional spontaneous abortions and 74 additional live births. Therefore, the number of pregnancies dropped by 0.4%. *Id.* at 127-129.

However, in Ohio, the number of induced abortions fell by 1367 from 3958 to 2591; and there were 20 fewer spontaneous abortions. Moreover, this drop in abortions was not replaced by an increase in the number of live births. In fact, there were 224 fewer births to Medicaid-eligible women in 1978, resulting in a 15.1% drop in the number of pregnancies. Similarly, in Georgia, the number of induced abortions declined by 310 from 1474 to 1164; spontaneous abortions fell by 2; and live births decreased by 25. Therefore, the number of pregnancies went down by 3.8%. *Id.* Obviously, the lack of public funds did not result in an increase in "unwanted" births. Instead, fewer children were conceived.[21] Thus, whether

[21] Although Trussell, *et al.*, relate a couple of undocumented tragic anecdotes about women who supposedly died from self-induced abortions as a result of the restriction on public funding, they admit that the Center for Disease Control only linked "four deaths of indigent women from illegal or self-induced abortions to the unavailability of Medicaid financing" and that "the relatively small number suggests that there was little demographic impact from recourse to illegal or self-induced abortion." *Id.* at 121, 129. *Cf.* Petitti & Cates, *Restricting Medicaid Funds for Abortions: Projections of Excess Mortality for Women of Childbearing Age*, 67 Am. J. Pub. Health 860 (1977) (predicting up to 90 deaths annually if publicly funded abortions were restricted by the Hyde Amendment) *with* Gold & Cates, *Restriction of Federal Funds for Abortion: 18 Months Later*, 69 Am. J. Pub. Health 929 (1979) (finding only three deaths "associated to some degree" with funding restrictions).

the law affects minors or adults, restrictive laws apparently result in fewer pregnancies, abortions and births.

III. STUDIES OF WOMEN DENIED ABORTION SHOW THAT A HIGH PERCENTAGE OF WOMEN AND CHILDREN HAVE POSITIVE OUTCOMES AND THAT DENIED ABORTION IMPOSES NO LONG-TERM, NEGATIVE OUTCOMES ON ANY SIGNIFICANT PERCENTAGE OF WOMEN OR THEIR CHILDREN.

From *Roe* to *Webster*, advocates like the City of New York have contended that elective abortion serves society by preventing the birth of "unwanted children" who psychologically and financially burden families. Brief for the City of New York, *et al.*, as *Amicus Curiae* at 5 & n.5. Indeed, the rationale in *Roe* for the privacy interests of the mother was primarily based on this proposition. Allegedly, mothers who bear an "unwanted child" suffer "a distressful life and future. Psychological harm may be imminent." *Roe*, 410 U.S. at 153.[22] Likewise, children raised by mothers who are denied abortion allegedly grow up more troubled.[23]

[22] Both Jane Roe in *Roe* and Jane Doe in *Doe* were allegedly denied abortion, never had an abortion, and eventually gave birth. Richardson, "Child of 'Jane Roe' found, searcher says," Washington Times, June 29, 1989, at A-1; Sharpe, "Child from Roe v. Wade located," Cincinnati Enquirer, June 26, 1989. Jane Doe has an ongoing relationship with her daughter. Associated Press, "Abortion Plaintiff, Daughter Reunited," Los Angeles Times, Dec. 10, 1989.

[23] *See also Beal v. Doe*, 432 U.S. 438, 447-48 n.15 (1977); *id.* at 451 n. (Brennan, J., dissenting); *id.* at 456 (Marshall, J., dissenting) (the statutes "brutally coerce poor women to bear children whom society will scorn for every day of their lives. Many thousands of unwanted minority and mixed-race children now spend blighted lives. . . ."); *id.* at 462 ("The effect will be to relegate millions of people to lives of poverty and despair."); *id.* at 463 (Blackmun, J., dissenting) ("And so the cancer of poverty will

A. Denied Abortion Has No Long-term Or Severely Negative Impact On The Vast Majority Of Women.

Although many women may have initial, negative reactions to an unplanned pregnancy,[24] those same women generally (though not invariably) experience positive transformations toward their children once born.[25] A

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continue to grow."); *Maher v. Roe*, 432 U.S. at 484 (Brennan, J., dissenting); *Bellotti v. Baird*, 443 U.S. at 642 (Powell, J.); *Harris v. McRae*, 448 U.S. at 330-31 & n.4 (Brennan, J., dissenting); *id.* at 338-346 (Marshall, J., dissenting).

[24] There is no competent evidence that a woman's attitude toward her unborn child has any measurable relationship to possible complications of pregnancy. A number of studies, noted by David, found that unwantedness and denied abortion did not adversely affect pregnancy, prematurity, perinatal mortality, delivery, or presence of fetal malformations. David at 50-51; Hultin & Ottosson, *Perinatal Conditions of Unwanted Children*, Acta Psychiat. Scand. Supp. No. 221, 59 (1971); Arfwidsson & Ottosson, *Pregnancy and Delivery of Unwanted Children*, Acta Psychiat. Scand. Supp. No. 221, 77 (1971); Blomberg, *Influence of maternal distress during pregnancy on complications in pregnancy and delivery*, 62 Acta Psychiat. Scand. 399 (1980). In the Prague study, more medical complications during pregnancy "were found among the control group of mothers (35 percent) than among those who were denied abortion (26 percent); the same is true for puerperium complications (17 percent, compared to nine percent)." Dytrych, 7 Fam. Plan. Perspect. at 167. "Compared to the AP [accepted pregnancy] children, the UP [unwanted pregnancy] children did not show more signs of major biological stress during their intrauterine life." David at 111.

[25] Most studies show that upwards of 85% of women who are denied abortion eventually carry the child to term, rather than otherwise obtain legal or illegal abortion, or experience spontaneous abortion. Three studies found that about 85% of women denied abortion carried the child to term. Hultin & Ottosson, *Perinatal Conditions of Unwanted Children*, Acta Psychiat. Scand. Supp. 221, at 62 (1971) (citing Hook (1963), Hultgren, (1959), and Lindberg (1948)). A 1971 Swedish study found that 81.2% of the women carried the child to term. *Id.* at 59. A fifth study of Swedish women during World War II found that 65% carried to term. Forssman & Thuwe, *One Hundred and Twenty Children Born After Application for Therapeutic Abortion Denied*, 42 Acta Psychiat. Scand. 71 (1966). *See also*, David at 47.

study of 249 Stockholm women concluded that 81% of the women denied abortion who gave birth (173 of 213) were satisfied with their denied abortion and with their present condition with the child. Hook, *Refused Abortion*, Acta Psychiat. Scand. Supp. No. 168, 109 (1963). Likewise, a Prague study showed that "[t]he subsequent development of the mother's relationship with the child had, however, proceeded in such a way as to obliterate any difference between the groups [unwanted pregnancy mothers (UP) and accepted pregnancy mothers (AP)]. Accordingly, the mothers of both groups expressed about the same satisfaction with the child." H. David, Z. Dytrych, Z. Matejcek & V. Schuller, eds., *Born Unwanted: Developmental Effects of Denied Abortion* 77 (1988) [hereinafter cited as David].[26] Of the UP mothers, 92% described their level of satisfaction with the child as "average" or "satisfied," and 86.4% viewed the change produced in the family by the child's birth as "favorable" or "none at all." David at 77 (Table 6.21). Significantly, when the UP children were nine, 38% of their mothers "placed themselves in a category of not having asked for an induced abortion" when they were pregnant with the child. Dytrych, *et al.*, *Children Born to Women Denied Abortion*, 7 Fam. Plan. Persp. 165, 171 (1975); David at 75-76. Consequently, the authors of the Prague study concluded that "[b]y and large, the study group mothers did move from initial rejection to ultimate acceptance" of their children. Dytrych, 7 Fam. Plan. Persp. at 171.[27]

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[26] David elaborates: "only a small group of UP [unwanted pregnancy] children rejected at the outset of pregnancy remain, in their mothers' words, still unaccepted at the end of eight years. . . . Notwithstanding the tendency of the UP mothers to distort facts to suit social conventions, most of them must be credited with a significant positive shift in attitudes toward the child, particularly on the conscious level." *Id.* at 78-79.

[27] The Prague study points up the transitory nature of "unwantedness" in many cases. "As will be noted in the Prague studies, not every child unwanted during pregnancy remained unwanted. Some became wanted gradually, usually as the result of

B. Denied Abortion Has No Long-term Or Severely Negative Impact On The Vast Majority of Children.

Abortion advocates cite various studies to support the proposition that the majority of "unwanted" children experience negative outcomes as a result of denied abortion. These studies uniformly ignore the critical philosophical questions at stake. If the question is whether it is better for children to be wanted than unwanted, these "studies" are hardly needed. If the question is whether it is better to be dead than unwanted, these studies never address, and cannot resolve, this issue. Yet, the answer to this question is presumed in the focus on unwantedness; and it is precisely on this point that the studies lack any predictive value. That is, they are unable to predict whether a child will suffer developmental detriments, and if so, how severe these detriments will be, whether any alternative supporting relationships or networks will offset the detriments, and what the long-term outcome will be.

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a variety of interacting factors and circumstances. Thus, a child originally unwanted for seemingly economic reasons may benefit from changing parental attitudes as the economic situation improves. However, no matter how important, economic factors may not be decisive. Parental maturity, community support, and the help of friends and grandparents may be equally important contributors to changing the perception of what was once considered a hopeless situation. Experiencing life with a child may also create conditions for changing attitudes from negative to positive." David at 33.

Other studies establish that denied abortion is not a reliable indicator of future child abuse. *See* Benedict, *Maternal Perinatal Risk Factors and Child Abuse*, 9 Child Abuse and Neglect 217 (1985); Kotelchuck, *Child Abuse and Neglect: Prediction and Misclassification*, in R. Starr, Jr., ed., *Child Abuse Prediction: Policy Implications* (1982); Garbarino, *Some Ecological Correlates of Child Abuse: The Impact of Socioeconomic Stress on Mothers*, 47 Child Development 178 (1976); Ney, *Relationship Between Abortion and Child Abuse*, 24 Can. J. Psychiat. 610 (1979); Pohlman, *Unwanted Conceptions: Research on Undesirable Consequences*, 14 Eugenics Quarterly 143 (1967); Zimlich & Watson, *Maternal Attitudes of Acceptance and Rejection During and After Pregnancy*, 23 Am. J. Orthopsychiat. 570 (1953).

Beyond the philosophical questions, social science studies of denied abortion are subject to a number of methodological guidelines, which must be followed in order for the conclusions to be valid. The key requirement is called *internal validity*. W. Reid & A. Smith, *Research in Social Work* 121 (1981). In this context, the issue is whether the observed differences between one group of children and another are attributable to the factor investigated or to some other factor. Thus, internal validity refers to the degree of certainty that the "unwanted" child's social and psychological development (the outcome measure) is attributable to "unwantedness" (the independent variable) rather than some other pre-existing or co-existing factor (e.g., poverty or family instability).[28] Only if the children of denied abortion (the study group) can be equated at the outset with a group of "wanted" children (control group) on all other potentially influential factors except the factor of denied abortion can an acceptable degree of internal validity be achieved. Although perfect matching is impossible, this matching process can be successful if the differences (on confounding variables) that remain between the two groups after matching are no greater than could be expected by chance alone. Then these differences are not statistically "significant." W. Reid & A. Smith, *Research in Social Work* 259-69 (1981). The key problem in this area of research is that women cannot be randomly assigned to wanted or unwanted categories, because they have al-

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[28] For example, a recent study examined all 698 children born on the Hawaiian island of Kauai in 1955, beginning with prenatal histories from mothers and following the children at periodic ages until age 31-32. With the help of innate qualities, support networks, and mediating institutions, many of the children who were identified as "high risk" (subject to four or more serious disadvantages, including poverty, family instability, and dysfunctional parents) "went on to develop healthy personalities, stable careers and strong interpersonal relationships." Werner, "Children of the Garden Island," *Scientific American* 106 (April, 1989). (Denied abortion was not a focus of this study.) *See also*, E. Werner & R. Smith, *Vulnerable But Invincible: A Longitudinal Study of Resilient Youth* (1982).

ready adopted an attitude toward the child. As a result, the research can only be *quasi*-experimental (nonequivalent group design). *Id.* at 155. Internal validity for this type of research depends on the careful selection of a matched control group. As will be seen, this was not achieved in *any* of the various studies examined which purport to find negative consequences from denied abortion. In all of them, the researchers were unable to sufficiently equate the unwanted pregnancy (UP) and accepted pregnancy (AP) groups at the outset. Consequently, the studies fail to isolate unwantedness or denied abortion (rather than other conditions) as the cause of the child's developmental condition.

Henry David's *Born Unwanted: Developmental Effects of Denied Abortion* (1988) is a widely cited work on denied abortion.[29] David examined five major studies of groups (cohorts) of children born to women denied abortion in Europe. Buried in the book, David concedes that "[u]nwanted pregnancy alone does not specifically harm the child's development, but in its wake come a variety of other factors, which collectively appear to influence the development of the child and his or her social integration." *Id.* at 84.[30] But this nuanced statement begs the question. If "unwanted pregnancy" does not specifically harm the child's development, while "other factors" ad-

[29] David has been an abortion rights researcher for over 20 years (H. David, *Population and Mental Health* (1964)) and an expert witness for abortion rights litigants in at least *Hodgson v. Minnesota* and *Jane L. v. Bangerter*, No. 91-345 (D. Utah). In *Born Unwanted*, the agenda is clear: "involuntary childbearing is rarely conducive to sound public health practice. Unwantedness can pose significant risks for child development, with socially undesirable long-term implications. Hopefully, our attempt to share experiences from Northern and Central Europe will strengthen the worldwide efforts to reduce the incidence of unwanted pregnancy, while maintaining ready access to safe legal abortion for women in need." *Id.* at 22.

[30] Likewise, David concedes: "In sum, the findings around age nine suggested that a woman's originally rejecting attitude toward her pregnancy does not inevitably lead to behavioral difficulties in the child." David at 85-86.

mittedly do affect development, "unwanted pregnancy" cannot be isolated reliably as having any effect on the child's development. Therefore, the flaws in the research, as well as the minimal consequences observed, do not support David's sweeping conclusions, much less a "fundamental" right to abortion in American law.

1. *The Goteborg Cohort.*

In the Goteborg study, Forssman and Thuwe studied 120 children born during 1939-42 to women who were refused abortion sought for psychiatric reasons. David at 37. The control group consisted of the next same-sex child born after each of the study group children in the same hospital or registered in a city hospital. An initial study was conducted at age 21, with a follow-up study at age 35.

The researchers found statistically significant differences in psychiatric care, delinquency, public assistance dependency, and educational level for the children of mothers denied abortion, but there were no statistically significant differences for drunken misconduct, mental retardation, and other categories. David himself reached a tepid conclusion about the findings: "individuals born after refusal of an application for a therapeutic abortion are at greater risk than the controls for adverse psychosocial problems during their developmental years with such differences gradually diminishing in adulthood." David at 19, 45.

However, the authors of a study done in Prague acknowledged that this study was flawed "by the failure to match the study population with controls of similar background." Dytrych, 7 Fam. Plan. Persp. at 165. Significantly more UP children were born out of wedlock (26.7% v. 7.5%); significantly fewer of the UP children lived with both natural parents (50% v. 82%); and socio-economic status was significantly different. David at 39. For these reasons, the results of the Goteborg study cannot be generalized to other settings or populations ("external validity").

2. *The Stockholm Cohort.*

A second, retrospective study conducted in 1963 examined 249 Stockholm women denied abortion. Hook, *Refused Abortion*, Acta Psychiat. Scand. Supp. No. 168, 3 (1963). In this study, there were significant differences between the mothers at the outset. As Hook noted, many of the UP women "had already shown signs of mental disturbance in some form prior to the pregnancy in question" and 10% sought treatment for mental illness before they applied for the abortion. *Id.* at 29, 53. Even so, the percentage of UP children with some mental disturbance (22%) did not differ significantly from the percentage of all Stockholm school children (20%). David at 48.

Subsequently, Hook conducted a follow-up study at age 18 of 88 UP children in Stockholm. David at 48-49. Hook found that more UP children than AP children had a criminal record (20% v. 12%). However, there was no significant difference in overall school performance. The UP children, at age 23, incurred more sick leave and were more likely to have received economic assistance. *Id.* But, this follow-up study has serious methodological flaws. Hook failed to ensure that the interviewer and psychologist were blinded to the group membership of the children (ruling out experimenter expectancy effects). Reid & Smith at 142-43. He also made no attempt to match the two groups at the outset on highly relevant factors such as marital and socioeconomic status. With these flaws, the study has no external validity.

3. *The Swedish Cohort.*

A third researcher examined, over a 15-year period, the development of a group of 90 Swedish children born in 1960. David at 50. The 90 UP children were matched with 90 AP children born in the same hospital. According to David:

> Blomberg observed that all the differences in his study, whether statistically significant or not, were uniformly to the disadvantage of the UP children.

> When taken together, they led to the conclusion that, in the aggregate, the UP children 'grew up in a more insecure environment, performed worse in school, and more often needed treatment for nervous and psychosomatic disorders. There was also a tendency toward worse social adjustment.'

David at 51-52. However, the design flaws with this study render these results scientifically invalid. As with prior studies, no attempt was made to equate the UP and AP children at the outset on other, confounding factors. Moreover, the differences observed were statistically insignificant when UP and AP children who lived with both natural parents were compared. And, as Blomberg and David conceded, many differences were not statistically significant. David at 51. Some differences that were significant diminished over time. *Id.*

4. *The Northern Finland Cohort.*

A fourth study was based on a group of 12,058 children born to 11,931 women in Finland in 1966. David at 103. In contrast to the other studies, "unwantedness" was determined, not by denied abortion, but by statements by the women late in gestation that the pregnancy "should not have occurred at all." *Id.* at 103-104. Once again, the UP and AP children were not equated at the outset in this study. Their families lived under significantly different conditions—UP mothers were more often unmarried, had more children, and lived in lower socio-economic conditions than AP mothers. Although a follow-up study was initiated at age 8, the success of the attempt at pair-matching is not revealed. *Id.* at 107. Differences in school performance were not statistically significant and "no differences" were observed in emotional development. *Id.* Based on the father's occupation, UP families experienced more downward social mobility. David's conclusion is less than compelling:

> On the whole, the follow-up study at age eight showed slightly poorer development among the UP children, which could be ascribed to unwantedness

late in pregnancy or to differences in family social conditions, or to a combination of these factors.

Id.

5. *The Prague Cohort.*

A fifth study was initiated in 1971 of 220 boys and girls born between 1961-63 to women who requested an abortion twice for the same pregnancy in Prague. Dytrych, *et al.*, 7 Fam. Plan. Persp. at 165-66. This study is promoted by David as the most reliable of the five studies because of its longitudinal basis, its elaborate attempt to match the study group with a control group, and the extraordinarily high number of outcome measures examined.

Yet, the Prague study also suffers from design flaws which render any conclusions from the data scientifically invalid. The researchers in this study went to considerable length to match the study group with a control group. But, despite their claims, they were ultimately unsuccessful in equating the groups at the outset. The UP children were born into lower socioeconomic circumstances. In addition, the UP children were subject to more family instability. The UP mothers were more likely to be divorced (13% v. 8%) and to be married to a man other than the child's father (10% v. 3.6%). A greater percentage of the UP children were not raised by their birth mothers or fathers. Also, a greater percentage of UP children were not living at home (47% v. 29%). Dytrych, 7 Fam. Plan. Persp. at 170. These factors, by themselves, could account for the observed differences between the groups on psychosocial measures.

Furthermore, serious complications that are assumed to result from denied abortion (suicide, homicide, or pathological conditions) are nowhere to be found. As the authors concede, no cases of extreme forms of unwantedness, like permanent isolation, are found in the Prague children. David at 31. The data show that few children suffered significant problems. Only mild differences were seen in behavior at elementary school and in school performance in secondary school. David at 89. No differences between the UP children and the AP children were observed on many social, psychological and health variables. For example, no differences were seen in adaptation to school. On other variables, differences were observed, but they were not statistically significant: these included visual impairment, hearing impairment, long-term disease, hospitalization, minor accidents or minor surgery, perceptions of "naughtiness" and "stubbornness." Dytrych, 7 Fam. Plan. Persp. at 167. Only frequent acute illness and perceptions of bad temper were statistically significant in being more common among the UP children. *Id.* The researchers frankly concluded in a 1975 article that they "found no gross maladjustment or maladaptation" and that the "expectation that unwanted conceptions would lead inevitably to the children being unwanted proved *not* to be the case." *Id.* at 165.

Only a few mild differences were observed in a follow-up study at the age of 9. No differences were seen in average IQ scores or family relations on recognized scales. David at 88. "Both the UP and the AP children had assessed their relationships with their parents and those of their parents with them in the same positive way." David at 89. Likewise, David conceded: "overall differences between the children born following unwanted conception and the matched controls were not dramatic around nine years of age." David at 84. Those differences that were allegedly statistically significant included school tests on the Czech language.

In a number of ways, the authors strained to find differences between the groups on subjective criteria in order to reach illogical conclusions. For example, they reported that teachers and parents rated the UP children "as significantly less conscientious and more excitable." David at 88. Also, they observed that the UP and AP children perceived their parents differently. David concluded that:

> there is considerably more disagreement between the mother's and father's parental warmth as perceived by the UP subjects in comparison with the AP con-

> trols. UP parents are perceived discordantly, one as warm and the other as cold, which may reflect some kind of compensation mechanism operating in the family.

David at 90. Nevertheless, the authors concede that at age nine "the aggregate differences between the children born following unwanted conception and the control children are not dramatic. . . ." Dytrych, 7 Fam. Plan. Persp. at 171. Yet, they insist on speculating:

> The higher incidence of illness and hospitalization despite the same biological start in life, slightly poorer school marks and performance despite the same level of intelligence, somewhat worse integration in the peer group—all these point to a higher-risk situation for the child and the family, as well as for society.

Id. Of course, they failed to specifically discuss this "higher-risk situation." Still determined to find some deleterious effects of denied abortion, the authors identified "an increased defensive position against stress and frustration" as a "common denominator" among the UP children at age nine:

> If we sum up all the differences between children born from unwanted pregnancies and their controls, concerning performance, attitudes and behavior, one common denominator emerges from the objective data and from the perceptions of mothers, teachers and classmates. In our opinion, this common denominator is an increased defensive position against stress and frustration among the study children. The early and frequent need of such children, especially boys, to achieve satisfaction and to assert themselves is a strong source of stimulation leading to a certain behavior pattern which, in a given situation, is systematically enhanced and may become a more or less permanent trait.

Id. at 171. Most people do not view the need to achieve satisfaction or to assert oneself as inherently negative. In any case, the authors admitted that "[a]t present, this trait is well within the bounds of social viability; there

have been no excessive cases of breakdowns or conflicts that have come to the attention of psychological dispensaries or child psychiatric clinics." *Id.* Yet, they cautioned that "[n]evertheless, there may be a question concerning the future development of these children. What will they be like in puberty and adolescence?" *Id.* at 171.

A misleading analysis in the Prague study is the creation of a "Maladaptation Score" for the children. David at 79-81, 93-94. David reported that "the UP children had significantly higher maladaptation scores than the AP controls." *Id.* at 81. But the methodology in creating this "Score" was completely flawed. The authors observed all marks of differences between the groups on the outcome measures—whether statistically significant or not—and simply added them up. This calculation exploits differences that were not statistically significant and may have occurred by chance alone to render a total score that gives an aura of significance. Furthermore, the "Score" is not a recognized index, nor a scale that has been validated by application to other samples. It was entirely created, for this study, by the authors.

Another serious flaw in this study is the authors' attempt to demonstrate that the UP children suffered from "psychological subdeprivation." David at 84-85. David explains that:

> the relationship is not that of direct rejection of the child by his/her mother and family (which is the exception), . . . Rather, acceptance is incomplete, ineffective, and ambivalent, leading to more or less deviant interactions, less maternal empathy with the child's needs, less understanding of his/her behavioral signals, less warm emotional interchange of stimuli, etc. . . . In the case of unwantedness, the picture takes on a subdued and less dramatic appearance.

Id. at 85. However, like the "Maladaptation Score," the concept of "subdeprivation" was created by the authors; it is not an objective, defined, or recognized psychological term and cannot be found in the authority to which David

refers. *See* J. Langmeier & Z. Matejcek, *Psychological Deprivation in Childhood* 1-23 (3d ed. 1975). Moreover, David provides no data or hard evidence to support such a concept.

A follow-up study conducted at age 14 also found only minor differences. "While intelligence tests were not repeated at ages 14-16, teachers' assessments of intelligence on a rating scale were entirely similar for both groups." David at 88. David stated that difference in school performance between UP and AP children "reached statistical significance." *Id.* However, the data show that the difference observed was not greater failure among UP children but merely that more UP children were average and fewer UP children were found among the above-average or outstanding students. *Id.* Likewise, "a significantly larger number of UP children did not continue their education to secondary school, but instead became apprentices or started jobs without prior vocational training." *Id.* These findings are less than compelling in support of the original thesis that elective abortion is necessary to avert dangerously troubling psychological development.

David claimed to find significant behavioral disorders in the UP children at age 14. The official records indicated that 43 UP children and 30 AP children were referred to child psychiatric and school counseling. David concluded that "although differences in number of referrals were slight, the UP children were seen significantly more often because of serious behavioral disorders requiring therapeutic treatment." David at 87. However, David never provides any data or objective definitions of these "behavioral disorders" or their severity. At 14, UP children were rated "significantly less obedient" than the AP children by their teachers, and the UP children "were seen as either less sociable or more hyperactive than the AP controls." *Id.* at 88-89. With these subjective findings, David reaches strained conclusions:

> Even if the differences in specific indicators are still not very dramatic and easy to detect at the individual level, they are important in the aggregate, having attained increasing statistical significance over time . . . In the social integration and competence of UP subjects as a group and in their school achievements, it is the lack of pluses rather than surplus of marked minuses that becomes most apparent. Still . . . the fact that differences between UP subjects and AP controls persist and have actually widened after nearly 18 years of family life suggests that "unwantedness" during early pregnancy constitutes a not negligible factor for the child's subsequent life.

Id. at 90. However, David provides no basis to support the conclusion that the differences between the AP and UP children "widened" over time or had "an accelerating momentum." *Id.* at 91. In order to conclude that the alleged "widening" occurred, the authors would have had to conduct a special statistical analysis (multivariate analysis of variance). Apparently, no such analysis was done.

Fatal flaws also infected a follow-up study conducted when the children reached age 21-23. There was apparently no effort to remedy the loss of a significant number of subjects, which directly undermines internal validity.[31] Even so, only minor differences were observed: "[e]ducational attainment . . . did not differ significantly," although UP children still showed more average achievement. David at 95. Self-administered personality tests

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[31] This is called differential attrition, which refers to the loss of different types of subjects (e.g., higher-income children or mothers) from one or both groups which may result in a change in the characteristics of the samples. Reid & Smith at 143. Although David suggests that a high percentage of the original participants were examined in this follow-up study (a follow-up rate of 73 percent for UP subjects and 70% for AP subjects) (David at 91), several pages later it is revealed that only 112 of the original 220 matched pairs were available for study, which means that the real follow-up rate was only 50.9%. David at 95. The threat from differential attrition is that the samples over time may change on relevant characteristics for which they were equated at the outset of the study (baseline characteristics), with the result that the UP children that remain may have more diminished characteristics than the original group.

that are accepted as standard measures "did not produce any significant differences between the UP subjects and the AP controls taken as a whole." *Id.* at 98.

The myth of the unwanted child is that unwantedness results in long-term or severe negative impacts on the mother and child. But these studies undermine this myth. Not only are the findings scientifically invalid, the authors strained to find observed differences that were statistically significant. Even those that were allegedly significant showed no gross maladaptation, but merely mild differences, for which David presents no meaningful criteria for demonstrating that abortion would have been better for the children or their families. Can David be taken seriously for suggesting that abortion is socially indicated to prevent unwanted children from "suffering" merely average school performance? Remarkably, these data show that unwantedness and denied abortion cannot be isolated as significant causes of any abnormal or long-term maternal dysfunction or impaired child development. Likewise, short-term negative consequences that are so widely assumed recede into the background as children grow older. Children have a resilience that the emphasis on short-term consequences and options, like abortion, conveniently ignores. Certainly, the data examined here belie the assumptions that formed so much of the rationale of *Roe v. Wade* and its progeny.

CONCLUSION

The judgment of the United States Court of Appeals for the Third Circuit should be affirmed in No. 91-744 and reversed in No. 91-902.

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APPENDIX

Table 1

Ohio, Georgia and Michigan
Induced Abortions, Live Births, Spontaneous Abortions and Pregnancies [1]

	Induced Abortions			Spontaneous Abortions			Live Births			Pregnancies		
	OH	GA	MI	OH	GA	MI	OH	GA	MI	OH	GA	MI
1977	3958	1474	7213	543	604	928	6156	6854	10526	10657	8932	18667
(% of Preg)	(37.1)	(16.5)	(38.6)	(5.1)	(6.8)	(5.0)	(57.8)	(76.7)	(56.4)			
1978	2591	1164	7063	523	602	934	5932	6829	10600	9046	8595	18597
(% of Preg)	(28.6)	(13.5)	(38.0)	(5.8)	(7.0)	(5.0)	(65.6)	(79.5)	(57.0)			
Difference	−1367	−310	−150	−20	−2	+ 6	−224	−25	+74	−1611	−337	−70
% Change	(−34.5)	(−21.0)	(−2.1)	(−3.7)	(−0.3)	(+0.6)	(−3.6)	(−0.4)	(+0.7)	(−15.1)	(−3.8)	(−0.4)

[1] Data taken or derived from Trussell, *et al.*, *The Impact of Restricting Medicaid Financing for Abortion*, 12 Family Planning Perspectives 120 (1980).

Table 2

Minnesota Birth, Abortion and Pregnancy Rates [1]

	Ages 15-17			Ages 18-19			Ages 20-44		
	Birth Rate	Abortion Rate	Pregnancy Rate	Birth Rate	Abortion Rate	Pregnancy Rate	Birth Rate	Abortion Rate	Pregnancy Rate
1975	20.9	12.4	33.5	56.1	20.5	77.1	74.0	7.3	81.9
1976	19.6	16.5	36.3	53.0	28.9	82.3	72.5	9.5	82.6
1977	19.6	18.6	38.4	55.1	31.3	87.0	75.8	11.5	87.8
1978	17.8	18.3	36.2	55.6	35.7	91.8	76.1	12.4	89.1
1979	17.7	19.2	37.1	57.0	38.7	96.2	78.1	13.4	92.0
1980	17.5	19.6	37.2	59.5	40.3	100.2	79.8	14.1	94.4
1981 [2]	17.4	16.1	33.6	59.3	38.4	98.1	79.4	14.0	94.0
1982	16.5	14.3	30.9	56.6	36.5	93.5	78.1	14.0	92.5
1983	14.6	12.8	27.5	48.8	33.1	82.3	75.2	13.1	88.8
1984	16.0	13.0	29.2	48.8	35.0	84.2	75.6	14.2	90.3
1985	15.0	14.5	29.7	47.2	34.1	81.6	75.9	14.5	90.9
1986	15.5	14.4	30.1	42.6	31.9	74.9	74.0	14.3	88.7
1987	15.0	15.5	30.6	43.7	30.8	74.8	72.7	14.2	87.3

Ages 15-17:

Averages [3]	1978-1980:	Birth rate=17.7	Abortion rate=19.0	Pregnancy rate=36.8
Averages [3]	1982-1985:	Birth rate=15.5	Abortion rate=13.6	Pregnancy rate=29.3
	% Change:	−12.4%	−28.4%	−20.4%

Ages 18-19:

Averages [3]	1978-1980:	Birth rate=57.3	Abortion rate=38.2	Pregnancy rate=96.0
Averages [3]	1982-1985:	Birth rate=50.2	Abortion rate=34.6	Pregnancy rate=85.3
	% Change:	−12.4%	−9.4%	−11.1%

Ages 20-44:

Averages [3]	1978-1980:	Birth rate=78.0	Abortion rate=13.3	Pregnancy rate=91.8
Averages [3]	1982-1985:	Birth rate=76.2	Abortion rate=13.9	Pregnancy rate=90.6
	% Change:	−2.3%	4.5%	−1.3%

[1] Birth and Abortion data taken from Rogers, *et al.*, *Impact of the Minnesota Parental Notification Law on Abortion and Birth*, 81 American Journal of Public Health 294 (1991). All data are originally from the Minnesota Department of Health.

[2] Law passed and went into effect in 1981.

[3] The Rogers analysis used a geometric mean, rather than a simple mean.

Table 3

Massachusetts Births, Abortions and Pregnancies, Ages 12 to 17 [1]

		Births		Abortions					Pregnancies [2]	
Year months	Population [3]	Total	Rate [4]	In-State	Out-of-State [5]	Total	per month	Rate [6]	Total	Rate [7]
1978	292,045	2570	8.8	4632	—	4632	386	15.9	7202	24.7
1979	286,517	2550	8.9	5221	—	5221	435	18.2	7771	27.1
1980 [8]	294,167	2471	8.4	5113	—	5113	426	17.4	7584	25.8
1981a Jan-Apr [9]	295,060	2449	8.3	1519	—	1519	380	15.5	2335 [10]	23.7 [10]
1981b May-Dec				1851	731	2582	323	13.1	4215 [11]	21.4 [11]
1982	295,000	2478	8.4	2802	1141	3943	329	13.4	6421	21.8

Averages 1978-1980:	Birth rate = 8.7	Abortion rate = 17.2	Pregnancy rate = 25.9
Averages 1981b-1982:	Birth rate = 8.4	Abortion rate = 13.3	Pregnancy rate = 21.6
% Change:	−3.4%	−22.7%	−16.6%

[1] Data taken or derived from Tables 1, 2 and 3, Cartoof & Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 76 American Journal of Public Health 397 (1986).

[2] Pregnancies approximated by adding live births and induced abortions.

[3] Population figures are derived from Table 3 of Cartoof & Klerman.

[4] Birth Rate is defined as the number of births to MA residents ages 12-17 divided by the number of female MA residents ages 12-17, in thousands.

[5] Out-of-state abortions from 1978 through April, 1981 are not reported by Cartoof and Klerman.

[6] Abortion Rate is defined as the number of abortions occurring in MA (or occurring in a neighboring state to a MA resident) to women age 17 or under divided by the number of female MA residents ages 12-17, in thousands.

[7] Pregnancy Rate is defined as Birth rate + Abortion rate.

[8] Law passed in 1980.

[9] Law implemented April 1981.

[10] The number of pregnancies between January and April is estimated by adding the abortions for this period to the total number of births for 1981 multiplied by 12/4 (to approximate four months of births).

[11] The number of pregnancies between May and December is estimated by adding the abortions for this period to the total number of births for 1981 multiplied by 12/8 (to approximate eight months of births).

(21) (20)

Nos. 91-744 and 91-902

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *et al.*,
Petitioners and Cross-Respondents,

v.

ROBERT P. CASEY, *et al.*,
Respondents and Cross-Petitioners.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF FEMINISTS FOR LIFE OF AMERICA, PROFESSIONAL WOMEN'S NETWORK, BIRTHRIGHT, INC., LEGAL ACTION FOR WOMEN, AS AMICI CURIAE IN SUPPORT OF RESPONDENTS & CROSS PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
I. THE RATIONAL BASIS TEST IS THE PROPER STANDARD OF REVIEW FOR PENNSYLVANIA INFORMED CONSENT PROVISIONS	2
II. THE PENNSYLVANIA STATUTE PROTECTS A WOMAN'S RIGHT TO RECEIVE OR REFUSE MEDICAL TREATMENT	6
A. The Inherent Risks to the Woman of Legal Abortion Justify Standard Regulation of That Medical Procedure	6
B. The Twenty-four Hour Waiting Period Is a Reasonable Device to Ensure That a Woman Has Made a Fully Informed and Well-Reasoned Decision	12
III. SECTION 3205 IS A PROPER EXERCISE OF STATE POLICE POWER	14
A. Informed Consent Statutes Generally Are Proper and Legitimate Exercises of State Police Power	14
B. Medically Specific Informed Consent Statutes Are Rationally Related to the Commonwealth's Legitimate Interest and Serve the Woman's Need for Information	15
C. The Commonwealth's Legislature, Through Its Police Power, Is the Proper Authority to Review the Issue of Informed Consent	17

TABLE OF CONTENTS—Continued

	Page
IV. PENNSYLVANIA'S INFORMED CONSENT PROVISIONS DO NOT VIOLATE THE FIRST AMENDMENT TO THE CONSTITUTION	19
A. The Provisions Regulate Commercial Speech	19
B. Pennsylvania May Validly Compel the Dissemination of Information Necessary to Assist a Woman's Exercise of Her Right to Refuse Medical Treatment	21
C. Pennsylvania's Informed Consent Legislation Does Not Compel the Physician to Endorse an Ideological Position of the Commonwealth	24
V. THE INFORMED CONSENT PROVISIONS OF THE PENNSYLVANIA ABORTION CONTROL ACT LEAVE THE WOMAN FREE TO DETERMINE WHETHER TO OBTAIN AN ABORTION OR CARRY HER PREGNANCY TO TERM	26
CONCLUSION	28
APPENDIX	1a

TABLE OF AUTHORITIES

Cases Page

Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) ..... 1, *passim*
Allgeyer v. Louisiana, 165 U.S. 578 (1897) 27
Barsky v. Board of Regents, 347 U.S. 442 (1954) 14, 22
Bellotti v. Baird, 428 U.S. 132 (1976) 3
Board of Trustees v. Fox, 492 U.S. 469 (1989) 1, 20, 21, 25, 29
Bolger v. Young Drug Products Corp., 463 U.S. 60 (1983) 20, 25
Brief for Petitioners, *Planned Parenthood v. Casey*, Nos. 91-744, 91-902, 60 U.S.L.W. 3492 (U.S., 1992) 24
Bunting v. Oregon, 243 U.S. 426 (1917) 4
Colautti v. Franklin, 439 U.S. 379 (1979) 3
Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972) 26
Cruzan v. Missouri Dept. of Health, 110 S.Ct. 2841 (1990) 1, 6, 10, 13, 21
Franklin v. Fitzpatrick, 428 U.S. 901 (1976) 16
Harris v. McRae, 448 U.S. 297 (1980) 7
Hodgson v. Minnesota, 110 S.Ct. 2926 (1990) 5
Lochner v. New York, 198 U.S. 45 (1905) 3, 4
Maher v. Roe, 432 U.S. 464 (1977) 26
Manaskie v. Rosenblume, No. 15028-83 (N.Y. 1983) 7
Marks v. United States, 430 U.S. 188 (1977) 5, 29
McNair v. Rubin, No. 4492-81 (N.Y. 1981) 7
Metro Broadcasting v. F.C.C., 111 L.Ed.2d 445 (1990) 2
Missouri ex rel. Hurwitz v. North, 271 U.S. 40 (1926) 14
Muller v. Oregon, 208 U.S. 412 (1908) 4
Ohio v. Akron Center for Reproductive Health, 110 S.Ct. 2972 (1990) 5
Planned Parenthood v. Casey, Nos. 91-744, 91-902, 60 U.S.L.W. 3492 (U.S., 1992) 2, 29
Planned Parenthood v. Casey, 947 F.2d 682 (3d Cir. 1991) 3, 5, 26, 29, 30
Planned Parenthood v. Danforth, 428 U.S. 52 (1976) 1, 3, 15, 16, 17

TABLE OF AUTHORITIES—Continued

	Page
Planned Parenthood v. Fitzpatrick, 401 F. Supp. 554 (E.D.Pa. 1975)	16
Roe v. Wade, 410 U.S. 113 (1973)	3
Thornburgh v. Am. College of Obstetricians and Gynecologists, 476 U.S. 747 (1985)	1, *passim*
Webster v. Reproductive Health Services, 492 U.S. 490 (1989)	4, 26, 29
Whalen v. Roe, 429 U.S. 589 (1977)	14
West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624 (1943)	24
Williamson v. Lee Optical, 348 U.S. 383 (1955)	3
Wooley v. Maynard, 430 U.S. 705 (1977)	24, 25
Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985)	21, 24
Constitutions, Statutes, Legislative Materials	
ARIZ. REV. STAT. ANN. § 20-448.01 (1992)	22
CAL. HEALTH & SAFETY CODE, § 1690 (Deering 1991)	23
COLO. REV. STAT. § 13-20-402 (1991)	22
D.C. CODE ANN. § 36-1311	22
Employee Polygraph Protection Act, WH Publication 1462, U.S. Dept. of Labor, September 1988	22
IND. CODE ANN. § 16-1-9.5-3 (Burns 1991)	22
KY. REV. STAT. ANN. § 212.347 (Baldwin 1982)	13, 22
MINN. STAT. § 144.651 (1990 and Supp. 1991)	22
MONT. CODE ANN. § 37-27-311 (1991)	22
N.Y. PUB. HEALTH LAW § 2404 (Consol. 1992)	22
OHIO REV. CODE ANN. § 3701.242 (Baldwin 1991)	22
18 PA. CONS. STAT. ANN. § 3205 (1983 & Supp. 1991)	1, *passim*
35 PA. CONS. STAT. ANN. § 521.13 (1983 & Supp. 1991)	15, 22
35 PA. CONS. STAT. ANN. § 5641 (1983 & Supp. 1991)	15
"Your Rights Under the Fair Labor Standards Act," WH Publication 1088, U.S. Dept. of Labor, Rev'd April 1991	22

TABLE OF AUTHORITIES—Continued

Other Authorties	Page
AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, STANDARDS FOR OBSTETRIC-GYNECOLOGIC SERVICES (6th ed. 1985)	9, 13
CALIFORNIA VITAL STATISTICS: State of of California, Department of Vital Statistics, Death Records, Table A-2, Maternal Deaths by Selected Causes of Death, California, 1960-1984 (By Place of Residence)	8
R. Castadot, Md.D., M.H. P., *Pregnancy Termination: Techniques, Risks, and Complications and Their Management in* FERTILITY & STERILITY	7, 8
Frank, *Induced Abortion Operations and Their Early Sequelae*, 35 J. ROYAL C. GEN. PRAC. 175-80 (Apr. 1985)	7
Henshaw, Forrest, & Van Vort, *Abortion Services in the United States*, FAM. PLAN. PERSP., Mar.-Apr. 1987	20
Kaunitz, *Causes of Maternal Mortality in the United States*, 65 OBSTETRICS & GYNECOLOGY (May 1985)	7
David Kessler, News Briefing, Federal News Service, January 6, 1992, LEXIS	22
A. M. Kinball, *Deaths Caused By Pulmonary Thromboembolism After Legally Induced Abortion*, 132 AM. J. OBSTETRICS & GYNECOLOGY 169-74 (Sept. 15, 1978)	7
MED. MALPRACTICE VERDICTS, SETTLEMENTS & EXPERTS (Feb. 1988)	7
NATIONAL ABORTION FEDERATION STANDARDS FOR ABORTION CARE (1987)	6
D. REARDON, ABORTED WOMEN, SILENT NO MORE (1987)	8
A. SALTENBERGER, EVERY WOMAN HAS A RIGHT TO KNOW THE DANGERS OF LEGAL ABORTION (1982)	7
Torres & Forrest, *Why Do Women Have Abortion?*, 20 FAM. PLAN. PERSP. (1988)	19

TABLE OF AUTHORITIES—Continued

Page

WILKE, HANDBOOK ON ABORTION (1979) 8

G. Wulff, Jr., M.D. F.A.C.O.G. & S. Freiman, M.D., *Elective Abortion Complications Seen In a Free-Standing Clinic*, 49, No. 3 OBSTETRICS & GYNECOLOGY (1976) 7

INTEREST OF AMICI

Amici, representing women from all walks of life, are compelled by experience and conviction to advocate strongly that this Court reverse the vulnerable position of women caused by the lack of information given to women contemplating abortion. Amici respectfully urged this Court to affirm the ruling of the Court below, supporting the efforts of the women citizens of the Commonwealth of Pennsylvania to cause that government to exercise its police power to protect their health and safety by compelling the dissemination of the information necessary to make a fully informed decision.

SUMMARY OF ARGUMENT

The provision of factual information regarding the risks and consequences of a medical procedure to a prospective medical patient merely respects the common law right of the patient to receive or refuse medical treatment—her "freedom of choice." *Cruzan v. Missouri Dept. of Health*, 110 S. Ct. 2841, 2851 (1990). The Commonwealth of Pennsylvania, through its Abortion Control Act, 18 PA. CONS. STAT. ANN. § 3205 (1983 & Supp. 1991), has ensured "that her consent is informed and freely given and is not the result of coercion." *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 442 (1983), *citing Planned Parenthood v. Danforth*, 428 U.S. 52, 85 (1976). *See also, Thornburgh v. Am. College of Obstetricians and Gynecologists*, 476 U.S. 747, 760 (1985).

The Abortion Control Act under review in this case, and specifically § 3205 thereof, does not partake of the "flaws" of the ordinance found unconstitutional in *Akron v. Akron. Thornburgh*, 476 U.S. at 800 (White, J., dissenting). It should be upheld as constitutional.

This statute regulates only commercial speech. Therefore, it need not pass a strict scrutiny test. *Board of Trustees v. Fox*, 492 U.S. 469, 480-81 (1989). Moreover, the Pennsylvania Abortion Control Act does not compel adoption or transmission of ideology; it only compels pro-

vision of factual information. Therefore, the constitutional failings of the City of Akron's abortion informed consent ordinance, *Akron v. Akron*, 462 U.S. at 444, are not implicated here.

This Court should affirm the holding of the Third Circuit Court of Appeals, and rule that the Pennsylvania Abortion Control Act is constitutional in its entirety. Specifically, as amici will demonstrate, the informed consent provision of the statute, § 3205, violates neither the constitutional rights of the prospective abortion patient nor those of the physician. This Supreme Court should uphold the statute of the Pennsylvania legislature whereby it has sought to protect the woman's right to receive or refuse medical treatment.

ARGUMENT

I. THE RATIONAL BASIS TEST IS THE PROPER STANDARD OF REVIEW FOR PENNSYLVANIA INFORMED CONSENT PROVISIONS.

This Supreme Court has agreed to hear the constitutionality of the regulatory provisions of the Pennsylvania Abortion Control Act. *Planned Parenthood v. Casey*, Nos. 91-744, 91-902, 60 U.S.L.W. 3492 (U.S., 1992). The threshold issue when reviewing the constitutionality of a statute is to determine the applicable standard or test. As Justice O'Connor has noted in another Equal Protection context, "a dispute regarding the appropriate standard of review may strike some as a lawyers' quibble over words, but it is not. The standard of review establishes when the Court and Constitution allow the Government to employ racial classifications." *Metro Broadcasting Inc. v. F.C.C.*, 111 L. Ed. 2d 445, 492 (1990) (O'Connor, J., dissenting).

Similarly, in reviewing Pennsylvania's abortion legislation, the Third Circuit correctly observed that

> the threshold question is whether the standard of review of abortion regulations promulgated by the Court in *Roe* and later cases . . . has survived *Webster* and the Court's subsequent decision in *Hodgson v. Minnesota*. . . . [T]he standard of review used for abortion legislation establishes the degree to which the government may regulate abortion.

Planned Parenthood v. Casey, 947 F.2d 682, 687-88 (3d Cir. 1991) (citations omitted).

In *Roe v. Wade*, 410 U.S. 113 (1973), a majority of Justices held that the "right" to an abortion was a fundamental liberty interest under the Fourteenth Amendment, requiring the application of strict scrutiny to any statute impeding such a "right." 410 U.S. at 152-53. The majority conceded that a state had continuing interests throughout pregnancy in the health of the pregnant woman and in the preservation of potential life. The Court held, however, that those interests did not ripen into a compelling interest until the second and third trimesters respectively. *Id.* at 162-63.

In contrast, dissenting Justices opined that abortion was but an ordinary liberty interest under the Fourteenth Amendment, and that state legislation restricting abortions need pass only a rational relation test. *Id.* at 173 (White and Rehnquist, JJ., dissenting). *See, Williamson v. Lee Optical*, 348 U.S. 383, 487 (1955).

To those Justices who embraced the *Roe* strict scrutiny test, the standard became strict indeed. There was little that states could do beyond the very limited verbal formulas in *Roe* itself to further their legitimate interests.[1] Such a rigid limitation was unusual for Supreme Court jurisprudence. Even the now discredited case of *Lochner v. New York*, 198 U.S. 45 (1905), which established the fundamental right of contract, ultimately permitted a

---

[1] *See, e.g., Akron v. Akron* (voiding first and second trimester hospitalization requirements and informed consent provisions); *Colautti v. Franklin*, 439 U.S. 379 (1979) (viability standard struck down for vagueness); *Bellotti v. Baird*, 428 U.S. 132 (1976) (parental consent without bypass struck down); *Danforth* (striking down spousal and parental consent requirements, prohibition of abortion by saline amniocentesis, and standards of physician care).

range of state protections for workers when sufficient justification was proffered.[2]

It was in response to the atypical rigidity of the *Roe* formula that Justice O'Connor offered her telling critique and alternative formulation in *Akron v. Akron*, a view she has maintained and refined in each of her subsequent opinions.[3] Justice O'Connor found that "[o]ur recent cases indicated that a regulation imposed on 'a lawful abortion "is not unconstitutional unless it unduly burdens the right to seek an abortion."'" *Akron v. Akron*, 462 U.S. at 453 (citations omitted). She emphasized that an undue burden would be present only "in situations involving absolute obstacles or severe limitations on the abortion decision," not wherever a state regulation "'inhibit[s]' abortions to some degree." *Id.* at 464. If there were no undue burden, then Justice O'Connor would apply a rational basis test. This standard would be applied "throughout the entire pregnancy without reference to the particular 'stage' of the pregnancy involved." *Id.* at 453, 460-61. Only if the petitioner could demonstrate an undue burden on the abortion right would a strict scrutiny criterion be applied.

At the same time, a growing number of other Justices came to see the constitutional inadequacy of *Roe*, and continued to hold that state regulation of abortion need meet only a rational relation test. In *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), these two trends converged to change both the standard of review and the state of the law.

The plurality hinted that the right to an abortion was merely an ordinary interest, thus requiring only a rational relation between state regulation and the state's

[2] *Lochner* itself upheld New York's safety restrictions placed on employers and workers. 198 U.S. at 62. *See also, Bunting v. Oregon*, 243 U.S. 426 (1917) (sustaining maximum hours legislation for all factory workers); *Muller v. Oregon*, 208 U.S. 412 (1908) (sustaining maximum hours legislation for women).

[3] *See* particularly her dissent in *Thornburgh*, 476 U.S. at 828-29.

ends. *Id.* at 519-20. Justice O'Connor applied her undue burden test and found no such burden. *Id.* at 530. Missouri's requirements of viability and testing and its prohibition of non-therapeutic abortions in state facilities were upheld. The fact that the requirements of *Webster* were found constitutional, overruling a court of appeals holding based on *Roe*, clearly shows that the strict scrutiny standard has been eliminated.

Although the bare holding of *Roe* remained intact after *Webster*, there has been a marked shift in the standards applied by a majority of the Court. For the plurality, the patent illogic in *Roe's* trimester formula, earlier exposed by Justice O'Connor in *Akron v. Akron*, demonstrated that there was no fundamental liberty interest at bottom. For Justice O'Connor, the screen of the undue burden test was a sufficient grounding to apply the rational basis test without the need to overturn *Roe* altogether.

This combination of the undue burden standard and the rational relation standard served to validate parental notification statutes with judicial bypass provisions in *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990) and *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990). When confronted with the Pennsylvania Abortion Control Act, the Third Circuit accurately perceived that the bare strict scrutiny test of *Roe* was no longer the law of the land since *Webster*, *Hodgson*, and *Ohio v. Akron*.

It correctly applied *Marks v. United States*, 430 U.S. 188 (1977), to find the undue burden test to be the narrowest basis among the Justices of the Supreme Court upon which to decide the issues before it. The court of appeals found that the informed consent provisions "cause[] nowhere near the kind of burden that must result for a regulation to constitute an undue burden" on the woman's "right" to an abortion, and that the regulations easily satisfied the rational relation test. *Planned Parenthood v. Casey*, 947 F.2d at 704-06.

Whatever the differences in the opinions of Justice O'Connor and her brethren in *Webster*, *Hodgson*, and *Ohio v. Akron*, there has been convergence on a basic point, viz., either because the regulations in those cases did not impose an undue burden, or because abortion was only an ordinary liberty interest, statutes regulating the incidents of abortion, such as informed consent, are subject to a rational relation test. Indeed, even the older *Roe* majority conceded the principle—though not then its application—that informed consent was "clearly" a legitimate concern of the states. *Akron v. Akron*, 462 U.S. at 446. As demonstrated *infra*, Pennsylvania's informed consent provisions do not pose an undue burden upon the pregnant woman, and they further the legitimate state interests in the health of the pregnant woman and in her informed choice of abortion or childbirth.

II. THE PENNSYLVANIA STATUTE PROTECTS A WOMAN'S RIGHT TO RECEIVE OR REFUSE MEDICAL TREATMENT.

A. The Inherent Risks to the Woman of Legal Abortion Justify Standard Regulation of That Medical Procedure.

A woman has a common-law right to receive or reject medical treatment. *Cruzan v. Missouri Dept. of Health*, 110 S. Ct. at 2851. In order to be effective, her decision must be fully informed.

A woman's decision to terminate the life of her unborn child is final and irrevocable. It is a decision which this Supreme Court has recognized to be wrought with stress, *Akron v. Akron*, 462 U.S. at 442, 448. As will be demonstrated *infra*, this section, the emotional, psychological and physiological repercussions can be long-lasting and destructive. Abortion is a decision that should be made, if at all, only after careful consideration of all relevant factors,[4] for "abortion is inherently different from other

[4] *See*, NATIONAL ABORTION FEDERATION STANDARDS FOR ABORTION CARE (1987), supporting the necessity of providing women with all relevant information as to the risks and benefits of the abortion procedure prior to obtaining consent.

medical procedures because no other procedure involves the purposeful termination of a potential life." *Harris v. McRae*, 448 U.S. 297, 325 (1980).

It is irrefutable that there are many known medical risks associated with abortion, regardless of its "legality" or "illegality."[5] While there is debate regarding the true complication rate,[6] there is a well-established pattern of potentially lethal complications of abortion, including cardiac arrest, hemorrhage, infection, inflammation of the heart, water intoxication, septic shock, disseminated intravascular coagulation, amniotic fluid embolism,[7] pulmonary embolism, salt poisoning, swelling of the brain,[8] and death.[9] Despite these dangers, legal abortions can

[5] Kaunitz, *Causes of Maternal Mortality in the United States*, 65 OBSTETRICS & GYNECOLOGY (May 1985); *see, e.g., Manaskie v. Rosenblume*, No. 15028-83 (N.Y. 1983) *in* 4, No. 2 MED. MALPRACTICE VERDICTS, SETTLEMENTS & EXPERTS (Feb. 1988) ($75,000 verdict for 24-year-old woman who suffered a vaginal tear and a ruptured cervix during a first trimester abortion and suffered two miscarriages thereafter).

[6] One study has indicated that the medical risks of abortion taken together produce an immediate complication rate of ten percent—that is, physical complications of abortion in 150,000 women annually. Frank, *Induced Abortion Operations and Their Early Sequelae*, 35 J. ROYAL C. GEN. PRAC. 175-80 (Apr. 1985).

[7] *See, e.g., McNair v. Rubin*, No. 4492-81 (N.Y. 1981), *in* 4, No. 2 MED. MALPRACTICE VERDICTS, SETTLEMENTS & EXPERTS (Feb. 1988) ($701,500 verdict for estate of 24-year-old mother of two who died of amniotic fluid embolism after a second dose of saline solution to induce abortion).

[8] A. SALTENBERGER, EVERY WOMAN HAS A RIGHT TO KNOW THE DANGERS OF LEGAL ABORTION 28-32 (1982). *See*, R. Castadot, Md.D., M.H. P., *Pregnancy Termination: Techniques, Risks, and Complications and Their Management, in* FERTILITY & STERILITY 5; G. Wulff, Jr., M.D. F.A.C.O.G. and S. Freiman, M.D., *Elective Abortion Complications Seen In a Free-Standing Clinic*, 49, No. 3 OBSTETRICS & GYNECOLOGY 351 (1976); A. M. Kinball, *Deaths Caused By Pulmonary Thromboembolism After Legally Induced Abortion*, 132 AM. J. OBSTETRICS & GYNECOLOGY 169-74 (Sept. 15, 1978).

[9] Deaths from legal abortion, unlike those from illegal abortion immediately prior to the *Roe* decision, are not made a matter of

be performed in hospitals, doctors' offices, storefront clinics or virtually any place an abortionist chooses to perform the procedure. In 1982, 82% of abortions took place in non-hospital facilities.[10]

Amici contend that abortion on demand has not produced the health bonanza proclaimed by its proponents, but rather has created a public health hazard the scope of which is just beginning to emerge. In addition to the obvious physical complications, abortion has a profound psychological impact upon many women[11] that can be found in the testimonies of women who have undergone abortion. Since the absolute safety of abortion, whether in the first trimester or thereafter, cannot be established, there is no justification for complete deregulation of the procedure. The Commonwealth of Pennsylvania must be allowed to protect the woman considering abortion by

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public notice by the abortion industry. There is incontrovertible evidence from death certificates, police reports, coroner's reports and other sources, however, that at least four women and teenage girls died from legal abortion in Los Angeles County, California alone during 1983 and 1984—23-year-old Cora Mae Lewis, 16-year-old Patricia Chacon, 43-year-old Mary Pena, and 22-year-old Yvonne Tanner. None of these deaths were reported as abortion-related. State of California, Department of Vital Statistics, Death Records, Table A-2, Maternal Deaths by Selected Causes of Death, California, 1960-1984 (By Place of Residence, *in* CALIFORNIA VITAL STATISTICS (1986).

Death from abortion—and failure to report abortion deaths—is not limited to California. In an investigation of only four abortion clinics of the twenty operating in Chicago in 1979, the *Chicago Sun Times* uncovered 12 unreported abortion deaths. D. REARDON, ABORTED WOMEN, SILENT NO MORE 109 (1987) (citations omitted). Even when previously unreported abortion deaths such as those that occurred in Chicago and Los Angeles are uncovered, they are generally not included in the 'official' total since they were not reported as such on the original death certificate. *Id., citing* WILKE, HANDBOOK ON ABORTION 81-92 (1979).

[10] Castadot, *supra* note 8, at 13.

[11] *See* D. REARDON, *supra*, note 9 (the culmination of three years of research and interviews with women who have had abortions),

requiring that she be given an opportunity to give a meaningful consent.[12]

The materials which are to be made available to the woman describe the unborn child, and set forth information concerning alternatives to abortion as well as available assistance with respect to medical benefits, prenatal and neonatal care, childbirth, and the responsibility of the father concerning provision of financial support. Abortion Control Act, § 3205. These materials serve to advance the Commonwealth's interest in giving a woman full information on which to base the decision to receive or reject medical care. Provision of *written* materials enables the woman to review the information at her discretion, permitting reflection and a decision free from the influence of those who have a financial stake in the abortion process.[13]

The information to be provided is factual and in no way serves to mislead, but only to educate the woman in the area of prenatal development.[14] Providing her with relevant physiological data as to the gestational age and development of the unborn child enables a woman to make an informed and voluntary choice based on her own

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[12] To believe that physicians are somehow exempt from human nature and will only act in the interests of others without regard to their own interest is to deny the reality of human nature. The abortion industry is a highly profitable business. The livelihood of the abortionist and her staff depends on the selling of abortions. Certainly any industry which benefits from the sale of a medical procedure is open to regulation.

[13] As pointed out *infra*, Argument, § IV.A., well over three-quarters of abortions take place in non-hospital facilities, including clinics. There is no indication that a traditional long-standing physician-patient relationship is involved. Therefore, it may not be presumed that the abortion provider, who profits by the abortion, is necessarily acting in the best interests of the woman.

[14] *See*, AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, STANDARDS FOR OBSTETRIC-GYNECOLOGIC SERVICES 85 (6th ed. 1985) (hereinafter "A.C.O.G."), recommending that abortion counseling be followed by an adequate waiting period, to allow reflection on risks and benefits of abortion.

values and beliefs. It informs the woman of the possible health risks of an abortion relative to the gestational age of her unborn child. It permits her to reflect and make a careful balancing of all elements of her decision.

A woman's right to determine her own medical treatment, guaranteed by both common and constitutional law, *Cruzan*, 110 S.Ct. at 2851, is illusory when the only information provider is an entity with a financial interest in a particular outcome of her decisional process, and who supports only one option. The failure to provide complete information on all of her options and the consequences of each choice is closely akin to providing false and misleading information. This serves neither the Commonwealth's compelling interest in protecting the health and welfare of its citizens, nor the woman's own interest in making a voluntary choice based upon complete and accurate data.

The Court in *Akron v. Akron* expressed a concern that informed consent statutes for abortion might dissuade women from choosing abortion. 462 U.S. at 443-45. The very purpose of informed consent, however, is to fully inform the patient, to enable her to make a fully informed choice. Informed consent, by its nature, presumes that she might change her mind, based on her own values and beliefs.[15] This is also the purpose behind product labeling and all consumer protection legislation. Should the prospective abortion patient know less about major surgery than about her choice of breakfast cereal?

If the provision of factual and relevant information reflecting the development of the unborn child as well as available options or alternatives to abortion serves to dissuade a woman from choosing abortion, it is only because in light of all the available information, relative to her own private beliefs and values, the woman has made her own decision. The risk of interfering with a woman's ability to choose her own medical treatment arises only

[15] The argument that informed consent information which induces a change in opinion *ipso facto* must be coercive is perfectly circular.

where incomplete and biased information is provided, preventing the necessary weighing and balancing of the benefits. That has not taken place here. The Abortion Control Act requires only the sharing of incontestably true information. The dissemination of accurate and relevant information is critical to the woman's exercise of her right to receive or reject medical treatment.

In *Thornburgh*, the Court gutted the 1982 Pennsylvania Abortion Control Act by relying heavily on the notion that "states are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies." 476 U.S. at 759. The Court, citing *Akron v. Akron*, asserted that Pennsylvania was doing "nothing less than . . . attempt[ing] to wedge the Commonwealth's message discouraging abortion into the privacy of the informed consent dialogue between the woman and her physician." *Thornburgh*, 476 U.S. at 762.

As Justice White wrote in his *Thornburgh* dissent, however,

> . . . *Akron* is not controlling. The informed consent provisions struck down in that case, as characterized by the majority, required the physician to advance tendentious statements concerning the unanswerable question of when life begins, to offer merely speculative descriptions of the anatomical features of the fetus carried by the woman seeking the abortion, and to recite a "parade of horribles" suggesting that abortion is "a particularly dangerous procedure." . . . I have no quarrel with the general proposition . . . that a campaign of state-promulgated disinformation cannot be justified in the name of "informed consent" or "freedom of choice." But the Pennsylvania statute before us . . . does not, on its face, require that the patient be given any information that is false or unverifiable. Moreover, it is unquestionable that all of the information required would be relevant in many cases to a woman's decision whether or not to obtain an abortion.

Id. at 799-800.

Therefore, the statute here suffers none of the "flaws of the ordinance at issue in *Akron* [*v. Akron*]," the basis of the paradoxical *Thornburgh* majority opinion. 476 U.S. at 800 (White, J., dissenting). Even the *Akron v. Akron* majority acknowledged that accurate and relevant information could be constitutionally disseminated:

> The decision to have an abortion has "implications far broader than those associated with most other kinds of medical treatment" . . . and thus the state legitimately may seek to ensure that it has been made "in the light of all attendant circumstances—psychological and emotional as well as physical—that might be relevant to the well-being of the patient."

462 U.S. at 443 (citations omitted). The Court in *Thornburgh* should have been consistent with its own logic and ruled the Pennsylvania statute constitutional then, but refused, ostensibly because "the subject is abortion." *Thornburgh*, 476 U.S. at 799 (White, J., dissenting). This Supreme Court should remedy that patent inconsistency and uphold the Court of Appeals' finding of constitutionality.

B. The Twenty-four Hour Waiting Period is a Reasonable Device to Ensure That a Woman Has Made a Fully Informed and Well-Reasoned Decision.

Section 3205(a)(1) of the Pennsylvania Abortion Control Act requires a 24-hour waiting period between provision of information and the performance of an abortion. Consent may be given at any time within that period.

Justice O'Connor, in her dissenting opinion in *Akron v. Akron*, joined by Justice White and Justice Rehnquist, stated that "a regulation imposed on a 'lawful abortion' is not unconstitutional unless it *unduly burdens* the right to seek an abortion," 462 U.S. at 453 (citations omitted; emphasis added). According to Justice O'Connor, "'*Roe* did not declare an unqualified "constitutional right to an abortion," . . . Rather, the right protects the woman from unduly burdensome interferences with her freedom to decide whether to terminate her pregnancy.'" *Id.* at 461 (citations omitted; ellipses in original).

It is apparent throughout Justice O'Connor's discussion of the undue burden standard that the burden must be one that essentially prevents a woman from exercising her right to determine her own medical treatment. *Id.* at 464. The 24-hour waiting period does not prevent or unduly burden the woman's ability to decide whether to undergo surgery. It fulfills the Commonwealth's interest, rather, in ensuring that her choice is free and voluntary. It permits time for reflection, further protecting the health and welfare of the mother.[16]

In other related areas, Kentuckians wait 24 hours before consenting to sterilization. KY. REV. STAT. ANN. § 212.347 (Baldwin 1982). Even within a simple sales contract, commonly there is a 3-day waiting period which permits the buyer to rescind after reflection. It would be beyond reason to permit a statutorily imposed waiting period for sterilization, which only revocably terminates reproductive capability, and yet strike down, simply because it impacts abortion, *Thornburgh*, 476 U.S. at 799 (White, J., dissenting), another provision which merely provides the same period for reflection prior to deciding to irrevocably terminate the life of the unborn child of the prospective abortion patient. Such a provision simply provides a woman with essential time for consideration in light of the irrevocable, stressful and emotional decision to abort.[17]

The 24-hour waiting period of the Act must be seen in the light of the lack of the traditional long-term physician-patient relationship, demonstrated *infra*, Argument, § IV.A., and keeping in mind the economic benefit the clinic derives from a woman's decision to have an abortion. It is a valid exercise of the Commonwealth's police

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[16] A.C.O.G., *supra* note 14, at 84.

[17] Though the former is revocable and the latter is not, the distinction between sterilization and abortion actually is not as great as it might seem at first blush. Choosing the former operation is an exercise of the common-law right to receive medical treatment. *Cruzan*, 110 S.Ct. at 2851. Choosing the latter implicates merely the same analysis and standards of protection.

power in protecting its citizens, to insure that the woman have the benefit of all relevant and pertinent information and to insure a voluntary and informed decision.

This reasonable time period, away from the abortion clinic and those who have an economic interest in a choice in favor of abortion, gives the prospective abortion patient time for meaningful reflection free from undue influence or intrusion. Therefore, her decision can be carefully considered, free, and voluntary. The consequences of a woman's decision to abort are lifelong and irrevocable. Her decision should not be one entered into hastily.

III. SECTION 3205 IS A PROPER EXERCISE OF STATE POLICE POWER.

A. Informed Consent Statutes Generally Are a Proper and Legitimate Exercise of State Police Power.

Through § 3205 of its Abortion Control Act, the Commonwealth of Pennsylvania protects the health of women within its jurisdiction. This is a legitimate exercise of an integral aspect of the Commonwealth's police power, the authority to protect public health. This power of the Commonwealth to regulate the medical field is indisputable. *See, e.g., Whalen v. Roe*, 429 U.S. 589 (1977); and *Missouri ex rel. Hurwitz v. North*, 271 U.S. 40 (1926).

> [I]t is elemental that a state has broad powers to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state's police power. The state's discretion in that field extends naturally to the regulation of all professions concerned with health.

Barsky v. Board of Regents, 347 U.S. 442, 449 (1954).

A necessary component of regulating the medical field is enforcing the patient's right to informed consent.

> "The decision to abort . . . is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the State to the extent of requiring her prior written consent."

Akron v. Akron, 462 U.S. at 442-43, *quoting Danforth*, 428 U.S. at 67. "Informed consent," according to the *Danforth* Court, means "the giving of information to the patient as to just what would be done and as to its consequences." *Danforth*, 428 U.S. at 67, n.8.

State legislatures nationwide have rejected the idea that the physician is permitted to disclose just that information which she deems relevant. Instead, these statutes respect the patient and her ability to make a self-determined decision. To do less in the case of abortion is to belittle the capacity of a woman to make a knowing, rational, and willing choice to terminate the life of the unborn child which she carries.

B. Medically Specific Informed Consent Statutes Are Rationally Related to the Commonwealth's Legitimate Interest and Serve the Woman's Need for Information.

The movement toward providing greater quantity and quality of information for patients' informed consent decisions has also resulted in a parallel movement toward medically specific informed consent statutes. Pennsylvania has undertaken specific informed consent provisions for breast cancer treatment, 35 PA. CONS. STAT. ANN. § 5641, and prenatal examination for syphilis, 35 PA. CONS. STAT. ANN. § 521.13. Likewise the statute under consideration, Pennsylvania Abortion Control Act § 3205, requires specific informed consent regarding abortion. This is not an aberration, but is in keeping with the trend toward more fully tailored, medically specific informed consent.

In *Danforth*, this Supreme Court recognized Missouri's legislative prerogative to require a woman to sign a consent indicating that it was "informed and freely given and not the result of coercion." *Id.* at 65. The Missouri statute was applicable during all stages of pregnancy and was *medically specific*. This Court upheld the statute:

> [T]he imposition . . . of such a requirement [informed consent] for termination of pregnancy even during the first stage, in our view, is not in itself an unconstitutional requirement. The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the State to the extent of requiring her prior written consent.

Id. at 67.

This Supreme Court in *Franklin v. Fitzpatrick*, 428 U.S. 901 (1976), *aff'g. Planned Parenthood v. Fitzpatrick*, 401 F.Supp. 554 (E.D. Pa. 1975), approved the Commonwealth of Pennsylvania's informed consent legislation the same year as *Danforth*. The District Court found that the requirement was rationally related to the Commonwealth's interest. The Commonwealth's requirement that the information be given "is suggested . . . by the realities of the system that provides abortions." *Planned Parenthood v. Fitzpatrick*, 401 F.Supp. at 587 (Adams, J., concurring). The Court correctly held that the three disclosure requirements of the statute (of possible unforeseen detrimental physical and psychological effects; of possible alternatives to abortion, including childbirth and adoption; and of the medical procedures to be used), were within the prerogative of the Pennsylvania state legislature. *Id.* at 587-88.

The tailoring of the Pennsylvania Abortion Control Act provides the basis upon which a woman can make a truly informed decision. This is especially critical here, for "abortion has implications far broader than those associated with most other kinds of medical treatment." *Akron v. Akron*, 462 U.S. at 443 (citations omitted). *See also, id.* at 448, where the *Akron v. Akron* majority characterized the abortion decision as "stressful." To do less than inform a woman of the full extent of her right to receive or reject medical treatment would work a gross injustice. Denial of this right of the woman

would be a patronizing denigration of a woman's ability to function as a fully competent adult in society. It would be a dereliction of the Commonwealth's duty to safeguard the public health.

C. The Commonwealth's Legislature, Through Its Police Power, Is the Proper Authority to Review the Issue of Informed Consent.

Informed consent statutes are a fundamental function of the police power of the Commonwealth.

> [T]he government is entitled not to trust members of a profession to police themselves, and accordingly the legislature may for the most part impose such restrictions on the practice of a profession or business as it may find necessary to the protection of the public.

Thornburgh, 476 U.S. at 803 (White, J., dissenting). *See also, id.* at 760 (Blackmun, J., writing for the majority).

Not until 1983, ten years after *Roe*, did the Court overrule a legislative body's determination of the content of informed consent disclosure. In *Akron v. Akron*, the Court ruled that the ordinance passed by the City of Akron was unconstitutional. The Court used the standard of "strict scrutiny" without finding the chilling effect required under prior rulings, however. As Justice O'Connor wrote, "[t]he Court's analysis of the Akron regulations [was] inconsistent . . . with the methods of analysis employed in previous cases dealing with abortion . . ." 462 U.S. at 452-53 (O'Connor, J., dissenting).

The Court in *Akron v. Akron* erroneously appointed themselves an "ex-officio" medical board to review the determination of state legislatures as to medical regulation of the abortion industry. *Cf. Danforth*, 428 U.S. at 99 (White, J., concurring). This standard incorrectly makes the state subservient to the abortion industry, thereby allowing the abortion industry to be, in effect, self-regulating. *Akron v. Akron*, 462 U.S. at 431. A clearly defined rationale for this concept is nonexistent.

This is not the function or place of a court.

> [A]lthough legislatures are better suited to make the necessary factual judgments in this area, the Court's framework forces legislatures, as matter of constitutional law, to speculate about what constitutes "accepted medical practice" at any given time. Without the necessary expertise or ability, courts must then pretend to act as science review boards and examine those legislative judgments.

Id. at 458 (O'Connor, J., dissenting). Rather than emplace itself as Pennsylvania's "medical review board," this Supreme Court

> must keep in mind that when we are concerned with extremely sensitive issues, such as the one involved here, 'the appropriate forum for their resolution in a democracy is the legislature. We should not forget that 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' "

Id. at 465 (O'Connor, J., dissenting; citations omitted).

In *Thornburgh*, the *Roe* majority again injected itself into the regulation of State medical practices. The Court found the medical judgments of the legislature of the Commonwealth of Pennsylvania "overinclusive," 476 U.S. at 762, "irrelevant and inappropriate," *id.* at 763, and "facially unconstitutional," *id.* at 764. Chief Justice Burger posed questions begging for answers:

> Can anyone doubt that the State could impose a similar requirement with respect to other medical procedures? Can anyone doubt that doctors routinely give similar information concerning risks in countless procedures having far less impact on life and health, both physical and emotional than an abortion, and risk a malpractice lawsuit if they fail to do so?

Thornburgh, 476 U.S. at 783 (Burger, C.J., dissenting).

The teaching of this Supreme Court is clear: informed consent requirements are a legitimate regulation of every aspect of the medical profession, abortionists not excepted. Even under the prior holdings of the *Roe* majority, informed consent statutes which mandate merely factual disclosure, as the Pennsylvania Act does, are acceptable. Therefore, the Pennsylvania Abortion Control Act should be upheld as constitutional.

IV. PENNSYLVANIA'S INFORMED CONSENT PROVISIONS DO NOT VIOLATE THE FIRST AMENDMENT TO THE CONSTITUTION.

A. The Provisions Regulate Commercial Speech.

Abortion clinics provide a service for a price. Abortion is almost always an elective procedure.[18] Over 80% of abortions are performed in clinics that limit themselves to one primary function only.[19] The vast majority of abortions do not take place in the context of a traditional physican-patient relationship in which the procedure is decided upon in light of the long-range health needs of the patient. Typically, the woman arrives at the clinic and undergoes an abortion in one stop. Like one-hour eyeglass outlets at retail malls, abortion clinics are engaged in a commercial activity.[20]

Regulations on commercial speech do not need to pass a strict scrutiny or clear and present danger test. The appropriate level of scrutiny has been most recently defined by the Supreme Court as

> a " 'fit' between the legislature's ends and the means chosen to accomplish those ends," . . . a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served," . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decision makers to judge what manner of regulation may best be employed.

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[18] Less than two per cent of abortions are for clinical reasons. Torres & Forrest, *Why Do Women Have Abortions?*, 20 FAM. PLAN. PERSP. 169 (1988). Since Pennsylvania's informed consent requirements do not apply to medical emergencies, they will apply almost entirely in cases where the woman is seeking an elective service for a fee.

Board of Trustees v. Fox, 492 U.S. at 480 (citations omitted).

The objective of the informed consent provisions is to provide a pregnant woman with sufficient data upon which to make an informed choice. She may decide as she pleases, based upon her own values. The means chosen by the Commonwealth of Pennsylvania to effectuate that legitimate end is to ensure that the prospective abortion patient receive fact-specific information regarding the medical aspects of the procedure and the social and legal variables relevant to making her decision.

The fit between the means and the legitimate State end is obvious. The information provided to the woman describes the risks of abortion as well as the risks of childbirth. It delineates the "probable gestational age of the unborn child," § 3205, a relevant factor in terms of both the safety of the abortion and the time needed to carry the unborn child to term. It also describes alternatives to abortion, as well as medical assistance and legal options available to her. In sum, it allows her to become an informed consumer.

The legislation is not a regulation of political speech, it does not control speech in a traditional or designated public forum, and it does not operate as a prior restraint upon speech. Under the rules governing commercial speech, the Commonwealth may require the purveyor of a commercial service to disseminate information that the Commonwealth reasonably believes will assist the consumer in making an informed choice. In situations where the provider of services has far greater access to relevant information, and where the consumer is at an arguable

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[19] Henshaw, Forrest, & Van Vort, *Abortion Services in the United States*, FAM. PLAN. PERSP., Mar.-Apr. 1987 at 68.

[20] Abortion clinics advertise their services; they normally set a standard price for their services; they limit themselves to a particular standard service; and they have an economic motivation for their actions. They are, in sum, engaged in a commercial activity, no matter what ideological incidents may accompany the transaction. *Bolger v. Young Drug Products Corp.*, 463 U.S. 60, 67-68 (1983).

disadvantage in weighing the options of accepting the service or not, the Commonwealth can compel greater disclosure, even if it works to the ultimate disadvantage of the seller.

As the Court explained in *Zauderer v. Office of Disciplinary Counsel*, the Commonwealth "has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present." 471 U.S. 626, 650 (1985).

As with other regulations of commercial transactions, from advertisements of cigarettes, to the selling of homes, to the promotional literature of lawyers, there is indeed a clear "fit" between the information that must be given to the potential consumer and the objective, to provide a potential consumer of goods or services with sufficient knowledge to make a rational choice. *Board of Trustees v. Fox*, 492 U.S. at 480. In fact, this Supreme Court has held that where a state is seeking to prevent a consumer from being misled, all that is needed is a "reasonable fit" between the means and the "substantial" goal. *Id.*; *see also, Zauderer*, 471 U.S. at 625.

B. Pennsylvania May Validly Compel the Dissemination of Information Necessary to Assist a Woman's Exercise of Her Right to Refuse Medical Treatment.

In *Cruzan v. Missouri Dept. of Health*, this Supreme Court held that "the common law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment." 110 S.Ct. at 2851. The Court further noted that the refusal of unwanted medical treatment is "a constitutionally protected liberty interest" rooted, at least in part, in the common law protection against battery. *Id.*

The federal government, under its implied powers, and the states, under their police power, possess acknowledged authority to require the dissemination of accurate information so that individuals may more effectively exercise their statutory and common law rights, as virtually any

worker in this country can attest.[21] The State, in particular, has special competence in regulating the provision of health services to its people. *Barsky v. Board of Regents*, 347 U.S. at 449.

There is no constitutional objection to the plethora of specific informed consent state statutes dealing with breast cancer treatment,[22] electroconvulsive treatments,[23] prenatal examination for syphilis,[24] HIV tests,[25] communicable diseases,[26] experimental research,[27] services of a midwife,[28] or a 24-hour waiting period for nontherapeutic sterilizations.[29] Nor should there be for a procedure fraught with such potentially devastating outcomes as abortion. *See, supra*, Argument, § II.A.

The manner in which the State of California deals with the medical procedure of hysterectomy is instructive. Before a woman may undergo the surgical removal of her uterus, California law requires that the attending physician must first obtain verbal and written informed con-

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[21] *See, e.g.*, D.C. CODE ANN. § 36-1311 (requiring posting of Employees' Rights under the District of Columbia Family and Medical Leave Act of 1990); Employee Polygraph Protection Act, WH Publication 1462, U.S. Dept. of Labor, September 1988; "Your Rights Under the Fair Labor Standards Act," WH Publication 1088, U.S. Dept. of Labor, Rev'd April 1991.

[22] N.Y. PUB. HEALTH LAW § 2404 (Consol. 1992); 35 PA. CONS. STAT. ANN. § 5641 (1983 and Supp. 1991). See also the debate within the Food and Drug Administration regarding whether silicone breast implants should be banned or allowed with the required informed consent of the patient. News Briefing by David Kessler, Federal News Service, January 6, 1992, LEXIS.

[23] COLO. REV. STAT. § 13-20-402 (1991).

[24] 35 PA. CONS. STAT. ANN. § 521.13 (1983 and Supp. 1991).

[25] OHIO REV. CODE ANN. § 3701.242 (Baldwin 1991). ARIZ. REV. STAT. ANN. § 20-448.01 (1992).

[26] IND. CODE ANN. § 16-1-9.5-3 (Burns 1991).

[27] MINN. STAT. § 144.651 (1990 and Supp. 1991).

[28] MONT. CODE ANN. § 37-27-311 (1991).

[29] KY. REV. STAT. ANN. § 212.347 (Baldwin 1992).

sent from the woman attesting that she has been given specific information, including, *inter alia*,

> (2) A description of the type or types of surgery and other procedures involved in the proposed hysterectomy, and a description of any known available and appropriate alternatives to the hysterectomy itself;
>
> (3) Advice that the hysterectomy procedure is considered to be irreversible, and that infertility will result; . . .
>
> (4) A description of the discomforts and risks that may accompany or follow the performing of the procedure, including an explanation of the type and possible effects of any anesthetic to be used.

CAL. HEALTH & SAFETY CODE, § 1690 (Deering 1991).

Additional information given to the woman contemplating a hysterectomy includes details of her right to withdraw agreement to the operation at any time, the benefits and advantages of the treatment, length of hospitalization and recovery, and costs. It seems beyond peradventure that informing a woman of the implications and alternatives to the removal of her unborn child and the elimination of any possibility of her child being born is as reasonable and justified as informing her of the implications and alternatives to removing her uterus and the closure of any possibility of having children.

Amici have noted above that Pennsylvania's statute is a valid form of consumer protection legislation, regulating the incidents of a commercial transaction. More importantly, however, the statute also furthers the right of patients to give complete informed consent, rooted in their common law right to refuse medical treatment.

Despite their protestations, abortion clinics are neither equipped nor, absent this statutory motivation, are they motivated to give each woman particularized information for her specific situation. Such a possibility is chimerical in the one stop, homogenized procedure experienced by most of those who arrive at the clinics' doors. The Commonwealth has found that it must provide the umbrella

of information under which a woman may make a reflective and reasoned decision. This Supreme Court should uphold that provision.

C. Pennsylvania's Informed Consent Legislation Does Not Compel the Physician to Endorse an Ideological Position of the Commonwealth.

Under § 3205 of the Pennsylvania Abortion Control Act, a physician is required to provide three pieces of neutral and balanced information: 1) the type of treatment, its alternatives and risks; 2) the gestational age of the unborn child; and 3) the medical risks in carrying a child to term. The physician is not compelled to say anything more on these matters. There is no more "ideological message" in describing the risks and alternatives to abortion than there is in describing the risks and alternatives to an HIV test, a breast implant, or a hysterectomy.

The regulations do not intrude upon a physician's First Amendment rights. The government may compel a provider of services to engage in relevant commercial speech to present the truth to individual consumers.[30]

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[30] While it is settled law that the government may not conscript a person to proclaim its own ideological message, *Zauderer*, 471 U.S. at 625; *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943); *Wooley v. Maynard*, 430 U.S. 705 (1977), that is not occurring here. The information which the physician must impart is merely factual. Any ideological message to be drawn from the provision of this information is thus only drawn from the bare fact of its provision.

The petitioners object to this statutory duty. Brief for Petitioners, *Planned Parenthood v. Casey*, Nos. 91-744, 91-902, 60 U.S.L.W. 3492 (U.S., 1992) at 51-55. They did not and could not allege, however, that the information to be presented was false. Rather, petitioners object that compelling dissemination of unarguably true material to a consumer of services "violates [the] conscientious beliefs and professional commitments" of Pennsylvania abortionists. *Id.* at 54.

Truth is thereby reduced by the petitioners to a mere "ideological point of view," *id.* at 54, citing *Wooley*, 430 U.S. at 715, antithetical to their own ideology. One must wonder how truth could violate the "conscientious beliefs," *id.* at 54, of honest physicians. One must

In *Thornburgh*, Justice O'Connor stated that the informed consent regulations in that case were "the kind of balanced information I would have thought all could agree is relevant to a woman's informed consent." 476 U.S. at 830 (O'Connor, J., dissenting). Though Justice O'Connor was concerned that "requiring the physician or counselor to read aloud the State's printed materials . . . raises First Amendment concerns," *id.*, this statute does not partake of that infirmity. All the physician must do is provide the potential patient with factual, relevant information. This remains a regulation of commercial speech, and any political nuances drawn from the Commonwealth's requirements are merely incidental. *Board of Trustees v. Fox*, 492 U.S. at 475, *citing Bolger v. Young*, 463 U.S. at 67-68.

Beyond divulging the limited factual information on risks, alternatives, age of the unborn child, and dangers attendant in pregnancy, the specific content of which the physician's own professional judgment determines, the physician may express any opinion on the woman's condition that she wishes. She is given no ideological script to read. She may opine that it is in the woman's best interests to have an abortion. She may criticize this very law. She may even recommend that she ignore the state mandated printed materials. In sum, her only obligation is to provide factual information material to whether the consumer wishes to avail herself of the proffered medical services. By thus allowing the prospective patient to be informed, the Commonwealth empowers her with information on which to base her decision whether to accept or refuse the available medical treatment.[31]

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inquire why such an honest provider of medical services would wish to "disavow," *id.* at 53, the truth.

[31] Amici wish to emphasize that the issue is not that the woman does not have enough native intelligence to decide for herself; that is Petitioner's argument. Rather, amici argue that, at a time of emotional and psychologocial stress, a prospective abortion patient is unlikely to seek out information which is not readily available. The Act makes this information available for the woman's review and use.

V. THE INFORMED CONSENT PROVISIONS OF THE PENNSYLVANIA ABORTION CONTROL ACT LEAVE THE WOMAN FREE TO DETERMINE WHETHER TO OBTAIN AN ABORTION OR CARRY HER PREGNANCY TO TERM.

Although a state may constitutionally encourage childbirth over abortion, *Maher v. Roe*, 432 U.S. 464 (1977), under this statute, Pennsylvania has left the decision of birth or abortion to the individual woman.[32] The Commonwealth has insured that, no matter what the woman's first inclination in submitting to a medical procedure about which she may know little, she cannot be induced to "move forward on a decision to abort without evaluating that decision on an informed basis." *Planned Parenthood v. Casey*, 947 F.2d at 704 n.16. As Justice White noted in *Thornburgh*,

> [t]rue consent to what happens to one's self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each. The average patient has little or no understanding of the medical arts, and ordinarily has only his physician to whom he can look for enlightenment with which to reach an intelligent decision. From these almost axiomatic considerations springs the need, and in turn the requirement, of a reasonable divulgence by physician to patient to make such a decision possible.

476 U.S. at 799 (White, J. dissenting), *quoting Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir. 1972).

[32] Although the legislation refers to the "unborn child," that characterization is no more legally enforceable than was Missouri's finding that "[t]he life of each human being begins at conception," and that "[u]nborn children have protectable interests in life, health, and well-being." *Webster*, 492 U.S. at 500. Nonetheless, absent the constraints of *Roe v. Wade*, there is adequate evidence for the Commonwealth reasonably to conclude that the unborn child is a human person. Constrained by *Roe*, Pennsylvania has not chosen in this legislation to accord the unborn child full personblood status under its law. Indeed, it could not grant the unborn child personhood and still provide that, once the woman has received the information and has had time to consider it, she may still choose to abort.

To presume, as did the Court in *Akron v. Akron*, that the physician will tailor the individual information to the needs of the patient is to rely upon a fiction in the abortion context. *See, supra*, Argument, § IV.A. There is hardly any individuation in an abortion clinic. Many women do not see the physician until the operation is about to begin.

What the *Akron v. Akron* majority did was to exalt the discretion of the physician over the needs of the patient. It left a constitutionally protected total veto over the consent process in the hands of the person performing the abortion, who has an economic interest in insuring that the patient proceed with the operation. Pennsylvania has merely righted that imbalance in favor of the patient.[33]

That trend so explicitly embraced in *Akron v. Akron* by the Court should now be ended, and constitutional jurisprudence returned to its traditional underpinnings. In light of the growing evidence of what actually occurs in this fictionalized "physician-patient relationship" in abortion clinics, in light of the scientific support for the state to prefer childbirth, and in light of the new standards articulated by this Supreme Court in *Webster*, *Hodgson*, and *Ohio v. Akron*, it is clear that *Akron v. Akron's* unduly restrictive notion of state action in regard to physicians sharing the truth with their prospective patients can no longer be supported as a matter of constitutional law.

Nonetheless, in the present statute, the fact remains that the state has not forced an unwilling listener to hear its message of the virtue of childbirth. Instead, it merely requires that, beyond the limited technical information provided by the attending physician, the woman must receive certain materials. The materials describe abortion alternatives and legal and social opportunities for the woman, but they do not contain the hortatory message that was the defective part of the statute struck down in

[33] By this provision we are a long way from *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), and interference with the right of a person to pursue her lawful calling unhampered by the state.

Thornburgh. Even though these materials are absolutely neutral and accurate, the woman is not required to read them.

To the extent these neutral facts carry the "message" of the Commonwealth's preference of childbirth over abortion through the provided material, they do so through the intervention of the woman's own value system. She reads the facts—if she chooses to do so—and she draws the conclusions. The Commonwealth of Pennsylvania respects the values and independent judgment of the woman more than do those who would deprive her of relevant information vital to a decision of the greatest import to her life.

CONCLUSION

Amici respectfully urge the Supreme Court to uphold the rights of women to receive the information necessary to make a free, voluntary, and considered decision regarding a most important medical issue. The resistance of Petitioners to the dissemination of truthful material to women considering the abortion option is nothing less than a paternalistic and condescending effort to control the destinies of women—a measure most strongly protested by amici representing women from all walks of life.

This Abortion Control Act does not partake of the constitutional flaws that caused the *Roe* majority to find invalid the informed consent provisions in *Akron v. Akron* and *Thornburgh*. There is no "parade of horribles." There are no "tendentious statements concerning the unanswerable question of when life begins" or "speculative descriptions of the anatomical features of the fetus." *Thornburgh*, 476 U.S. at 800 (White, J., dissenting). Rather, § 3205 of the Abortion Control Act mandates empirically verifiable scientific data and information about government programs to be shared with women seeking abortions.

The goal of this dissemination? The Commonwealth of Pennsylvania seeks to empower its citizens to exercise their common-law and constitutional right to receive or reject medical treatment. As long as abortion is legal,

women must receive full and complete information to enable them to make a voluntary and informed choice.

This statute in no wise violates the rights of the outstanding medical community of the Commonwealth of Pennsylvania. The speech which is implicated by this statute is commercial speech, incontestably entitled to a lower level of protection than other forms of speech. *Board of Trustees v. Fox*, 492 U.S. at 480-81. Giving women the information they need to make a fully informed consent is certainly a "substantial" goal of the Commonwealth. This program of information dissemination has an unarguable "reasonable fit" to meet that goal. *Id.*

Therefore, this Court should affirm the holding of the Third Circuit Court of Appeals, and find that § 3205 of the Pennsylvania Abortion Control Act is constitutional. Amici respectfully urge, however, in agreement with Justice Scalia, that "[t]he real question . . . is whether there are valid reasons to go beyond the most stingy possible holding today." *Webster*, 492 U.S. at 534.

In its grant of certiorari in this case, this Supreme Court specifically limited its review to the constitutionality of the state regulatory provisions of the Pennsylvania Abortion Control Act. *Planned Parenthood v. Casey*, Nos. 91-744, 91-902.

Amici contend that the Third Circuit Court of Appeals was correct to apply the case of *Marks v. United States* to arrive at the proper standard of review. *Planned Parenthood v. Casey*, 947 F.2d at 692-96. However, amici also agree with the amicus briefs in support of the Commonwealth of Pennsylvania's petition for writ of certiorari which state that this Supreme Court is not bound by *Marks*, and can and should enunciate a clear standard of review in this overwhelmingly critical area of constitutional jurisprudence.

As the Third Circuit correctly stated, the

> threshold question is whether the standard of review of abortion regulations promulgated by the Court in

> *Roe* and later cases . . . has survived *Webster* and the Court's subsequent decision in *Hodgson v. Minnesota* . . . . [T]he standard of review used for abortion legislation establishes the degree to which the government may regulate abortion.

Planned Parenthood v. Casey, 947 F.2d at 687-88 (citations omitted).

Whether the "right" to abortion is "fundamental," and thus whether the "strict scrutiny" test is applicable, depends therefore on a continuation of the *Roe* rationale or some similar construct. As Justice White has written, however, joined by (now Chief) Justice Rehnquist, the stability of *Roe* has been brought into question:

> Both the characterization of the abortion liberty as fundamental and the denigration of the State's interest in preserving the lives of nonviable fetuses are essential to the detailed set of constitutional rules devised by the Court to limit the States' power to regulate abortion. If *either or both* of these facets of *Roe v. Wade* were rejected, a broad range of limitations on abortion (including outright prohibition) that are now unavailable to the States would again become constitutional possibilities.

Thornburgh, 476 U.S. at 796 (White, J., dissenting; emphasis added). Thus, it is imperative that this Court examine the foundations of the *Roe* structure explicitly to determine the correct standard of review of the regulatory provisions of the Pennsylvania Abortion Control Act.

Respectfully submitted,

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APPENDIX

APPENDIX

DESCRIPTION OF AMICI

INTEREST OF FEMINISTS FOR LIFE OF AMERICA AND PROFESSIONAL WOMEN'S NETWORK

Feminists For Life of America ("FFLA") and Professional Women's Network file this brief under United States Supreme Court Rule 37, with the consent of the parties, as *Amici Curiae* in support of Respondent. These organizations, having seen the adverse physical and psychological effects of abortion on women, oppose the continued deregulation of the lucrative abortion industry, advocate the development of non-violent alternatives to crisis pregnancies, and seek an end to the exploitation of women and the widespread destruction of preborn children which characterizes the current state of abortion on demand.

INTEREST OF BIRTHRIGHT, INC.

Birthright was founded in Toronto, Canada by Louise Summerhill in 1968. Four years later, Denise F. Cocciolone, along with others, founded Birthright, Inc. (U.S.A.). Since its founding in 1972 in this country, Birthright has provided emergency pregnancy service out of its approximately 600 centers in this country.

Birthright is a non-profit, interdenominational U.S. corporation staffed by volunteers and funded by private contributions. Birthright receives no governmental funding nor is it supported on a regular basis by any particular church or denomination.

Birthright does not engage in political or legislative activity of any kind, but rather offers medical, legal and psychological help to pregnant women from all parts of the country, from all walks of life. Some are rich, others are poor, but most feel abandoned by a family or a society which has no or little patience for a problem

unique to women—an unplanned pregnancy. These women, rather than receiving the love and support they need to cope with this challenge are offered the easy way out, the "quick fix" cover-up-abortion. It is to these women that Birthright holds out an alternative of bringing their pregnancy to full term by providing them with shelter facilities where needed, clothing, food, furnishings, as well as the medical, legal and psychological assistance referred to.

Birthright volunteers give of themselves and their time freely and lovingly. Birthright services are offered free of charge and in complete confidence.

The Birthright office in the United States staffs 2800 telephone lines through which girls and women from the United States can call for help for any pregnancy-related problem at any time, day or night.

Birthright, offers at least a microcosm of an alternate solution to a woman in need, and represents but one of many such agencies growing in size and number throughout these United States. Birthright and its clients have an immediate and continuing interest in the case of *Planned Parenthood v. Casey* for the reasons set forth herein.

LEGAL ACTION FOR WOMEN

Legal Action for Women is a non-profit ministry to women injured by abortions. The ministry is headquartered in Pensacola, Florida, and regularly provides counseling and advice for women across the nation who are suffering from abortion-related trauma or injuries. Since its founding in 1985, Legal Action for Women has provided counseling to over 1,200 women who have been injured by abortions in the United States.

Legal Action for Women has worked with Pennsylvania women relating to abortion injuries in that Commonwealth, including providing counseling for a family whose

18-year-old daughter died in 1989 of septicemia caused by a legal abortion in a Pittsburgh hospital. Legal Action for Women has had particular experience in dealing with adverse effects of abortions upon women in Pennsylvania and elsewhere who were not provided full information such as that at issue in the statutes involved in the present case, and who have been harmed thereby.

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Nos. 91-744 and 91-902

IN THE
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PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *et al.*,

Petitioners,

v.

ROBERT P. CASEY, *et al.*,

Respondents.

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v.

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF AGUDATH ISRAEL OF AMERICA AS AMICUS CURIAE IN SUPPORT OF ROBERT P. CASEY, *et al.*

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS 1

SUMMARY OF ARGUMENT 3

ARGUMENT

THE RIGHT TO ABORTION SHOULD NOT UNIVERSALLY BE DEEMED "FUNDAMENTAL"; ITS CHARACTERIZATION AS SUCH SHOULD DEPEND ON THE CIRCUMSTANCES SURROUNDING THE CLAIMED RIGHT 4

I. IN TYPICAL CASES, WHERE THE SOLE CONSTITUTIONAL SOURCE OF THE CLAIMED ABORTION RIGHT IS THE PERSONAL LIBERTY/PRIVACY INTEREST, ABORTION SHOULD NO LONGER BE DEEMED A "FUNDAMENTAL" CONSTITUTIONAL RIGHT 8

II. IN EXTRAORDINARY CASES, WHERE THE CONSTITUTIONAL SOURCE OF THE CLAIMED ABORTION RIGHT INCLUDES A SOURCE IN ADDITION TO THE PERSONAL LIBERTY/PRIVACY INTEREST -- FOR EXAMPLE, CASES WHERE ABORTION IS AN EXPRESSION OF FREE EXERCISE OF RELIGION -- ABORTION SHOULD REMAIN A "FUNDAMENTAL" CONSTITUTIONAL RIGHT 11

CONCLUSION 16

TABLE OF AUTHORITIES

Cases **Page(s)**

Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983). 5

Bowers v. Hardwick, 478 U.S. 186 (1986). 8-9

Colautti v. Franklin, 439 U.S. 379 (1979) 15

Doe v. Bolton, 410 U.S. 179 (1973) 7

Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) 4,13

Harris v. McRae, 448 U.S. 297 (1980) 13

Hodgson v. Minnesota, --- U.S. ---, 110 S.Ct. 2926 (1990) 5

Planned Parenthood of Southeastern Pennsylvania v. Casey, 947 F.2d 682 (3rd Cir. 1991) . . . . . *passim*

Roe v. Wade, 410 U.S. 113 (1973) . . . . . *passim*

Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707 (1981) 12

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 5,9,11,15

Wisconsin v. Yoder, 406 U.S. 205 (1972) 12

Other Authorities

Bleich, *Abortion in Halakhic Literature*, *reprinted* in Bleich, *Contemporary Halakhic Problems* at 325 (Ktav/Yeshiva University Press 1977) 12

H.R. 2797, the "Religious Freedom Restoration Act" 14

H.R. 4040, the "Religious Freedom Act" 14

Tribe, *American Constitutional Law* (2d Ed. 1988) 10

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BRIEF OF AGUDATH ISRAEL OF AMERICA AS AMICUS CURIAE IN SUPPORT OF ROBERT P. CASEY, *et al.*

INTEREST OF THE AMICUS CURIAE

Agudath Israel of America, founded in 1922, is a national grassroots Orthodox Jewish movement. The movement is led, and its policies determined, by a group of prominent senior Orthodox rabbinical figures respected broadly as outstanding scholars of Jewish law and decisors of Jewish policy.

Informed by classical Jewish tradition which teaches that all human life is sacred, and possessed of the firm view that laws which undermine the sanctity of human life send a message that is profoundly dangerous for all of society, Agudath Israel speaks out frequently on a broad panoply of public policy issues that arise at the outset and conclusion of the human life cycle. Consistent with this approach, Agudath Israel has long opposed the central holding of *Roe v. Wade*, 410 U.S. 113 (1973), that the right to abortion protected under the Fourteenth Amendment's personal liberty/due process clause is uniformly "fundamental," and thereby protected against governmental abridgment absent a compelling state interest.

At the same time, as a representative of a religious minority community whose constituents rely heavily on the religious freedoms guaranteed under the First Amendment, Agudath Israel is a staunch advocate of religious liberty for all Americans. Here again, the issue of abortion figures prominently on Agudath Israel's agenda. Jewish tradition accords fetal life significant protection. As a general rule, Judaism rejects the notion that termination of pregnancy, even prior to fetal viability, is properly a matter of free maternal choice. Nonetheless, in certain exceptional cases, Jewish law may authorize abortion -- indeed, may require abortion as a matter of religious obligation. Accordingly, in conjunction with its opposition to legalized abortion on demand, Agudath Israel has supported a woman's legal right to abortion where she seeks the abortion as an expression of her religious faith.

Agudath Israel's interest herein relates primarily to what Judge Alito referred to below as "the crux of this case . . . the identification of the constitutional standard that the lower courts must now apply in cases involving laws regulating abortion." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 947 F.2d 682, 720 (3rd Cir. 1991) (Alito, J., concurring in part and dissenting in part). Agudath Israel believes the time is ripe for this Court expressly to discard the "fundamental right/compelling state interest" framework of *Roe v. Wade*, and to adopt in its place a jurisprudential framework that is at once protective of human fetal life yet solicitous of religious freedom. It is the objective of this *amicus* brief to attempt to outline such a framework.

Through their respective counsel, the parties have consented to the appearance of Agudath Israel as *amicus curiae*.

SUMMARY OF ARGUMENT

The central premise of Agudath Israel's argument is that characterization of the right to abortion as "fundamental" need not be a matter of *always* or *never*.

I. In most cases, where the sole constitutional source of the claimed right to abortion is the personal liberty/privacy right developed in *Roe v. Wade*, 410 U.S. at 152-53, the right to abortion should not be accorded the status of a "fundamental" right. Accordingly, legislative measures designed to restrict the

availability of abortion -- such as the Pennsylvania statutes at issue here -- should generally be upheld even in the absence of any compelling state interest, so long as there is a rational basis for the legislation.

II. There are times, though, when a woman's claimed right to an abortion is grounded not only in her personal liberty/privacy right, but also in another constitutionally protected interest. For example, when abortion is an expression of the mother's religious beliefs, her constitutional claim is enhanced by her First Amendment right freely to exercise her religion. In such cases -- presenting the type of favored "hybrid situation" this Court acknowledged in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 882 (1990) -- access to abortion is indeed a right that is "fundamental," and may not be abridged absent a countervailing compelling state interest.

ARGUMENT

THE RIGHT TO ABORTION SHOULD NOT UNIVERSALLY BE DEEMED "FUNDAMENTAL"; ITS CHARACTERIZATION AS SUCH SHOULD DEPEND ON THE CIRCUMSTANCES SURROUNDING THE CLAIMED RIGHT

The court below prefaced its review of the Pennsylvania statutes at issue with the observation that "[t]he choice of a standard of review in a substantive due process case turns on whether a 'fundamental right' is implicated." 947 F.2d at 688. The court then surveyed this Court's abortion decisions and discovered in the opinions of the various Justices three divergent approaches to the "fundamental right" debate:

> (1) at one extreme, the view of the majority in *Roe v. Wade*, most recently expressed in Justice Marshall's dissenting opinion in *Hodgson v. Minnesota*, --- U.S. ---, 110 S.Ct. 2926, 2952 (1990) (Marshall, J., dissenting), that abortion is always a "fundamental" right, and that it accordingly can never be burdened absent a compelling governmental interest (947 F.2d at 689);
>
> (2) at the other extreme, the view of the dissenting Justices in *Roe v. Wade*, that abortion may be burdened even if government has only a rational basis to do so, on the theory that abortion is merely "a species of 'liberty' that is subject to the general protections of the Due Process Clause," *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 790 (White, J., dissenting), but not a "fundamental" right (947 F.2d at 689);
>
> (3) the "middle ground" first articulated by Justice O'Connor in her dissenting opinion in *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 461-65 (1983) (O'Connor, J., dissenting), and reiterated most recently in Justice O'Connor's concurring opinion in *Hodgson, supra*, 110 S.Ct. at 2949-50, that the right to abortion is a "limited fundamental right" which may not be "unduly burdened" absent a compelling government interest, but may be burdened

less severely merely upon a rational basis (947 F.2d at 689-91).

Based on its reading of this Court's more recent abortion decisions, the court below concluded that "Justice O'Connor's undue burden standard is the law of the land," 947 F.2d at 698[1]; and accordingly proceeded to review the Pennsylvania statutes at issue under the "undue burden" standard. With but one exception, the court determined that none of the challenged statutes imposed an undue burden on abortion; that Pennsylvania had a rational basis for each of the laws; and that therefore the laws were constitutionally acceptable. The one exception was the law relating to spousal notice, which in the view of the court's majority did impose an undue burden on the right to abortion; was not justified by a compelling

[1] Justice Rehnquist's plurality opinion in *Webster v. Reproduction Health Services*, 492 U.S. 490 (1989), took pains to avoid embracing any one specific approach to the status of abortion as a "fundamental" right. ("The experience of the Court in applying *Roe v. Wade* in later cases . . . suggests to us that there is wisdom in not unnecessarily attempting to elaborate the abstract differences between a 'fundamental right' to abortion . . ., a 'limited fundamental constitutional right' . . ., or a liberty interest protected by the Due Process Clause . . ." 492 U.S. at 520.) As the decision of the court below demonstrates, however, the "abstract differences" between the various formulations have concrete applications; lower courts called upon to evaluate the constitutionality of abortion-related legislation require clear guidance on what the court below characterized as "[t]he threshold question" of the appropriate standard of review. 947 F.2d at 687.

state interest; and was accordingly struck down as unconstitutional. 947 F.2d at 698-719.

It is noteworthy that under all three of the approaches identified in the court below, a woman's motivation in seeking abortion is entirely irrelevant to the determination of whether the right is "fundamental." In making that determination, it would seem to matter not a whit under any of the three models whether the abortion is being done to save the mother's life, to preserve her health, to advance her career, to avoid the stigma of single motherhood, to preserve her personal independence, to avoid having a baby of a particular gender, or for any other "convenience, whim or caprice of the putative mother" (*Doe v. Bolton*, 410 U.S. 179, 221 (1973) (White, J., dissenting)). Even under the more flexible "middle ground" approach attributed to Justice O'Connor, the variable factor that will determine whether to apply strict scrutiny or rational basis analysis relates to the nature and extent of the burden imposed by government, not the circumstances surrounding the woman's desire to terminate her pregnancy.

As detailed below, Agudath Israel submits that the woman's motivation in seeking abortion ought not be irrelevant to the "fundamental right" determination. Analysis of the Court's definition of rights that are "fundamental" should lead to the conclusion that most abortions do not fit that definition, but that some most assuredly do.

I.

In Typical Cases, Where the Sole Constitutional Source of the Claimed Abortion Right Is the Personal Liberty/Privacy Interest, Abortion Should No Longer Be Deemed a "Fundamental" Constitutional Right

In *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Court had occasion to consider the factors that go into the making of a right or liberty that is "fundamental":

> "Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection. In *Palko v. Connecticut*, 302 U.S. 319, 325, 326, (1937), it was said that this category includes those fundamental liberties that are 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed.' A different description of fundamental liberties appeared in *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (opinion of Powell, J.), where they are characterized as those liberties that are 'deeply rooted in this Nation's history and tradition.' *Id.*, at 503 (POWELL; J.). See also *Griswold v. Connecticut*, 381 U.S., at 506."

Id. at 191-92. Applying these formulations to the asserted right of homosexuals to engage in acts of consensual sodomy, the Court in *Bowers* noted that proscriptions against such acts had strong historical roots, both from ancient times and in the laws of the various states for most of this nation's history. "Against this background, to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious." *Id.* at 194.

The same can be said with respect to most cases of abortion: It is facetious, at best, to claim that abortions of convenience are deeply rooted in our history and tradition, or that they are a necessary component of ordered liberty. We need not dwell on the point, since the Court has heard it made many times over in the years since *Roe*, both from within and without. Suffice it for us to reiterate the persuasive analysis offered by Justice White, dissenting in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 793-94 (1986):

> "If the woman's liberty to choose an abortion is fundamental, then, it is not because any of our precedents (aside from *Roe* itself) commands or justifies that result; it can only be because protection for this unique choice is itself 'implicit in the concept of ordered liberty' or, perhaps, 'deeply rooted in this Nation's history and tradition.' It seems clear to me that it is neither. The Court's opinion in *Roe* itself convincingly

refutes the notion that the abortion liberty is deeply rooted in the history or tradition of our people, as does the continuing and deep division of the people themselves over the question of abortion. As for the notion that choice in the matter of abortion is implicit in the concept of ordered liberty, it seems apparent to me that a free, egalitarian, and democratic society does not presuppose any particular rule or set of rules with respect to abortion. And again, the fact that many men and women of good will and high commitment to constitutional government place themselves on both sides of the abortion controversy strengthens my own conviction that the values animating the Constitution do not compel recognition of the abortion liberty as fundamental."

Indeed, as Professor Laurence H. Tribe (himself an outspoken critic of the *Bowers* decision) has noted (Tribe, *American Constitutional Law* at 1430 (2d Ed. 1988)), there is a factor present in the abortion context that renders abortion even less deserving of "fundamental rights" protection than consensual sodomy: the irrevocable harm done to the fetus. Whereas consensual acts of sodomy, in theory at least, are performed with the full knowledge and acquiescence of the parties involved, abortion is not. "The pregnant woman cannot be isolated in her privacy," observed the Court in *Roe*, 410 U.S. at 159, a factor that led Justice White to argue -- correctly, in our view -- that the abortion decision "must be recognized as *sui generis*, different in kind from the others

that the Court has protected under the rubric of personal or family privacy or autonomy." *Thornburgh, supra*, 476 U.S. at 792 (White, J., dissenting; footnote omitted).

In typical cases, therefore, where a woman's claimed constitutional right to an abortion is grounded solely in her personal liberty/due process rights, the analysis in *Bowers* leads *a fortiori* to the conclusion that -- contrary to *Roe v. Wade* -- the right ought not be deemed "fundamental." Accordingly, states that seek to restrict or prohibit abortions in those cases should be permitted to do so on any rational basis, even in the absence of a compelling state interest. Applying that analysis to the instant case, the statutes at issue should be upheld; Pennsylvania surely had a rational basis upon which to enact these laws -- including the law governing spousal notice -- and in a facial challenge against their validity no more than a rational basis need be shown.

II.

In Extraordinary Cases, Where the Constitutional Source of the Claimed Abortion Right Includes a Source In Addition to the Personal Liberty/Privacy Interest -- For Example, Cases Where Abortion Is an Expression of Free Exercise of Religion -- Abortion Should Remain a "Fundamental" Constitutional Right

The conclusion that *most* abortions are not expressions of a "fundamental" right does not mean that *all* abortions are not expressions of a "fundamen-

tal" right. Some are -- and should expressly be recognized as such.

Consider, for example, the case of a pregnant woman whose clergyman advises her to procure an abortion as a matter of religious obligation -- as in fact a rabbi may advise a Jewish woman under certain extraordinary circumstances.[2] When that woman seeks an abortion, her claim is constitutionally grounded not only in her general liberty/privacy interest, but also in her First Amendment right freely to exercise her religion. Under such circumstances, the woman's claim to abortion deserves enhanced constitutional status.

Free exercise rights are indisputably "fundamental." *E.g., Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972). Government may not burden free religious exercise unless it can show that "an inroad on religious liberty . . . is the least restrictive means of achieving some compelling state interest," *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 718 (1981); or, as the *Yoder* Court put it, "only those interests of the highest order and those not otherwise served can overbalance

[2] A comprehensive discussion of the Jewish attitude toward abortion, including the circumstances under which abortion may be authorized or compelled under Jewish law, is beyond the scope of this brief. A scholarly analysis of this complex subject appears in Rabbi J. David Bleich's *Abortion in Halakhic Literature*, reprinted in Volume 1 of the author's *Contemporary Halakhic Problems*, at 325 (Ktav/Yeshiva University Press 1977).

legitimate claims to the free exercise of religion." 406 U.S. at 215. Although the Court has not had occasion to consider the applicability of its free exercise jurisprudence to the abortion context -- *Harris v. McRae*, 448 U.S. 297, 320-21 (1980), the one case where the issue was raised, was dismissed on this point because the plaintiffs lacked free exercise standing -- there is every reason to emphasize both its relevance and importance in any post-*Roe* regulatory framework.

It is true that in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), five Justices of the Court voted to curtail considerably the scope of the Free Exercise Clause, holding that free exercise protection does not extend to laws of general applicability that burden religious practice only incidentally.[3] Nonetheless, even the *Smith* majority acknowledged that "the First Amendment bars application of a neutral, generally applicable law to religiously motivated action . . . [where the free exercise claim is advanced] in conjunction with other constitutional protections . . ." 494 U.S. at 881. Such a "hybrid situation," *id.* at 882, which under *Smith* does merit heightened constitutional protection, would appear to be present when a woman seeks abortion as an expression of her religious beliefs; her claim in such cases would be predicated on the twin constitutional bases of liberty/privacy and free exercise.

[3] For the record, Agudath Israel believes the *Smith* Court's majority erred in its analysis of the Free Exercise clause.

The interplay between abortion and free exercise of religion is by no means a trivial issue. Currently pending in the House of Representatives are two bills designed to address the Court's ruling in the *Smith* case: H.R. 2797, the "Religious Freedom Restoration Act," and H.R. 4040, the "Religious Freedom Act." Both bills would make it clear that the protections of free religious exercise apply even in cases where a government action burdens religious practice only incidentally; and that only a compelling governmental interest, applied through the least restrictive means, can overcome an assertion of free exercise of religion. The major difference between the two bills is that whereas H.R. 2797 is neutral on its face and in no way limits the types of claims that may be entitled to the bill's protections, H.R. 4040 expressly excludes several substantive areas from the scope of the bill's protections -- including specifically the area of abortion. Thus, section 3(c)(2) of H.R. 4040 provides: "Nothing in this Act shall be construed to authorize a cause of action by any person to challenge . . . (C) any limitation or restriction on abortion, on access to abortion services or on abortion funding."

Putting aside for now the legal question of whether the constitution would permit H.R. 4040's exclusion of abortion from the scope of the bill's protection,[4] the ongoing debate in Congress over H.R. 2797 and H.R. 4040 makes it abundantly clear that

[4] Agudath Israel has argued in a February 14, 1992 memorandum to H.R. 4040's lead sponsor, Congressman Christopher H. Smith, that in fact his bill would violate both the Free Exercise and Establishment Clauses.

religiously based claims to abortion would encounter considerable resistance in the political arena. It is for this reason that Agudath Israel feels so strongly about the importance of the Court using the earliest possible opportunity to state clearly that the right to abortion is constitutionally "fundamental" when it is asserted in the context of a woman's exercise of her sincerely held religious beliefs. This case affords the Court occasion to do so -- through the enunciation of a standard that would evaluate the circumstances surrounding a woman's claim to abortion in determining whether the claim is entitled to protection as a "fundamental" constitutional right.[5]

[5] There are other contexts in which abortion may rise to the level of a "fundamental" constitutional right. The most obvious example is where the pregnancy threatens the mother's life. *Roe v. Wade* itself makes clear that abortions in cases involving danger to the mother's life are entitled to enhanced constitutional protection. In those cases, states must permit abortions even *subsequent* to fetal viability. 410 U.S. at 163-64. *See Thornburgh, supra*, 476 U.S. at 768-69; *Colautti v. Franklin*, 439 U.S. 379, 397-401 (1979). Reconsideration of the general rule of *Roe* that all abortions are "fundamental" rights does not necessarily, and should not, vitiate the enhanced constitutional status of at least those abortions performed to preserve the mother's life. Such abortions, long permitted under the laws of the various states (see *Roe, supra*, 410 U.S. at 138-40), are "deeply rooted in this Nation's history and tradition" and, we submit, "implicit in the concept of ordered liberty." Moreover, for a state to deprive a woman the right to abortion even where her life is in danger is not merely to deprive her of some vague sense of a personal liberty "interest"; it is literally to deprive her of the "*life*" the Fourteenth Amendment expressly protects. Surely abortion in such cases is a right that is "fundamental."

CONCLUSION

For the reasons stated above, *amicus curiae* Agudath Israel of America respectfully submits that *Roe v. Wade*'s holding that all abortions are expressions of a "fundamental" constitutional right should be reconsidered and expressly overruled; and that in its place the Court should adopt a framework whereby abortion claims would or would not be accorded "fundamental right" status depending upon the circumstances surrounding their assertion -- a framework under which both a woman's religious freedom and a fetus' "right to life" would be accorded significant legal protection.

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Nos. 91-744 and 91-902

In The

SUPREME COURT of the UNITED STATES

October Term, 1991

PLANNED PARENTHOOD OF
SOUTHEASTERN PENNSYLVANIA, et al.,
Petitioners/Cross-Respondents

v.

ROBERT P. CASEY, et al.,
Respondents/Cross-Petitioners

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF NINETEEN ARIZONA LEGISLATORS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS/CROSS-PETITIONERS

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15

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE UNDUE BURDEN TEST IS ANALYTICALLY DEFICIENT. 3

II. RATIONAL REVIEW IS THE ONLY COHERENT STANDARD OF REVIEW FOR ABORTION REGULATIONS. . . . 9

CONCLUSION 11

TABLE OF AUTHORITIES

CASES: **Page**

Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) 3, 4

Eisenstadt v. Baird, 405 U.S. 438 (1972) 9

Finn v. Williams, 376 Ill. 95 (1941) 5

Hodgson v. Minnesota, 110 S. Ct. 2926 (1990) 3

Marks v. United States, 430 U.S. 188 (1977) 3

Planned Parenthood v. Casey, 947 F.2d 696 (3d Cir. 1991) 3

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) 7

Roe v. Wade, 410 U.S. 113 (1973) . . . . . *passim*

Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) 3

OTHER SOURCES:

Eichbaum, *Towards An Autonomy-Based Theory of Constitutional Privacy: Beyond the Ideology of Familial Privacy*, 14 Harv. C.R.-C.L. L. Rev. 361 (1979) 9

Richards, *The Individual, the Family, and the Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. Rev. 1 (1980) . 9

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BRIEF OF NINETEEN ARIZONA LEGISLATORS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS/CROSS-PETITIONERS

INTEREST OF AMICI CURIAE

Pursuant to Rule 36.2 of this Court, Nineteen Arizona Legislators respectfully submit this brief amici curiae in support of Respondents/Cross-Petitioners, Robert P. Casey, et al. Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

Amici are senators and representatives of the Arizona State Legislature who have a keen interest in the Court's formulation of

workable principles governing abortion legislation. The resolution of the instant case will affect pending and future regulations concerning abortion in the State of Arizona. Because this case raises questions of paramount significance to the public interest, we believe that our perspective will complement the brief of Respondents/Cross-Petitioners and assist the Court in the resolution of these issues. Our focus will be narrowly limited to an assessment of the "undue burden" test.

SUMMARY OF ARGUMENT

The undue burden test lacks critical features of a workable constitutional principle. In particular, the test is deficient because it does not, when logically parsed, provide an informative standard which can guide decision-making in this area. The undue burden approach may be viewed either as a process of analysis or as a shorthand judgment of what the weighing of interests between the woman and the fetus yields. If the latter, the test summarizes the view that the interest of the woman is of overriding significance in a given case. Employed in this way, however, the test is not a decision-principle applied in reaching a legal conclusion, but is rather merely the conclusion restated. In order to be a genuine mode of analysis, the undue burden criterion must offer a principle that can be used to derive a conclusion favoring the interest of the woman. On this score, however, the undue burden analysis cannot succeed.

Where no undue burden on a woman's interest is found, the competition between the interest of the woman and that of the fetus is not problematic. If an undue burden is discerned, however, it indicates simply that the possibility of a conflict between these competing interests has materialized. In other words, the existence of the undue burden is weaker than that required if the test is to have real value, for the finding of an undue burden is intended to show that the scales have tipped in favor of the interest of the woman.

The practical upshot of our analysis for the purposes of this case is that the undue burden test cannot logically be applied to invalidate the spousal notification requirement. Rational review analysis is the only coherent approach to review abortion regulations, and under that standard the spousal notification requirement passes muster.

ARGUMENT

I. THE UNDUE BURDEN TEST IS ANALYTICALLY DEFICIENT.

In a substantive due process case, the selection of a standard of review is the critical first step in resolving the constitutionality of a challenged law or regulation. In its opinion below, the Third Circuit concluded that a majority of this Court had declined to follow the strict scrutiny standard of *Roe v. Wade*, 410 U.S. 113 (1973), based on the Court's analyses in *Hodgson v. Minnesota*, (1990) and *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989). The Third Circuit declined, however, to apply rational basis review because of Justice O'Connor's statement in *Hodgson* that such review was reserved for regulations that did not "unduly burden" the abortion decision. *Planned Parenthood v. Casey*, 947 F. 2d at 696 (*citing Hodgson*, 110 S. Ct. at 2949-50 (O'Connor, J., concurring in part and concurring in the judgment in part)). Relying upon *Marks v. United States*, 430 U.S. 188,193 (1977), the Third Circuit concluded that Justice O'Connor's undue burden analysis was the "law of the land" (947 F.2d at 698) because it was the "narrowest ground" upon which a majority of the Supreme Court would agree. Id. at 693.

The undue burden analysis derives from Justice O'Connor's dissent in *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 453 (1983)(O'Connor, J., joined by White & Rehnquist, JJ., dissenting). Justice O'Connor referred to the woman's interest as a limited fundamental right, triggering strict scrutiny if the regulation causes an undue burden on the woman's decision whether to seek an abortion. If an undue burden is not

discerned, rational review applies. *Akron*, 462 U.S. at 453, 465 n. 10 ("If the particular regulation does not 'unduly burden' the fundamental right, then our evaluation of that regulation is limited to our determination that the regulation rationally relates to a legitimate state purpose"). An undue burden occurs when a regulation imposes an "absolute obstacle[] or severe limitation[] on the abortion decision. It is not enough that a regulation "may 'inhibit' abortions to some degree." *Akron*, 462 U.S. at 464.

The undue burden test seems attractive because it appears to offer a method of decision-making independent of and more intuitively valid than the trimester framework of *Roe*. An "undue burden" is viewed as a distinct factor in the balance of interests, or at least a description of the state of affairs where such a factor is present. It is thought to be a consideration which carries sufficient weight to tip the balance decisively, to convey information affecting the analysis of the respective interests of the fetus and mother in a concrete way.

Upon closer inspection, however, the test does not hold up as a meaningful principle. It does not do what it purports to do, namely, advance the resolution of the issue of competing interests. Instead, where an undue burden is found, this indicates merely that the possibility of an actual conflict between the competing interests of the mother and the fetus has materialized; that a genuine dilemma has arisen which, like any dilemma, requires a decision-principle in order to be resolved. The undue burden test establishes that such a principle is required, but it does not give that principle to us. To use the metaphor of a grocer's balance, the discerning of an undue burden tells us only that, in order to resolve a conflict, it is time to retrieve the balance from the cupboard. It does not tell us which way the balance will tip when the respective interests are weighed in a given case.

To see this, consider a different situation where competing interests are found involving property claims. Assume generally that having a property interest includes both the right of access to one's property and the right to prevent others from ingressing

one's property. In the abstract, the co-existence of the two interests implies the potential for a conflict of those interests in a particular case. Suppose that X has undertaken to build an access road, beginning on his land but crossing a portion of Y's land in order to reach another point on his own property. Y does not want the road built.

In such a case, the potential for conflict between X's property interest and Y's property interest has become actual: either X's interest or Y's interest must give way. X will claim that it would be an impermissible burden on his interest if he were prevented from completing an access road, while Y will claim that he would suffer a similar impermissible burden if he were precluded from stopping X's construction. *Cf. Finn v. Williams*. 376 Ill. 95, 33 N.E. 2d 226 (1941).

X and Y both assert that their being impeded is an impermissible burden on their respective interests. But if litigation ensues, the mere existence of such impermissible burdens would not settle the issue. Other factors would have to be considered for that to occur. If a court were to rule that X had no right to build the road on Y's land, X will still maintain that he suffered an impermissible burden on his property interest. On the other hand, if it were ruled that X had such a right, Y will argue that he has sustained an impermissible burden on his property interest.

To have an actual conflict in this hypothetical case means that whichever way the court rules, a burden will be imposed on one of the two competing interests -- a burden that, in ordinary experience, would be undue or impermissible. (If the burden were not, in general, impermissible, a claimant could not appeal to that burden as grounds for adjudication in his favor.) Therefore, the identification of such burdens does not show how the scales of justice must tip. It merely shows that an actual conflict between undue burdens exists.

In the abortion context analogous competing interests are involved. The respective interests of the fetus and the woman are

potentially in conflict, and if a regulation impedes the woman's ability to have an abortion, an actual conflict can materialize. That the woman can claim there is an impermissible burden on her right to secure an abortion only demonstrates that the conflict of interests between the fetus and the woman has generated a dilemma. That is, the legitimate claim by the woman that a burden has been imposed which is normally an impermissible burden only shows that a potential conflict has become an actual conflict.

That a regulation is unduly burdensome would be useful in assessing its constitutionality only if this fact conveyed something in addition to the dilemma-producing information already present. But it does not. It is information relevant not to the balancing of interests, but rather to the issue of whether a potential conflict of interests is an actual conflict in a given case. The existence of an undue burden is not a distinct piece of information relevant to assessing which interests are more important, but is rather just part and parcel of the conflict itself. To say that there is an undue burden is merely to describe the dilemma, not to resolve it.

The same point may be illustrated using the analytical concept of defeasibility. Defeasible rights are rights that can be overridden in special circumstances. For example, the right to liberty can be overridden by competing factors if a person engages in criminal activity. Once these factors are no longer in play -- once the grounds for imprisonment no longer exist -- the right to liberty once again predominates, making continued imprisonment no longer permissible. Such a right is defeasible, not disappearing: It does not come and go as one enters and is released from prison. It is inalienable, but in a way that allows the exercise of the right to be overridden, or defeated, by special circumstances.

Likewise, when the competing interests of the woman and the fetus are in actual conflict, it would be a mistake to think that the burden placed on one interest can be erased by a justification for preferring the other interest. For example, the Court recognized in *Roe* that the interest of the fetus may predominate over the

woman in the third trimester, holding that in the third trimester the state may "regulate, and even proscribe, abortion." *Roe*, 410 U.S. at 165. *Cf. Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 60 (1976) (the Court in *Roe* "emphatically rejected . . . the proffered argument 'that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses.'" (*quoting Roe*, 410 U.S. at 153)). Yet, it would be plainly incorrect to say that the burden imposed by an abortion regulation is any less onerous in the third trimester than in the first. The passage of time has not rendered the burden any less "undue." It is still an impermissible burden, but a defeasibly impermissible burden, in the same way that imprisonment is an undue burden on the right to liberty, but a defeasibly impermissible burden. In short, the undue burden test does not logically provide information for tipping the balance in favor of the interest of the woman over that of the fetus, for the undue burden exists solely by virtue of the fact that a potential conflict of interests has become a real conflict.

In this rendering of the undue burden analysis, it functions as a piece of information to be employed in arriving at a judgement. As shown above, taken in this way, the existence of an undue burden cannot *resolve* a dispute. There is, however, another way to employ this idea.

Instead of being a piece of information to be weighed in the balance, the claim that a regulation unduly burdens a woman's interest could be a conclusion, that is, it could be regarded as a shorthand judgement of what the weighing of the respective interests yields. Advocates of the test as understood in this way would insist on a distinction between a ***burden*** on a right or interest and an ***undue*** burden. In this view, the existence of a burden which is, in general, impermissible, fails to show that the burden in the present case is impermissible. To be impermissible here, it would have to be the kind of burden which overrides all other factors relevant to a resolution of the case. Used in this more robust sense, to say that an undue burden exists is to say that

the burden imposed on a woman by a regulation outweighs any other competing factor, including the interest of the fetus.

There are two obvious reasons for concern about interpreting the undue burden analysis in this way. First, it converts the test into the conclusion of a legal argument rather than a principle to be employed in arriving at a conclusion. Used in that fashion, the undue burden test would not be a means for determining when a regulation needs special justification. Rather, it would be merely the conclusion restated. Second, if it were suggested that the finding of an undue burden actually be treated as a conclusion, the issue remains: What is the justification for it? The test simply begs the question.

In sum, if the undue burden test were meant to be a guiding principle to be employed in the process of reaching a conclusion, it cannot succeed, for it provides no additional information beyond affirming that an actual dilemma is present rather than a merely potential conflict of interests. If, however, the undue burden test were not to be construed in this way, but were rather a shorthand judgement about how the dilemma is to be resolved, a decision-principle for the resolution must still be found. That principle is, what the undue burden test was meant to reveal, but in this the test fails.

II. RATIONAL REVIEW IS THE ONLY COHERENT STANDARD OF REVIEW FOR ABORTION REGULATIONS.

The *Roe* majority embraced the proposition that there is a fundamental right to privacy. This includes "the right of the *individual*, married or single, to be free from unwarranted government intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). While *Roe v. Wade* rejected, at least formally, the assertion that a woman "is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses," 410 U.S. at

153, in reality, the abortion right enunciated in *Roe* thereafter became essentially absolute as the Court invalidated virtually every regulation of the abortion decision.

Because regulations affecting a fundamental right warrant strict scrutiny and are thus virtually certain to be invalidated, much debate has been devoted to the constitutional status of a right to privacy and whether a right of personal autonomy and the attendant right to an abortion are entailed by it. *See, e.g.*, Eichbaum, *Towards An Autonomy-Based Theory of Constitutional Privacy: Beyond the Ideology of Familial Privacy*, 14 Harv. C.R.-C.L. L. Rev. 361, 362, 365 (1979)(Privacy rights are said to be "grounded in notions of individual autonomy," because "[t]he human dignity protected by constitutional guarantees would be seriously diminished if people were not free to choose and adopt a lifestyle which allows expression of their uniqueness and individuality"); Richards, *The Individual, the Family, and the Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. Rev. 1, 31 (1980)(In recognizing a constitutional right to privacy, the Court has given effect to the view "that persons have the capacity to live autonomously and the right to exercise that capacity"). It is not necessary, however, to resolve this controversy in order to see the inadequacy of strict scrutiny review in the abortion context.

Let us assume *arguendo* the existence of a constitutional right to privacy and, further, that the privacy right implicates the right of dominion over one's person, including the abortion decision. It does not follow that strict scrutiny is a coherent standard to review abortion regulations. Some implications are purely logical and hence indefeasible; others are defeasible. If the connection between the right to privacy and the right of full personal autonomy were a logical one, no further countervailing information could sever that connection. If that were true, however, other patently non-cognizable issues would demand strict scrutiny analysis. For example, regulations restricting breast implants for health reasons ostensibly would raise a right to privacy issue and thus would be susceptible of strict scrutiny

review by virtue of affecting a right of dominion over one's person. Yet, as a legal matter such regulations would not be viewed as implicating the right to privacy, for the connection between these rights is only a defeasible one. Where important interests are involved which override the wishes of a person seeking a breast implant, as is the case when health and safety concerns arise, a regulation may limit self-dominion without requiring strict scrutiny.

Appealing to the defeasible character of the implication involved provides an explanation for the conclusion that strict scrutiny would be inappropriate to assess such regulations: The right to privacy, though generally implicated by a right of personal autonomy, does not demand strict scrutiny when countervailing circumstances obtain. But for the defeasible character of the implication, no rational basis could be found for eschewing strict scrutiny in a vast array of cases where it is clearly unwarranted.

Similarly, while there is a connection between the right to privacy and the right to an abortion, it would be fallacious to insist that this connection holds regardless of the circumstances. What this means, effectively, is that strict scrutiny cannot be a valid approach to regulating abortion decisions, even if a privacy right is assumed. Even if a woman has a constitutionally protected privacy right, any attempt to infer from this that all abortions -- or all abortions within a certain timeframe -- are permissible ignores the defeasible character of the rights and implications in question. Put another way, if strict scrutiny of abortion regulations were appropriate, it could only be because some justification were available for thinking that the interest of the woman necessarily predominates over that of the fetus, at least during a particular period of time. As the disintegration of the rationale of *Roe v. Wade* shows, however, no reasonable foundation for such a view exists.

A sense of the defeasible character of the connection between these rights may underlie Justice O'Connor's suggestion that the right to an abortion is a limited fundamental right warranting

heightened scrutiny in certain cases. In the language of the foregoing discussion, a *limited* fundamental right may be viewed as one which is defeasibly implicated by a fundamental right. As shown in Section I, however, the undue burden test fails to provide a suitable analytical device for gauging when such heightened scrutiny should apply. Moreover, it is not at all clear that any alternative test designed along the same lines could avoid the conceptual flaws of the undue burden test. This strongly suggests that rational review is the only coherent standard for reviewing abortion regulations. Advocates of more restrictive alternatives to rational review carry the burden of generating workable principles to that end. Without such principles, the rational review standard remains presumptively valid and dictates the only proper course for evaluating abortion regulations.

CONCLUSION

For the foregoing reasons, the judgment of the Third Circuit should be affirmed in all respects except as to its ruling concerning the spousal notification requirement. Because that regulation clearly passes constitutional muster under the rational review standard, the decision should be reversed and remanded as to that issue.

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TABLE OF CONTENTS

	Page
Table Of Authorities	iii
Interest Of Amici Curiae	1
Statement Of Facts	2
Summary Of Argument	3
Argument	5
I. A STATE STATUTE REQUIRING SPOUSAL NOTIFICATION PRIOR TO A WIFE UNDERGOING ABORTION IS RATIONALLY BASED AND ADVANCES THE STATE'S INTEREST IN PROMOTING THE INTEGRITY OF THE MARRIAGE RELATIONSHIP.	5
A. A substantial body of professional and social opinion supports the testimony of the Respondents' expert witness that involvement of a husband in abortion decisionmaking is beneficial.	5
B. Various sociological studies show that marital integrity is enhanced by communication and weakened by avoidance of discussion of critical and important issues.	9
C. A significant number of husbands are not notified in advance of their wife's abortion who would be included in the scope of the spousal notification provision.	11

D. Husbands may not be notified prior to their wife's abortion in functioning marriage situations. 13

E. Ignoring the husband in the decision-making process may damage or destroy the marriage relationship. 16

II. A REQUIREMENT OF SPOUSAL NOTIFICATION PRIOR TO ABORTION DOES NOT CREATE A SUBSTANTIAL RISK THAT A WOMAN WHO WOULD OTHERWISE HAVE AN ABORTION WOULD BE PREVENTED FROM DOING SO BY PHYSICAL VIOLENCE OR BY ECONOMIC AND PSYCHOLOGICAL DISTRESS. 20

III. A STATE STATUTE REQUIRING SPOUSAL NOTIFICATION PRIOR TO A WIFE UNDERGOING ABORTION IS RATIONALLY BASED AND ADVANCES THE STATE'S INTEREST TO PROTECT A SPOUSE'S INTEREST IN HAVING CHILDREN WITHIN MARRIAGE AND IN PROTECTING THE PRENATAL LIFE OF THAT SPOUSE'S CHILD. 23

A. Notifying a husband prior to an anticipated abortion increases the likelihood of childbirth 23

B. Abortion may destroy or impair the opportunity for future fatherhood. . . . 25

Conclusion 28

TABLE OF AUTHORITIES

Cases **Page**

Planned Parenthood v. Casey, 947 F.2d 682 (3d Cir. 1991) 20

Planned Parenthood of Missouri v. Danforth 428 U.S. 52 (1975) 9,28

Przbyla v. Przbyla, 275 N.W.2d 112 (Wis. App. 1978) 17,22

STATUTES AND CONSTITUTIONAL PROVISIONS

18 Pa. Cons. Stat. Sec. 3209 . . . . . *passim*

OTHER AUTHORITIES

Aguirre, *Repeat Induced Abortion: Single, Married and Divorced Women*, 12 J. Biosocial Science 275 (1980) 12

Barnard, *The Long Term Psychological Effects of Abortion*, Institute for Abortion Recovery and Research: Portsmouth N.H. (1990) 8

Barnes, *Ambulatory Maternal Health Care and Family Planning Services, Policies, Principles, Practices*, Committee on Maternal Health Care and Family Planning, Maternal and Child Health Section, American Public Health Association (1978) 5

Belsey, Greer, Lal, Lewis, Beard, *Predictive Factors in Emotional Response to Abortion: King's Termination Study-IV*, 11 Social Science & Medicine 71 (1977) 12,17,19

Berger, Gold, Andress, *Repeat Abortion: Is It A Problem?*, 16(2) Family Planning Perspectives 70 (March/April 1984) 11

Blumenfield, *Psychological Factors Involved in Request for Elective Abortion*, The J. of Clinical Psychology 17 (Jan. 1978) 14,21

Borton and Stewart, *Abortion Counseling*, in *Obstetrical Decision Making*, Second Edition, Ed. Friedman, Acker, Sachs (1987) 6

Bracken and Kasl, *First and Repeat Abortions: A Study of Decision Making and Delay*, 7 J. Biosocial Science 473 (1975) 14,20

Bracken, Klerman and Bracken, *Abortion, Adoption or Motherhood. An Empirical Study of Decision-Making During Pregnancy*, 130 Am. J. Obstetrics and Gynecology 25 (1978) 16

Cotroneo and Krasner, *A Study of Abortion and Problems in Decision-Making*, 3 J. Marriage and Family Counseling 69 (1977) 6

David, Rasmussen, Holt, *Postpartum and Post Abortion Psychotic Reactions*, 13(2) Family Planning Perspectives 88, (March/April 1981) 8

Fighting Fair Keeps Marriages Strong, U.S.A. Today, Feb. 20, 1992, p. 6DT 10

Francke, *The Ambivalence of Abortion* (1978) . . . 26

Francke, *Abortion and Men*, Esquire 59 (Sept. 1978) 26

Freeman, *Abortion Subjective Attitudes and Feelings*, 10(3), Family Planning Perspectives 150 (May/June 1978) 8,11

Friedlander, Kaul, Stimel, *Abortion: Predicting the Complexity of the Decision-Making Process*, 9(1) Women & Health 43 (Spring, 1984) . . . 16

Gaydos, *Men and Abortion*, Gannett News Service, Tucson Citizen, June 14, 1988, p. 1NW 18,22

Handy, *Psychological and Social Aspects of Induced Abortion*, 21 Br. J. Clinical Psychology 29 (1982) 7

Harris, *Fathers and Fetuses*, 96 Ethics 594 (April, 1986) 28

Helper, Cohen, Beitenman, Eaton, *Life Events and Acceptance of Pregnancy*, 12 J. Psychosomatic Research 183 (1968) 25

Kantor and Lehr, *Inside the Family: Toward a Theory of Family Process* (1975, 1976) 10

Kochanek, *Induced Terminations of Pregnancy: Reporting States*, 37(12) Monthly Vital Statistics Report 19 (April 28, 1989) 13

Leifer, *Psychological Changes Accompanying Pregnancy and Motherhood*, 95 Genetic Psychology Monographs 55 (1977) 25

Lewis, Beavers, Gossett, Phillips, *No Single Thread: Psychological Health in Family Systems* (1975) 10

Lieh-Mak, Tam, Ng, *Husbands of Abortion Applicants: A Comparison With Husbands of Women Who Complete Their Pregnancies*, 14 Social Psychiatry 59 (1979) 6

Mattinson, *The Effects of Abortion on a Marriage* in *Abortion: Medical Progress and Social Implications*, Ciba Foundation Symposium 115 (1985) 27

McAll and Wilson, *Ritual Mourning for Unresolved Grief After Abortion*, 80(7) So. Medical Journal 818 (1987) 17,22

McDonnell, *Not an Easy Choice, A Feminist Re-Examines Abortion* (1984) 25

Moseley, Follingstad, Harley, Heckel, *Psychological Factors That Predict Reaction to Abortion*, 37 J. of Clinical Psychology 276 (1981) . . . 13

Mumford, *An Interdisciplinary Study of Four Wives Who had Induced Abortions*, 87 Am. J. Obstet. and Gynecol. 865 (1963) 13,21

Murphy, Symington, Jacobson, *Pregnancy Resolution Decisions. What If Abortions Were Banned?*, 28(11) The J. of Reproductive Medicine 789 (Nov. 1983) 16

Olson, McCubbin, Hamilton, and Associates, *Families: What Makes Them Work?* (1983) 9

Papier, *Distressed Fathers Assert Rights in Abortion Cases Across Nation*, The Washington Times, June 7, 1988, p. 1A. 18,22

Paterson, *Whose Freedom of Choice?*, The Progressive 42 (April, 1982) 11

Payne, Kravitz, Notman, Anderson, *Outcome Following Therapeutic Abortion*, 33 Archives General Psychiatry 725 (June, 1976) 8

Perlmutter and Stewart, *Unplanned Pregnancy*, in *Obstetrical Decision Making*, Second Edition, Ed. Friedman, Acker, Sachs (1987) 6

Plutzer and Ryan, *Notifying Husbands About an Abortion*, 71(3) Sociology and Social Research 183 (April, 1987) 11,13,21,24

Reardon, *Aborted Women: Silent No More* (1987) 16

Robbins and DeLamater, *Support from Significant Others and Loneliness Following Induced Abortion*, 20 Social Psychiatry 92 (1985) 8,11

Rovinsky, *Abortion Recidivism, A Problem in Preventive Medicine*, 39(5) J. Obstetrics and Gynecology 649 (May, 1972) 15

Ryan and Plutzer, *When Married Women Have Abortions: Spousal Notification and Marital Integration*, 51 J. Marriage and the Family 41 (Feb. 1989) 21

Senay, *Therapeutic Abortion-Clinical Aspects*, 23 Archives General Psychiatry 408 (Nov. 1970) 6

Sherman, Mandelman, Kerenyi and Sher, *The Abortion Experience in Private Practice*, in *Women and Loss*. Psychobiological Perspectives, Ed. William F. Finn et al., The Foundation of Thanatology Series, Vol. 3 (1985) 9

Shostak, *Abortion as Fatherhood Lost: Problems and Reforms*, 28 The Family Coordinator 569 (Oct., 1979) 26

Shostak and McLouth, *Men and Abortion, Lessons, Losses and Love* (1984) 7,17,18,19,22

Shusterman, *Predicting the Psychological Consequences of Abortion*, 13A Social Science and Medicine 683 (1979) 11,13

Stinnett, *Strong Families: A Portrait in Prevention in Family Services: Approaches to Family Wellness*, Ed. David R. Mace (1983) 9

Swigar, Breslin, Pouzzner, Quinlan, Blum, *Interview Follow-Up of Abortion Applicant Dropouts*, 11 Social Psychiatry 135 (1976) 15,21,24,25

Swigar, Quinlan, Wexler, *Abortion Applicants: Characteristics Distinguishing Dropouts Remaining Pregnant and Those Having Abortions*, 67(1) Am. J. Public Health 142 (Feb. 1977) 15,24

Szabady and Klinger, *Pilot Surveys of Repeated Abortion Seeking*, 14 International Mental Health Research Newsletter 6 (1972) 12,15

Tolman, *Protecting the Children of Battered Women*, 3(4) J. of Interpersonal Violence 476 (Dec. 1988) 23

Vought, *Post Abortion Trauma* (1991) 19,22

Walter, *Psychologic and Emotional Consequences of Elective Abortion: A Review*, 36(3) Obstetrics and Gynecology 482 (Sept. 1970) 6

No. 91-744 and 91-902

IN THE

Supreme Court Of The United States

October Term, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, ET AL.,

Petitioners,

v.

ROBERT P. CASEY, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For The Third Circuit

BRIEF AMICI CURIAE OF THE RUTHERFORD INSTITUTE AND THE RUTHERFORD INSTITUTES OF ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, ILLINOIS, KANSAS, KENTUCKY, LOUISIANA, MARYLAND, MICHIGAN, MINNESOTA, NEBRASKA, NEW YORK, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, TENNESSEE, TEXAS, VIRGINIA AND WISCONSIN, IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE[1]

Amici Curiae— The Rutherford Institute and its affiliated state chapters have as two of their purposes the strengthening of the traditional family and fostering respect for the uniqueness

[1] Counsel of record to the parties in this case have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 36.

and paramount worth of human life. These values are deeply rooted in America's common law constitutional tradition and its morality and values. Diminishing the value of human relationships and respect for life, including prenatal life, diminishes, in one form or another, the lives of all citizens. The Rutherford Institute believes that this case, with issues concerning the power of states to regulate abortion and to sustain and protect the traditional American family, is important to constitutional jurisprudence and the growth and progress of the nation.

Beginning in 1985, Amici Curiae undertook to extensively research the available medical and social literature to determine the extent to which the legalization of abortion had an adverse effect on the quality of life of men and women, the impact on the family and its effect on health and social life. The relevant portions of that research are presented particularly as applied to the importance of spousal notification prior to abortion.

Amici Curiae are non-profit religious corporations named for Samuel Rutherford, a 17th century Scottish minister and Rector at St. Andrew's University. It has state chapters in 40 states and affiliates on three continents, with offices in four foreign countries and an international office in Charlottesville, Virginia. Counsel for Amici Curiae have specialized in litigation in state and federal courts and have participated as counsel in previous cases before this Court in significant cases relating to the protection of human life and family values. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

STATEMENT OF FACTS

Amici Curiae hereby adopt the proposed findings of fact submitted by the Respondent to the trial court below.

SUMMARY OF ARGUMENT

The literature is sparse on the nature and extent of males', including husband's, involvement in abortion decisionmaking, although there appears to be general agreement that the male is important to the decisionmaking process. Studies which discuss whether or not or under what circumstances spouses may or may not be notified prior to abortion are rare. Only one published study could be located which provides specific reasons why wives do not tell their husbands in advance of abortion. Anecdotal reports where husbands do not know beforehand are scattered throughout the literature and are included herein, including press reports. While these anecdotal reports are helpful, generalizations are difficult or impossible. Under these circumstances the stage is set for speculation and conjecture in the general absence of information. With these limitations, Amici Curiae have sought to summarize the body of professional opinion that supports male involvement in abortion decision-making, to ascertain the effects on a marriage if communication on important subjects such as childbearing does not occur, to examine the types of marital relationships where husbands are not notified and to learn something of the qualities of women who seek abortion and who have not told their partner. The following conclusions were made based upon this analysis.

Spousal notification prior to a wife undergoing an abortion where prenatal life has been conceived within the marriage relationship is rationally related to the integrity of the marital relationship and protects the spouse's interest in having children within marriage. A substantial body of professional opinion supports involvement of a husband in abortion decision making. In addition, various sociological studies have demonstrated that marital integrity is enhanced by communication and weakened by avoidance of discussion of critical and important issues. There are a significant number of spouses who would not be

notified prior to abortion unless the spousal notification provision law is implemented.

The lower court erroneously found that there was a substantial risk that spousal notification would bring on physical violence or economic or psychological distress. Based upon the only study in the published literature, only one out of ten women reported fear of verbal or physical abuse as the reason for not telling her husband in advance of abortion. None mentioned economic distress or coercion as a reason for not telling their husbands. Other data also support this finding.

Based upon available reports, lack of intimacy in marriage, marital conflict, isolation or distancing or wives who make hasty or impulsive decisions are examples of situations where husbands may not know in advance of abortion. Not notifying husbands may be very damaging or destructive to the marriage relationship and these include situations where abortion may occur out of spite or because of a power struggle in which prenatal life is used as a weapon, or where the husband had a strong belief in the humanity of prenatal life, or where a husband was ill. Notification of a husband where a wife is considering abortion has been shown to increase the likelihood of a decision for childbirth and also may enhance the opportunity for future fatherhood.

ARGUMENT

I. A STATE STATUTE REQUIRING SPOUSAL NOTIFICATION PRIOR TO A WIFE UNDERGOING ABORTION IS RATIONALLY BASED AND ADVANCES THE STATE'S INTEREST IN PROMOTING THE INTEGRITY OF THE MARRIAGE RELATIONSHIP.

A. A substantial body of professional and social opinion supports the testimony of the Respondents' expert witness that involvement of a husband in abortion decision-making is beneficial.

Marriage and family therapist, Dr. Vincent Rue, an expert witness for the Respondent Commonwealth of Pennsylvania, testified that spousal notification was beneficial stating that "communication is very important in marriage (and it is) the bedrock of healthy marriages. Most marriages are neither so good that spousal notification is unnecessary or so bad that it would be presumed harmful to the wife to notify the husband with respect to the abortion." Joint Appendix of Petitioners and Respondents at 802.

There is considerable support in the professional literature for involvement of the husband in abortion decision making. For example a Committee of the American Public Health Association has recommended: "Informational abortion counseling should, where appropriate, include partner, husband, parents or other significant persons accompanying the patient". Barnes, *Ambulatory Maternal Health Care and Family Planning Services, Policies, Principles, Practices*, Committee on Maternal Health Care and Family Planning, Maternal and Child Health Section, American Public Health Association (1978), p. 49.

In a current medical text book entitled Obstetrical Decision Making, it is stated in an article entitled Unplanned Pregnancy:

> "to ensure the woman understands the significance of her choice between abortion and carrying the fetus to term for adoption or to keep and raise it... it is prudent to involve her partner or a family member in counseling with her permission." Perlmutter and Stewart, *Unplanned Pregnancy*, in *Obstetrical Decision Making*, Second Edition, Ed. Friedman, Acker, Sachs (1987), p.40.

Another article in the same medical text entitled Abortion Counseling states:

> "If possible, involve the father of the fetus in the decision-making." Borten and Stewart, *Abortion Counseling*, in *Obstetrical Decision Making*, Second Edition, Ed. Friedman, Acker, Sachs (1987), p.44.

The necessity for spousal involvement in abortion decision-making recognizes that it is impossible to lift a pregnant woman out of her primary loyalty system i.e. her present and future family network for the purpose of decision-making without manifesting a complimentary therapeutic concern for the relationship fall-out of her decision on her *mate*, parents, children (born and unborn) and other significant relationships. Cotroneo and Krasner, *A Study of Abortion and Problems in Decisionmaking*, 3 J. Marriage and Family Counseling 69 (1977) (emphasis added). Other authorities have made similar findings.[2]

[2] Walter, *Psychologic and Emotional Consequences of Elective Abortion: A Review*, 36(3) Obstetrics and Gynecology 482 (Sept. 1970) (Any woman seeking abortion should be dealt with in the context of a social unit of inter-relationships and the most prominent is her sexual partner); Lieh-Mak, Tam, Ng, *Husbands of Abortion Applicants: A Comparison With Husbands of Women Who Complete Their Pregnancies*, 14 Social Psychiatry 59 (1979) (The husband plays an important role in abortion-seeking and fertility regulation. It is high time we should give substance to the shadowy figure that we call the male partner); Senay, *Therapeutic Abortion-Clinical Aspects*, 23 Archives General Psychiatry 408 (Nov. 1970)(One should always interview the spouse, fiance or parent in order to understand the psychology of the crisis and to involve this person in the preparation for the procedure); Handy, *Psychological and Social Aspects of Induced Abortion*, 21 Br. J. Clinical Psychology 29 (1982) (Actively including men in the abortion decision may facilitate future joint family planning while rebuffing involvement might result in increased passivity and detachment from family responsibilities).

Not only professionals think the spouse should be involved but also males who were involved in abortion. In a sociological study of 1000 males who accompanied their partners or wives to 30 different abortion clinics in 18 different states during 1981, a majority thought abortion clinics should be required to notify a husband before performing an abortion on his wife. It was believed that such a law might achieve the following desirable results:

> 1. It could provide a very short "cooling off" period in which both parties might further explore the decision.
>
> 2. It could encourage a wife to reconsider her decision if it was made solely in response to a temporary problem in the couple's relationship.
>
> 3. It could encourage the husband to reconsider and improve his pledge of emotional and financial support for bringing the fetus to term and rearing their child.
>
> 4. It could help a wife stop guessing what her husband's reaction is to her pregnancy before she has a chance to hear his side.
>
> 5. It could help a husband gain a better understanding of his wife's final decision and the status of their relationship even if he disagrees with that decision.

Shostak and McLouth, *Men and Abortion, Lessons, Losses and Love* (1984), p. 213.

Respondent's expert witness, Dr. Vincent Rue also testified at the trial that it is advantageous for wives to draw upon the support of their husbands in a crisis pregnancy decision-making period. One reason he stated was that a conflicted relationship at the time of abortion is a psychological risk for the woman experiencing a painful aftermath from abortion. J.A. 802-803. This is well documented in the literature[3] and is an important point that is over-looked by those opposed to spousal notification. Others are also in agreement with Rue.[4]

In summary, the professional sources conclude that involvement of husbands in abortion decision-making is needed to convey information about the abortion procedure, to help in the decision between abortion or childbirth, to understand the social context of the woman, to acknowledge the important role the husband plays in abortion-seeking and fertility regulation, to understand the psychology of the crisis pregnancy and to involve the husband in preparation for the abortion procedure. The approach taken by male partners was somewhat different. It tended to emphasize the importance of communication between husband and wife for clarification, the minimizing of conflict and the reconsideration of previously stated positions.

[3] This includes anger and depression, Payne, Kravitz, Notman, Anderson, *Outcome Following Therapeutic Abortion*, 33 Archives General Psychiatry 725 (June 1976), or regretting the decision to abort, Freeman, *Abortion: Subjective Attitudes and Feelings*, 10(3) Family Planning Perspectives 150 (May/June 1978), or loneliness or isolation, Robbins and DeLamater, *Support from Significant Others and Loneliness Following Induced Abcrtion*, 20 Social Psychiatry 92 (1985), or increased psychiatric hospital admission rates, David, Rasmussen, Holt, *Postpartum and Post Abortion Psychotic Reactions*, 13(2) Family Planning Perspectives 88 (March 1981), or risk for post traumatic stress disorder, Barnard, *The Long Term Psychological Effects of Abortion*, Institute for Abortion Recovery and Research: Portsmouth, NH (1990).

[4] Robbins and DeLamater, *supra*, n. 3 at 98; Sherman, et al., *infra*, n.5 at 106.

A requirement that husbands be notified prior to abortion is a step in the direction of advancement of each of these goals.

B. Various sociological studies show that marital integrity is enhanced by communication and weakened by avoidance of discussion of critical and important issues.

The U.S. Supreme Court has recognized that a decision as to whether or not to terminate a pregnancy is "an important and vital issue" in a marriage. *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 71 (1975). Clearly it should be so considered.[5]

Communication in important matters of marriage and family life will enhance marital integrity. For example, researchers from the University of Minnesota assessed what major marital factors were present in highly satisfied families where the husband and wife were living together. It was found that communication and conflict resolution were important factors. Low stress families, both with and without children, were found to exhibit critical resources of family accord and ability to communicate. Olson, McCubbin, Hamilton and Associates, *Families: What Makes Them Work* (1983).

Similarly, in an Oklahoma State University study of strong families, good communication patterns and an ability to deal with crisis in a positive manner were among the six major characteristics in a wide range of different cultural contexts. Stinnett, *Strong Families: A Portrait in Prevention in Family Services: Approaches to Family Wellness*, Ed. David R. Mace (1983), p. 30-35. In research conducted by the Timberlawn

[5] In a New York study of women who aborted in which 75% of the women were married or in long term relationships, 62% said the abortion represented a major decision and 46% said the abortion represented a major crisis. Sherman, Mandelman, Kerenyi, Scher, *The Abortion Experience in Private Practice*, in *Women and Loss*. Psychobiological Perspectives, Ed. William F. Finn, et al., The Foundation of Thanatology Series, Vol. 3 (1985), p. 101.

Foundation of Dallas, Texas measured family health and family pathology. It was determined that healthy families exhibited open and direct communication as opposed to distancing, obscuring or confusing communication. Lewis, Beavers, Gossett, Phillips, *No Single Thread: Psychological Health in Family Systems* (1975), pp. 100-104.

Other research has shown that families need to emphasize unity and solidarity and the existence of a meaningful "we." Kantor and Lehr, *Inside the Family: Toward a Theory of Family Process* (1975, 1976).

However, if there is lack of family communication the real possibility of destructive conflict arises. A recent study by researchers at the University of Wisconsin and the University of Michigan on 373 married couples in the Detroit area reported that one of the most consistent predictors of marital unhappiness is destructive conflict. The researchers learned that one of the biggest dangers was attempting to try to avoid conflict at all. Avoidance merely means couples never get to the issues which blow up later according to the authors of the study. What is needed is constructive fighting which means "calmly discussing issues, really listening, saying nice things and making your spouse laugh to defuse the anger." *Fighting Fair Keeps Marriages Strong*, U.S.A. Today, Feb. 20, 1992, p. 6DT.

Abortion of prenatal life conceived within marriage by the wife without prior notification to the husband undermines marital integrity. It lacks the essential element of open and direct communication and does not resolve any underlying issues that gave rise to any conflict. It takes the "we" out of marriage and seeks instead to substitute a deadly autonomy. It is a prime example of destructive conflict.

C. A significant number of husbands are not notified in advance of their wife's abortion who would be included in the scope of the spousal notification provision.

Various studies based upon reports of primarily single women have indicated that from 10-33% of their male partners in conception did not know of the abortion beforehand.[6] Husbands are more likely to be advised than non-married men. Based upon limited studies, 6-7% of husbands do not know of their wives abortion in advance.[7] If women are repeating abortion, there is evidence that a considerably greater number of male partners do not know about the abortion in advance. A Canadian study of mostly single women found that 45% of the male partners did not know in advance if the women were repeating abortion compared to 33% if the women were undergoing abortion for the first time.[8] A Hungarian study of married

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[6] Shusterman, *Predicting the Psychological Consequences of Abortion*, 13A Social Science and Medicine 683 (1979) (19%); Robbins and DeLamater, *Support from Significant Others and Loneliness Following Induced Abortion*, 20 Social Psychiatry 92 (1985) (25%); Plutzer and Ryan, *Notifying Husbands About an Abortion*, 71(3) Sociology and Social Research 183 (April, 1987) (10.5%), Freeman, *Abortion: Subjective Attitudes and Feelings*, 10(3) Family Planning Perspectives 150 (May/June 1978) (23%); Berger, Gold, Andress, *Repeat Abortion: Is It a Problem?*, 16(2) Family Planning Perspectives 70 (March/April 1984) (33% for first time abortion and 45% for women repeating abortion).

[7] These limited studies cannot necessarily be generalized to other populations. For example, according to press reports quoting the counseling director of the Women's Medical Center in Washington, D.C. most of the married women who had abortions at their center did so without the knowledge of their husbands. Paterson, *Whose Freedom of Choice?*, The Progressive 42 (April 1982), p. 44.

[8] Berger, *supra* n.6.

couples found that when women were repeating abortion, 33% of the decisions for abortion were made alone.[9]

In one study at Kings College in London published in 1977, 6% of the married women studied reported their husbands did not know of the abortion in advance. Belsey, Greer, Lal, Lewis, Beard, *Predictive Factors in Emotional Response to Abortion: King's Termination Study-IV*, 11 Social Science & Medicine 71 (1977). A study of married women repeating abortion at a Columbus, Ohio abortion clinic in 1973-74 reported the attitude of the husband toward the abortion in all but 5.8% of the cases. Aguirre, *Repeat Induced Abortion: Single, Married and Divorced Women*, 12 J. Biosocial Science 275 (1980).

An Illinois study in 1984 based on a questionnaire submitted to women at an abortion clinic found that 7% of the married women did not tell their husbands of their pregnancy or abortion. This 7% which totaled 20 women, gave the following reasons for not notifying their husbands:

extra-marital affair	-7
rape by another	-1
rape by husband	-1
broken up/living apart	-2
marital problems	-4
feared verbal and physical abuse	-1
husband very disapproving of abortion	-2
possible skewed relationship	-1
protecting him from crisis	-1
TOTAL	**20**

Based upon this Illinois study, 10 of the situations or about 3.5% of the married men would be notified under the provisions of the spousal notification law: An extra-marital affair(7), rape by another(1), rape by husband(1) and fear of verbal and physical

[9] Szabady and Klinger, *Pilot Surveys of Repeated Abortion Seeking*, 14 International Mental Health Research Newsletter 6 (1972).

abuse(1) would be excluded from the spousal notification requirement. 18 Pa. Cons. Stat., Sec. 3209; Plutzer and Ryan, *Notifying Husbands About an Abortion*, 71(3) Sociology and Social Research 183 (April, 1987). The study did not indicate whether or not any of the married women were repeating abortion. If that were the case it is likely that the number of husbands not knowing about an abortion in advance would be significantly higher.[10]

D. Husbands may not be notified prior to their wife's abortion in functioning marriage situations.

The Illinois study on why women do not notify their husbands prior to abortion reflected evidence of poor communication as well as significant conflict in the marriage. However, a marriage need not necessarily be falling apart or on the verge of divorce in order for married couples to fail to communicate. For example, a lack of intimacy in a relationship is an important reason why a husband or partner may not be told about a pregnancy or abortion. Shusterman, *Predicting the Psychological Consequences of Abortion*, 13A Social Science and Medicine 683 (1979). Lack of intimacy may arise if the woman considers herself "liberated" as this will tend to diminish the significance of her partner in conception, at least in her eyes. Moseley, Follingstad, Harley, Heckel, *Psychological Factors That Predict Reaction to Abortion*, 37 J. of Clinical Psychology, 276 (1981). A highly dominant, independent wife who is not in touch with her emotions and who has an incapacitated husband may not tell him about an abortion. Mumford, *An Interdisciplinary Study of Four Wives Who Had Induced Abortions*, 87 Am. J. Obstet. and Gynecol. 865 (1963).

[10] The repeat abortion rate in the U.S. in 1986 was nearly 50% and increases 1-2% each year. Kochanek, *Induced Terminations of Pregnancy: Reporting States*, 37(12) Monthly Vital Statistics Report 19 (April 28, 1989), (Among approximately 300,000 women, 48.6% reported a repeat abortion).

Marital conflict is another reason why wives may not tell their husbands prior to abortion. In one case involving a marriage of eight years duration and with two children, the wife became pregnant during a time of marital conflict. It appeared that the husband wanted another child in an attempt to hold the marriage together while the wife was considering divorce. The wife had an abortion without telling the husband in advance. Following the abortion the couple did not separate or divorce but the underlying conflicts remained unresolved. No threats of physical, economic or psychological abuse by the husbands were reported. To the contrary the husband evidenced concern over the well-being of his wife. Blumenfield, *Psychological Factors Involved in Request for Elective Abortion*, The Journal of Clinical Psychology 17 (Jan. 1978).

If the woman (married or unmarried) is repeating abortion she is less likely to tell others she is doing so-including a husband or partner. In a study at Yale University School of Medicine women having first abortions told an average of 3.0 people compared to only 2.4 if they were repeating abortion. Bracken and Kasl, *First and Repeat Abortions: A Study of Decision Making and Delay*, 7 J. Biosocial Science 473 (1975). A Hungarian study found that as abortion was repeated in marriage, wives were more and more likely to report that they did not feel close to their husbands during subsequent pregnancies. As the number of induced abortions increased, the abortion decision was more often made by the wife alone. Overall, among wives repeating abortion approximately 33% made the decision alone. Although the wives reported that they were increasingly unhappy with their marriages as the number of abortions increased, the overall divorce rate remained very low (1.3%). In these marriages the decision to abort without consulting the husband did not correlate with the incidence of divorce. This study is probably the best evidence that marriages may remain functional i.e. the parties did not separate or divorce, even though a substantial number of wives decided for abortion without consulting their husbands. Szabady and Klinger, *Pilot Surveys of Repeated Abortion Seeking*, 14 International Mental Health Research Newsletter 6 (1972).

There is considerable evidence that those repeating abortion particularly need to consult with someone else. For example, A New York study found that repeat abortion patients were characterized as having impulsive behavior patterns, an absence of reflectedness, an inability to foresee consequences and a reduced ability to plan ahead in directed tasks. Rovinsky, *Abortion Recidivism, A Problem in Preventive Medicine*, 39(5) J. Obstetrics and Gynecology 649 (May, 1972). Other studies have made similar findings.

Another type of woman who may not tell her husband or partner about a decision to abort is the woman who makes a hasty, impulsive decision. In a 1971-72 study by researchers at the Yale University School of Medicine, 100 women who had abortions were compared with 100 women who had initially applied for abortion and later changed their minds and carried to term. It was found that those who decided not to abort were more likely to have partners who gave negative responses to abortion. Some of these women appeared to have initially sought abortion before considering important information from relevant sources-including their partners. Swigar, Quinlan, Wexler, *Abortion Applicants: Characteristics Distinguishing Dropouts Remaining Pregnant and Those Having Abortions*, 67(1) Am. J. Public Health 142 (Feb. 1977); Swigar, Breslin, Pouzzner, Quinlan, Blum, *Interview Follow-Up of Abortion Applicant Dropouts*, 11 Social Psychiatry 135 (1976).

The Swigar studies probably provide the clearest example of how the alteration of circumstances or the consideration of additional factors, can change the initial decision for abortion into a decision for childbirth. Women who ultimately did so took moral or religious beliefs into account, found out that their partner desired the baby, learned that the partner or significant

other would provide help, an initial marital separation had been reconciled and was back with her husband, abortion was equated with the loss of the partner or there had been a favorable change in money or housing. *See also* Friedlander, Kaul, Stimel, *Abortion: Predicting the Complexity of the Decision-Making Process*, 9(1) Women & Health 43 (Spring, 1984) (Partner involvement increased the complexity of the abortion decision with the more involved the relationship the greater its influence appeared to be in continuing the pregnancy). These studies tend to confirm what others have also learned i.e. the more the woman is provided social support the more likely she is to carry her pregnancy to term. Isolated, distant, impulsive women without social support frequently decide for abortion.[11]

E. Ignoring the husband in the decisionmaking process may damage or destroy the marriage relationship.

There is evidence that not telling a husband in advance of abortion is the most likely possibility to cause a deterioration in marital relations. A study of 131 married women at Kings College Hospital in London compared the husband's attitude toward abortion with marital adjustment three months following induced abortion. 6% of the married women reported their husbands did not know of the abortion beforehand. In cases

[11] Other studies have made similar findings. Bracken, Klerman and Bracken, *Abortion, Adoption or Motherhood. An Empirical Study of Decision-Making During Pregnancy*, 130 Am. J. Obstetrics and Gynecology 25 (1978) (The outcome of pregnancy was related to circumstances surrounding each particular pregnancy); Murphy, Symington, Jacobson, *Pregnancy Resolution Decisions. What If Abortions Were Banned?*, 28(11) The J. of Reproductive Medicine 789 (Nov. 1983) (The availability of another person to help made it more likely the pregnancy would be carried to term); Reardon, *Aborted Women: Silent No More* (1987), p. 11 (83% of women in a study of members of Women Exploited By Abortion said the abortion outcome would have been different if male partners or others had encouraged differently).

where he did not know prior to the abortion, 62% of the wives reported mediocre or unsatisfactory marital adjustment. If husbands had urged the abortion upon an initially resistant wife it was 30%. If the husband had wanted the pregnancy to be carried to term and the wife did not it was 17%. If the husband approved of the abortion with the wife apparently also wanting the abortion it was only 7%. Belsey, Greer, Lal, Lewis, Beard, *Predictive Factors in Emotional Response to Abortion: King's Termination Study-IV*, 11 Social Science & Medicine 71 (1977).

It also appears from various scattered reports that at least some husbands will become greatly angered and distressed if their wife obtains an abortion without their knowledge. This may result in serious deterioration of the relationship or possibly divorce. It may also trigger illness in the husband. For example, during a family counseling session a husband learned from one of his children that his wife had terminated a pregnancy without his knowledge. He was very angry and suffered what appeared to be psychosomatic problems and was hospitalized for hypertension which had not responded to treatment. His reaction to the death was heightened because he also had an unresolved anger toward his mother who had died some years before. He had not been told about the pregnancy or abortion because he was ill. McAll and Wilson, *Ritual Mourning for Unresolved Grief After Abortion*, 80(7) Southern Medical Journal 818 (1987).

In *Przbyla v. Przbyla*, 275 N.W.2d 112 (Wis. App. 1978), a husband brought a claim against his wife for intentional infliction of emotional distress after she had allegedly falsely misrepresented and deceived him about her intentions to seek an abortion. In another case a husband, identified as " Vince", and who believed abortion was murder, found out that his wife had obtained an abortion without his knowledge or consent. Shortly thereafter, Vince obtained a divorce from his wife claiming the abortion had killed his love for her. Shostak and

McLouth, *Men and Abortion, Lessons, Losses and Love* (1984), p. 217.

In New York, orthodontist David Ostreicher sought legal redress against his wife and the abortion facility for "cruel and inhuman treatment" after his wife obtained an abortion without his knowledge. According to Dr. Ostreicher both he and his wife wanted and planned for a baby. However, once she became pregnant she began pressing him to tear up a pre-nuptial agreement and saying that if he refused, she would have an abortion. Until she had the abortion he thought it was an empty threat. "A wife shouldn't be able to use the fetus as a hostage," he says. "There should be laws against it." Papier, *Distressed Fathers Assert Rights in Abortion Cases Across Nation*, The Washington Times, June 7, 1988, p. 1A.

In another reported incident a man in St. Clair Shores Michigan publicly protested that his wife had murdered their baby. "She killed our child without giving me any notice," said the man, a lawyer who asked that his name be withheld." I look at abortion as homicide, but it may be justifiable homicide under very rare cases-a rape pregnancy, for example. I just think that everyone should be held accountable for bringing on life men and women. Life is precious; too precious to be thrown away like that." Gaydos, *Men and Abortion*, Gannett News Service, Tucson Citizen, June 14, 1988, p. 1NW.

And in another case, Gary Bell, later the founder of DADS for Life, reported that he came home from work one day to find his wife in tears after just having had an abortion. He had not even known she was pregnant. He suffered severe pain and agony which was intensified when his wife became pregnant once again and despite his protests had a second abortion. Finally a son was born of the marriage after very narrowly avoiding yet another abortion. But Gary became very over-protective of his son and due to this behavior eventually lost custody of him in divorce proceedings instituted by his wife.

Vought, *Post Abortion Trauma* (1991), p.26-27. These incidents do not appear to be isolated instances. Joseph Scheidler, who heads a Chicago based pro-life organization says, I have had dozens of phone calls.... from men who have found out by one means or another that their child's mother has already had an abortion. All were at least somewhat angry, very confused and bewildered. Most wanted to know what legal action they could take. One man had found an abortion receipt on his wife's dresser; one found the bill on his charge card. Some have said they could no longer live with the woman who destroyed their child without even consulting the child's father. One such desperate man said he had already filed for divorce. He could not live with a woman who would kill his child." Shostak and McLouth, *Men and Abortion, Lessons, Losses and Love* (1984) p. 169, *quoting* Joseph Scheidler.

These incidents support the concept that not notifying at least some husbands prior to abortion is very destructive to the marriage relationship. In these cases abortions were done for reasons the men perceive to be out of spite or because of a power struggle in which prenatal life is used as a weapon, or because the husbands had a strong belief in the humanity of prenatal life, or because the husband was ill and in a vulnerable state.

From the available reports it appears that husbands who are not notified are likely to care deeply about the value of childbirth and to be greatly upset upon learning of abortion after the fact. They may suffer illness or alienation or exhibit a sense of great anguish. Many of them were in functioning marriages that deteriorated following the abortion-some which resulted in divorce or other legal proceedings. At least in one case (David Ostreicher) it was unclear as to whether or not he could have been deemed to have knowledge of his wife's abortion in advance.[12] In this instance a spousal notification requirement

[12] In the London study some women who had not specifically notified their husbands also expressed uncertainty as to whether their husbands actually knew of the abortion or not. Belsey, et al., *supra*, p. 9 at 75.

could have prevented a lawsuit against the abortion facility or provided a defense if one was instituted. Thus, there are possible potential benefits to the Petitioners if this legislation is upheld.

The case of Gary Bell illustrates that it is possible to convince a wife not to obtain an abortion of a subsequent pregnancy if he had prior notice although it would not be a certainty. The first abortion by his wife without notice made it much more likely that she would have a repeat abortion, which, in fact, occurred. Each succeeding abortion makes it more likely that the couple will distance themselves from one another and thus places their marriage increasingly at risk.[13] Ultimately the marriage did result in divorce. The abortion experience appeared to adversely affect his parenting skills once a child was born of the marriage resulting in overprotectiveness.

II. A REQUIREMENT OF SPOUSAL NOTIFICATION PRIOR TO ABORTION DOES NOT CREATE A SUBSTANTIAL RISK THAT A WOMAN WHO WOULD OTHERWISE HAVE AN ABORTION WOULD BE PREVENTED FROM DOING SO BY PHYSICAL VIOLENCE OR BY ECONOMIC AND PSYCHOLOGICAL DISTRESS.

The lower court erroneously found that spousal notification created a substantial risk that a woman who would otherwise have an abortion would be prevented from doing so by physical violence, or by economic and psychological distress. *Planned Parenthood v. Casey*, 947 F.2d 682, 713 (3d Cir. 1991).

In the 1984 Illinois survey of 20 married women who did not tell their husbands about their pregnancy and abortion, only 10 would fall under the provisions of the act once the exceptions

[13] Bracken and Kasl, *First and Repeat Abortions: A Study of Decision Making and Delay*, 7 J. Biosocial Science 473 (1975). (Women repeating abortion are in less stable social relationships than women who seek abortion for the first time.)

were taken into account. Of the 10 remaining women only 1 or 10% stated a fear of verbal and physical abuse from the husband as the basis for not telling him. The other reasons in the Illinois study indicate marital problems or possible disagreement but do not indicate any particular threat of economic or psychological distress visited upon the wife by the husband. Plutzer and Ryan, *Notifying Husbands About an Abortion*, 71(3) Sociology and Social Research 183 (April, 1987). This is the only study on the subject in the social literature.[14]

The findings of this Illinois study are supported by research at the Yale University School of Medicine on 27 women who initially sought abortion but later changed their minds and carried to term. None of the women interviewed reported threats to physical safety or psychological or economic threats or abuse when they were asked what made them change their minds. Swigar, Breslin, Pouzzner, Quinlan, Blum, *Interview Follow-Up of Abortion Applicant Dropouts*, 11 Social Psychiatry 135 (1976).

Also, the eight anecdotal reports that could be located in the literature where husbands were not advised of their wife's abortion in advance do not appear to be likely possibilities for spousal abuse or child abuse. In one case the husband was reported to be concerned about the well-being of his wife.[15] In another, the wife was very domineering while the husband was incapacitated.[16] In 3 cases the husbands sought legal redress by

[14] See also follow-up study of same sample, Ryan and Plutzer, *When Married Women Have Abortions: Spousal Notification and Marital Integration*, 51 J. Marriage and the Family 41 (Feb. 1989).

[15] Blumenfield, *Psychological Factors Involved in Request For Elective Abortion*, The J. of Clinical Psychology 17 (Jan. 1978).

[16] Mumford, *An Interdisciplinary Study of Four Wives Who Had Induced Abortions*, 87 Am. J. Obstet. and Gynecol. 865 (1963).

bringing a lawsuit against their wives.[17] In one case the husband publicly protested.[18] In two cases the husbands appeared to direct their anger and grief inwardly as they became ill as a result of the abortion.[19] In one case the husband was hospitalized for hypertension. This family was in therapy and was helped to recover from the effects of the abortion by grief therapy. In the other the husband developed two stress conditions related to the abortion. He was also very protective of the one child born of the marriage. In four cases divorce proceedings were initiated with at least two marriages ending in divorce.

Finally, it appears from the available reports in the literature that men who are already physically abusing their wives are ones most likely to urge abortion or reject the unborn child not urge childbirth. In a study of sixty battered women referred by the medical staff of a rural health clinic, the women reported changes in the pattern of family violence during pregnancy. There was increasing abuse for some with the pregnant abdomen replacing face and breasts as the target for battering with abortions and premature births as the result. Others reported less abuse with pregnancy and one woman deliberately stayed pregnant to avoid violence. Hilberman and Munson, *Sixty Battered Women*, 2 Victimology 460 (1977-78). In another report a husband beat the wife extensively over the course of a 13 year marriage. He beat her during pregnancies, punching her in the face and stomach and kicking her between the legs. Following the birth of their first two children, he had forced her to have

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[17] Shostak and McLouth, *Men and Abortion, Lessons, Losses and Love* (1984), p. 217; Papier, *Distressed Fathers Assert Rights in Abortion Cases Across Nation*. The Washington Times, June 7, 1988, p. 1A; *Przbyla v. Przbyla*, 275 N.W.2d 112 (Wis. App. 1978).

[18] Gaydos, *Men and Abortion*, Gannett News Service, Tucson Citizen, June 14, 1988, p. 1NW.

[19] McAll and Wilson, *Ritual Mourning for Unresolved Grief After Abortion*, 80(7) So. Medical Journal 818 (1987); Vought, *Post Abortion Trauma* (1991), p. 26-27.

two abortions she did not want. The wife became pregnant a third time when the husband forced her to have sex with him which resulted in the birth of their third child, again after the wife refused to have an abortion. The case was referred to by social workers as "not atypical." Tolman, *Protecting the Children of Battered Women*, 3(4) J. of Interpersonal Violence 476 (Dec. 1988).

What appears from the Illinois study is that most women will at least notify their husband prior to abortion. However, there is a significant group of women who simply wish to avoid discussing the issue of pregnancy and abortion or childbirth at all with their spouse although he would be the father. Few of these have expressed a threat to their physical or psychological safety.

III. A STATE STATUTE REQUIRING SPOUSAL NOTIFICATION PRIOR TO A WIFE UNDERGOING ABORTION IS RATIONALLY BASED AND ADVANCES THE STATE'S INTEREST TO PROTECT A SPOUSE'S INTEREST IN HAVING CHILDREN WITHIN MARRIAGE AND IN PROTECTING THE PRENATAL LIFE OF THAT SPOUSE'S CHILD.

A. Notifying a husband prior to an anticipated abortion increases the likelihood of childbirth.

In the 1984 Illinois survey in which 20 married women were identified who did not notify their husband about their pregnancy and abortion, 2 of the women said they did not do so because their husband was very disapproving of abortion. Ten of the 20 women would fall under exceptions to the spousal notification statute in question (spouse is not the father of the child(8), rape by husband(1), fear of physical abuse(1). Based on this survey 2/10 or 20% of the applicable situations would

involve husbands who were very disapproving of abortion. Plutzer and Ryan, *Notifying Husbands About an Abortion*, 71(3) Sociology and Social Research 183 (April, 1987).

A study by researchers at the Yale University School of Medicine in 1971-72 compared 100 women who had abortions with 100 women who had initially applied for abortions but later changed their minds and carried to term. They also concluded from their study that women were less likely to tell the partner if they thought he would strongly object to the abortion. Swigar, Breslin, Pouzzner, Quinlan, Blum, *Interview Follow-Up of Abortion Applicant Dropouts*, 11 Social Psychiatry 135 (1976), *citing* Swigar, et al., *Abortion Applicants: Characteristics Distinguishing Dropouts Remaining Pregnant and Those Having Abortions*, 67(1) Am. J. Public Health 142 (Feb. 1977). The Yale University School of Medicine studies also made another important finding i.e. those who initially applied for abortion and later changed their minds and carried their child to term did so, in part, because they were more likely to have partners who gave negative responses to abortion. Thus, the partner opposition to abortion was a factor in the decision for childbirth over abortion. Swigar, Quinlan, Wexler, *Abortion Applicants: Characteristics Distinguishing Dropouts Remaining Pregnant and Those Having Abortions*, 67(1) Am.J. Public Health 142 (Feb. 1977).

In a specific case illustration where a husband's objection made a difference, Mrs. G. had scheduled an abortion because she felt it was her only alternative. Her husband, a Catholic, initially stated he supported whatever decision she made. However, prior to the abortion there was considerable discussion in the media and in newspapers on the abortion issue and Mr. G. began to press his wife to continue the pregnancy. Ultimately, she went along with his wishes partly because he had not previously stated his true feelings earlier and also because she had not wanted a baby that "no one wanted, or just me wanted."

Swigar, Breslin, Pouzzner, Quinlan, Blum, *Interview Follow-Up of Abortion Applicant Dropouts*, 11 Social Psychiatry 135 (1976).

The attitude of the husband toward the pregnancy is important. The adjustment and acceptance of a pregnancy by the wife is adversely affected if the husband says he doesn't want the baby, or if the wife has no one to help her, if she is being deserted by the husband, or has frequent quarrels with him. Helper, Cohen, Beitenmen, Eaton, *Life Events and Acceptance of Pregnancy*, 12 J. Psychosomatic Research 183 (1968). On the other hand, compatibility with the husband has been found to be one of the predictors of positive attitudes toward pregnancy. Some women view a baby as a gift to the husband or as an extension of him rather than the self. Discussions with the husband about the child's future and choosing a name were found to be particularly important in establishing the identity of the baby in the pregnant woman. Leifer, *Psychological Changes Accompanying Pregnancy and Motherhood*, 95 Genetic Psychology Monographs 55 (1977), also citing several studies.

Thus, a requirement of spousal notification prior to abortion where the husband is opposed to abortion appears to be a significant factor to reduce the incidence of abortion and result in more decisions for childbirth.[20]

B. Abortion may destroy or impair the opportunity for future fatherhood.

If prenatal life is aborted there may be considerable distress as a result of the lost opportunity for fatherhood and includes

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[20] Even some feminists have seen a need to expand the role of men in abortion decision-making by pointing out that in every other area of reproduction and child care an active, equal role of men is advocated and that faced with difficult and agonizing choices women should not have to make them alone. McDonnell, *Not An Easy Choice, A Feminist Re-Examines Abortion* (1984), p. 61, 67.

impotence, depression, inability to function, low self-esteem, grief and guilt.

Sociologist Arthur Shostak in his study of male reaction to abortion found that a sizeable minority of males reported the persistence of dreams about the "child-that-never-was" with some representing these moments as times of guilt, remorse and sadness. Shostak, *Abortion as Fatherhood Lost: Problems and Reforms*, 28 The Family Coordinator 569 (Oct. 1979).

Linda Bird Francke in her research on the effects of abortion on men concluded that "for the ones who care, the effects can be devastating." She cites repressed emotions in men following abortion which may reveal itself in various ways. For example, one man feared that a living son would be sacrificed for the aborted one; another felt sadness when he heard a certain song that was connected to the abortion. Another man experienced periodic impotence and depression. He said, "When the eight year old son of a close friend was killed in a car accident, I went to pieces. It took a while to realize that my despair was the grief over the loss of my child, whom I had never had a chance to grieve for and bury. I'm still not sure I have buried that fetus." Francke, *Abortion and Men*, Esquire 59 (Sept. 1978). *See also* Francke, *The Ambivalence of Abortion* (1978).

Researchers at the Tavistock Clinic in London have studied the effects of abortion on males in families. In one instance a man whose job had been rendered obsolete and who had experienced a loss of status and position became increasingly withdrawn and unable to function. He and his wife had previously aborted a child after genetic counseling but they had never grieved the loss nor faced their suppressed anger. Once this was accomplished he was able to resume his search for employment. In another instance, a husband with low self-esteem who came from a working class family married a woman from a wealthy family. During their courtship a child was

conceived and aborted. The wife had very little reaction to the abortion. However, for many years the husband interpreted her insistence on abortion as evidence of him being unworthy to father her first child. Inability to conceive following abortion was also identified in another instance. A wife had undergone a second trimester abortion and for ten years afterward the couple was unable to conceive although there was no physical cause to explain it. The wife blamed the husband for making her do it and the husband described how for ten years he had carried the guilt and horror of what the abortion had done to their marriage. After therapy the wife conceived and delivered a healthy baby. However, additional therapy was necessary when the wife turned against the child and had a severe breakdown. Mattinson, *The Effects of Abortion on a Marriage*, in *Abortion: Medical Progress and Social Implications*, Ciba Foundation Symposium 115 (1985), p. 165-177.

The loss of the opportunity for fatherhood is not necessarily limited to the immediate abortion but may impair or prevent future childbearing or relationships with one's child.

CONCLUSION

Until the male spouse at least has a legal right to notice prior to abortion his experience with abortion will continue to be an exercise of impotency regardless of his religious beliefs, personal convictions, feelings or desire for paternal responsibility. This is particularly true for those who have not at least been notified by their wives in advance.

Married couples engaging in sexual activity out of which prenatal life may develop, are engaging in an activity that is both morally and legally recognized. Harris, *Fathers and Fetuses*, 96 Ethics 594 (April, 1986). A statute requiring notice to a husband prior to abortion merely recognizes that a husband has an interest in having a child perhaps an only child and which may be unmatched by any other interest in his life. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1975) (White, J., concurring in part, dissenting in part).

For all of the compelling reasons set forth above, the judgment of the Court of Appeals that the spousal notification statute was unconstitutional must be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1991

PLANNED PARENTHOOD OF
SOUTHEASTERN PENNSYLVANIA,
et al.,
Petitioners and Cross-Respondents,

vs.

ROBERT P. CASEY, et al.,
Respondents and Cross-Petitioners.

ON CERTIORARI TO THE UNITED
STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE OF "AMERICA 21, FAMILY VALUES FOR THE TWENTY-FIRST CENTURY" AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS AND CROSS-PETITIONERS

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MOTION FOR LEAVE
TO FILE BRIEF AMICUS CURIAE
IN SUPPORT OF RESPONDENTS
AND CROSS-PETITIONERS

America 21-Family Values for the 21st Century, respectfully moves this Court, pursuant to Court Rule 36.3, for leave to file the accompanying brief amicus curiae in support of Robert P. Casey, et al., Petitioners and Cross-Respondents. The consent of the parties has been sought, but was not granted. America 21 is a national organization formed to promote education and encourage activism concerning family values and issues at the local, state and federal levels of government. One of its primary goals is information and education to achieve legal protection for unborn children. The organization works through a grassroots network established through Christians of several denominations.

The accompanying brief amicus uniquely argues that Proclamation No. 5761, issued January 14, 1988 by President Ronald Reagan, ***declaring the unalienable personhood of the unborn from conception until natural death*** is the "law of the land." It is binding on the Court in this decision and is outcome determinative. The brief further argues relevant legal history of the law of nature, the unalienable right to life, the anti-slavery crusade of the 19th century that forged the "due process" and "equal protection" provisions of the Fourteenth Amendment to extinguish all property rights in mankind, and other arguments supporting the constitutional law as well as authorities cited by Proclamation No. 5761. These additional arguments are put forth as independent bases on which the Court might rest its decision, and it is the belief of amicus that no other party or

amicus will be presenting the information and arguments set forth in the brief.

Therefore, Amicus requests this Court to grant this motion and consider the accompanying brief in support of Respondents and Cross-Petitioners.

Respectfully submitted,

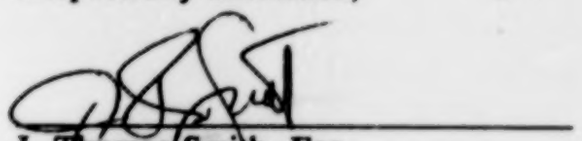

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTEREST OF AMICUS	xiii
SUMMARY OF ARGUMENT	1
ARGUMENT	4
I. PRESIDENTIAL PROCLAMATION NO. 5761 DECLARING THE "UNALIENABLE PERSONHOOD OF EVERY AMERICAN FROM THE MOMENT OF CONCEPTION TO DEATH" IS THE LAW OF THE LAND	4
A. President Reagan's Proclamation No. 5761	4
B. "Unalienable Personhood From The Moment Of Conception" Is A Nonjusticiable Political Statement Of Positive Law Binding On This Court And The Entire Land Until Otherwise Lawfully Changed	6
1. Presidential Proclamation No. 5761 Is Law In The Face Of Congressional Silence	6
2. Ample Constitutional and Other Legal Authority Supports Proclamation No. 5761	8
3. The Political Decision of Proclamation No. 5761 Is Nonjusticiable	10
4. Proclamation No. 5761 Tacitly Overrules Roe v. Wade	11

Page

II. THE UNALIENABLE RIGHT TO LIFE DEFINED IN THE LAW OF NATURE, THE DECLARATION OF INDEPENDENCE AND THE HISTORY OF THE FOURTEENTH AMENDMENT IS "SO ROOTED IN OUR TRADITIONS AND CONSCIENCE AS TO BE FUNDAMENTAL" AND REQUIRES A DETERMINATION THAT AN UNBORN CHILD IS A "PERSON" UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS 12

A. The Moral Laws of Nature and Nature's God Are Contextually Written into The Declaration of Independence and The Constitution Which Protect The Unalienable Right to Life of The Unborn Child 13

1. The Scriptural Authority of the Law of Nature's God 13

2. Secular Recognition of The Law of Nature 15

   a. Sir Edward Coke (1552-1634) 15

   b. Blackstone (1723-1780) 15

   c. John Locke (1632-1704) 16

   d. Other Recognitions of The Law of Nature 17

Page

3. Codification in Our Seminal Political Documents -- The Declaration of Independence and The Constitution 18

B. The Anti-Slavery Crusade of The Abolitionists Through The 19th Century Reaffirmed The Unalienable Right to Life in The Law of Nature and The Declaration of Independence and Demonstrates That an Unborn Child Cannot Be Chattel and Is A Person at Conception Under The "Due Process" and "Equal Protection" Clauses of The Fifth and Fourteenth Amendents 20

C. New Scientific Evidence and Revelations 25

III. THE UNALIENABLE PERSONHOOD OF UNBORN CHILDREN DEMANDS THAT THE CHALLENGE BY PETITIONERS TO THE PENNSYLVANIA STATUTES BE REJECTED 28

CONCLUSION 29

ENDNOTES 31-38

APPENDIX A-Proclamation No. 5761 39

TABLE OF AUTHORITIES

	Page
CASES	
Brown v. Board of Education, 347 U.S. 483 (1954)	29, 33
Calvin v. Smith and Another, Trin. 6 Jac. 1.7 Coke's Reports	15
Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857)	29
Fiallo v. Bell, 430 U.S. 787 (1977)	10
Green v. Bock Laundry Machine Co., 490 U.S. 504 (1989)	12
Independent Meat Packers Ass'n. v. Butz, 526 F.2d 228 (8th Cir. 1975), ***cert. denied***, Consumer Fed. of Am. v. Butz, 424 U.S. 966 (1976)	8
In Re Neagle, 135 U.S. 1 (1890)	9
Letter Carriers v. Austin, 418 U.S. 264 (1974)	8
Mathews v. Diaz, 426 U.S. 67 (1976)	11
National Labor Relations Board v. Bell Aerospace Co., 416 U.S. 267 (1974)	12
Oregon v. Mitchell, 400 U.S. 112 (1970) (Brennan, White and Marshall, J.J.)	8

	Page
Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158 (1989)	12
Roe v. Wade, 410 U.S. 113 (1973)	1,***passim***
Sea-Land Services, Inc. v. Interstate Commerce Comm'n., 738 F.2d 1311 (D.C. Cir. 1984)	5
Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986)	27
United States v. Sandoval, 231 U.S. 28 (1913)	10
United States v. Smith, 342 U.S. 225 (1952)	8
University of California Regents v. Bakke, 438 U.S. 265 (1978)	34
Webster v. Reproductive Health Services, 492 U.S. 490 (1989)	5
Youngstown Sheet and Tube v. Sawyer, 343 U.S. 579 (1952)	7,8

Page

SEMINAL DOCUMENTS

U.S. Const. art. II, § 3 — 9

U.S. Const. amend. V — 2,*passim*

U.S. Const. amend. XIV — 1,*passim*

Declaration of Independence (1776) — 2,*passim*

STATUTES AND PROCLAMATIONS

Emancipation Proclamation (1865) — 8, 29

Proclamation No. 5761, 3 C.F.R. 3-4 (1988 Comp.), 53 Fed. Reg. 1464 (1988) — 1,*passim*

Documents to be Published in the Federal Register:

44 U.S.C. §1505(a)(1) (1989) — 6

C.F.R. AND FED. REG

Proclamation No. 5761, 3 C.F.R. 3-4 (1988 Comp.) — 5,9

Proclamation No. 5761, 53 Fed. Reg. 1464 (1988) — 5

Page

HEARINGS

Prepared statement of Rosenblum, The Origins and Evolution Of National Policy 200-225 (1978), as cited in The Human Life Bill: Hearings on S. 158 Before The Subcommittee on Separation Of Powers, Senate Committee on The Judiciary, 97th Cong., 1st Sess. 475 (1981) — 25

The Transactions Of The American Medical Association, 12 American Medical Association 75 (1859), as reported in the Human Life Bill - S. 158: Report by the Subcommittee on Separation of Powers, Senate Committee on the Judiciary, 97th Congress, 1st Sess. 25 (1981) — 24-25,26

TREATISES, BOOKS, ETC.

G.T. Amos, Defending The Declaration (1989) — 15,18

Sir William Blackstone, Commentaries on the Laws of England (1765, ed.)(St. George Tucker, ed. Philadelphia: William Young Birch and Abraham Small, 1803; reprint, South Hackensack, N.J. Rothmary Reprints, Inc., 1969) — 16,32

	Page
Julian P. Boyd, The Papers Of Thomas Jefferson Vol. 1, 1770-1776 (1950)	18
Martin Diamond, "The Declaration and The Constitution: Liberty, Democracy, and the Founders," The Public Interest, No. 41, Fall, 1975	20
VIII Writings Of Thomas Jefferson 310 (P. Ford. ed. 1897)	31
Howard J. Graham, Every Man's Constitution (1968)	21
Anti-Slavery Impulse, 1830-1844	21
"Philanthropist," July 1, 1836	22
Charles Olcott, Two Lectures On The Subject Of Slavery and Abolition at 24-29	22
1 Anti-Slavery Record 8 (1835)	23
Weld, The Power Of Congress Over The District Of Columbia 41 (1838)	23
Cong. Globe, 39th Cong., 1st Sess. 542 (1867)	24
Cong. Globe, 39th Cong., 1st Sess. 2766 (1866)	24
43 Cong. Reg. 412-414 (1894)	34

	Page
Jefferson, 1815; quoted by Maxfield, The Real Thomas Jefferson 404, referenced by John Eidsmore, Christianity and the Constitution (1987)	20
Dr. J. Lejeune, Davis v. Davis Testimony, 21 Child and Family 7 (1989)	27
Locke, Two Treatises of Government (Peter Laslett, ed., 1960) §§153-54	16
Planned Parenthood Federation of America Plan Your Children for Health and Happiness 1963, as cited by George Grant, Grand Illusions, The Legacy Of Planned Parenthood 73 (1989)	17
Glendon A. Schubert, Jr., The Presidency and The Courts 354 (1973)(comprehensive listing of Presidential Orders from 1919-1953)	9

Page

The Bible (Scripture)

Old Testament:

Genesis 1 — 14
Genesis 4:9 — 30
Exodus 20 — 14
Deuteronomy 5:17 — 14
Job 10:9, 11-13; 14:14-15 — 13
Psalm 139:13-16 — 13
Proverbs 6:16-19 — 14
Isaiah 49:1 — 13
Jeremiah 1:5 — 13
Jeremiah 2:34 — 30

New Testament:

Luke 1:15 — 14
Luke 1:41-44 — 14
Acts 10:34 — 14
Romans 1:20 — 14
Romans 2:11 — 14
Romans 2:14-15 — 14,15
James 1:17 — 22

A. Tourtellot, The Presidents on The Presidency 35 (1964) — 31

LAW REVIEW ARTICLES

Byrn, An American Tragedy: The Supreme Court on Abortion; 41 Fordham L.Rev. 807 (1973) — 32-33

Page

Dellapenna, The History of Abortions Technology, Morality, and the Law, 40 U.Pitt.L. Rev. 359 (1979) — 33

Destro, Abortion and the Constitution: The Need for a Life-Protective Amendment, 63 Calif.L.Rev. 1250 (1975) — 33

Levinson, Presidential Self-Regulation Through Rulemaking: Comparative Comments on Structuring The Chief Executive's Constitutional Powers, 9 Vand. J. Trans. Nat'l. L. 695 (1976) — 6

NEWSPAPERS AND OTHER SOURCES

Adamek, Policy Implications of Recent Polls on Abortion, NRL News, June 22, 1989 — 33

Bromer, Most In U.S. Favor Ban On Majority Of Abortions, Poll Finds, Boston Globe, Mar. 31, 1989, at A1 — 17

Medical Hopes and Abortion Policies, Chicago Tribune, Mar. 25, 1990, Zone C at 2 — 35

More U.S. Curbs Urged in the Use of Fetal Tissue, N.Y. Times, Nov. 19, 1989, Sec. 1, at 1. — 35

	Page
NIH Skirts Ban on Transplants of Fetal Tissue, Wash. Times, Jan. 6, 1992, at A7	37
Lennart Nilsson, The First Days of Creation, Life Magazine, August, 1990, at 26	26
P.R. Newswire, Aug. 13, 1990 (Nexus, Exec./Allexe)	36
Shelton, Most Americans Think Abortion is Immoral, Los Angeles Times, Part I., Mar. 19, 1989, at 2	17
Tom W. Smith, Trendlets, Abortion After Webster, GSS News, September, 1990	17
Torres and Forrest, Why Do Women Have Abortions? 20 Family Planning Perspectives 169 (1988)	32
Wash. Post, Nov. 22, 1991, at A3	36

INTEREST OF AMICUS

America 21, Family Values for the Twenty-First Century, is a national organization formed to promote education and encourage activism concerning family values and issues at the local, state and federal levels of government. One of its primary goals is providing information and education to achieve legal protection for unborn children. The organization works through a grassroots network established through Christians of several denominations.

On its Board of Directors are a group of corporate leaders of national businesses, presidents of colleges and universities, administrator of a foundation, and pastors of some of the largest churches in different denominations including Southern Baptist, Presbyterian (p.c.a.), Churches of Christ, Pentecostal, and Interdenominational.

The family issues America 21 has impacted in the past are abortion, pornography, homosexuality, religious liberty, and parental involvement in education.

Nos. 91-744 and 91-902

In the Supreme Court of the United States

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, et al.,
Petitioners and Cross-Respondents,

vs.

ROBERT P. CASEY, et al.,
Respondents and Cross-Petitioners.

SUMMARY OF ARGUMENT

This case involves a review of certain provisions of Pennsyvania statutes alleged by the Petitioners and Cross-Respondents to violate a constitutional "right" to abortion. In Roe v. Wade, 410 U.S. 113 (1973), a majority of the Court held that unborn children are not "persons" entitled to protection by the Fourteenth Amendment to the Constitution and that a right to abortion exists under its penumbra.

Amicus submit that the real threshhold question -- the proper standard of review dispositive of the challenge, is: ***not*** whether there exists a constitutional ***right*** to abortion, but rather whether ***positive federal law*** already exists pursuant to President Reagan's Proclamation No. 5761 (granting recognition of ***personhood*** to unborn children) ***which prohibits abortion***? The Executive Branch has made a political decision to declare ***the unalienable personhood of***

every American from the moment of conception until natural death. This conflicts with no existing congressional legislation. The President acted in the face of Congress' silence and proclaimed that the unborn child ***from the moment of conception*** is a ***person*** for the purposes of the Fifth and Fourteenth Amendments which means that their lives cannot be terminated without "due process" of law. Moreover, the amicus brief alternatively contends that the right to life for the unborn is "so rooted in the traditions and conscience of our people as to be ranked as fundamental." Amicus urge this Court to overrule Roe v. Wade and declare that unborn children are ***persons*** entitled to constitutional protection from the moment of conception under the Fifth and Fourteenth Amendments.

The ***unalienable right to life*** for all human beings including the unborn child was developed and respected in the common law and woven into the fabric and heart of the Nation and its Constitution. This right had its source in the "laws of nature and nature's God" foundational to the Declaration of Independence. Under this law of nature as revealed by the law of God in Scripture, each unborn child has a human destiny and plan for their life prior to birth, is made in the image of God, and their personal protection is a sacred right. Under the canon law of the church, this destiny required the condemnation of all abortion independent of the question of when life began in the womb. Coke, Blackstone, Locke and others confirm that the life in the womb must be protected to the fullest extent of the law because it is ***unalienable*** -- it cannot be disposed of or destroyed by the arbitrary decision of another individual because it belongs to no other person, but to God.

The Declaration of Independence invokes the law of nature and nature's God as its authority, and affirms that "all

men are created equal" and endowed by their Creator with the unalienable right to life. The plain meaning of this language is that constitutional protection for every life vests when these rights are endowed by the Creator -- when the creation process of that individual begins at conception. Failure to provide this protection is a violation of the primary duty of our government.

The scope of protection to be afforded the unalienable right to life is exemplified by the 19th Century anti-slavery crusade which culminated in Congress enacting the "due process" and "equal protection" provisions of the Fourteenth Amendment. This crusade argued the law of nature and equal creation principles in the Declaration of Independence. Under the Fourteenth Amendment, any state law permitting or failing to prohibit the arbitrary taking of the life of the unborn child after conception ***treats the unborn as inhuman chattel***. It and all other such statutes permit a multibillion dollar trade in the lives of the unborn and are unconstitutional as well as immoral. The Fourteenth Amendment excludes no class of humanity from its equal protection of "persons". The protection required by the law of nature was accepted by nearly every state in the 19th Century when each ratified the Fourteenth Amendment, constituting proof of coverage of unborn persons from conception. It vests in every human being a right to life that cannot be held by another at any time after conception, except under due process protection.

The conflict between Proclamation No. 5761 and Roe v. Wade should be resolved by this Court overruling Roe and rendering a decision that affirms the "unalienable personhood from conception" proclamation of the President as an elected representative of the people. Failure to do so will permit and encourage continuing state law enactments

that violate this fundamental right to life. Justice and its orderly administration urge this Court to deny the challenge to the Pennsylvania statutes and affirm the Presidential Proclamation's statement of law that the constitutional protection of the ***unborn child from conception until natural death*** exists under the Fifth and Fourteenth Amendments.

ARGUMENT

I. PRESIDENTIAL PROCLAMATION NO. 5761 DECLARING THE "UNALIENABLE PERSONHOOD OF EVERY AMERICAN FROM THE MOMENT OF CONCEPTION TO NATURAL DEATH" IS THE LAW OF THE LAND

A. President Reagan's Proclamation No. 5761

On January 14, 1988, President Reagan issued a proclamation entitled, "National Sanctity of Human Life Day," which states in part:

> [I]n legislation introduced at my request in the First Session of the 100th Congress, I have asked the Legislative Branch to declare the "humanity of the unborn child and the compelling interest of the several states to protect the life of each person before birth." This duty to declare on so fundamental a matter falls to the Executive as well. By this Proclamation, I hereby do so.
>
> NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, by virtue of the authority vested in

> me by the Constitution and the laws of the United States, do hereby proclaim and declare ***the unalienable personhood of every American, from the moment of conception until natural death***, and I do proclaim, ordain, and declare that I will take care that the Constitution and laws of the United States are faithfully executed for the protection of America's unborn children... .

Proclamation No. 5761, ¶¶ 6-7, 3 C.F.R. 3-4 (1988 Comp.), 53 Fed. Reg. 1464 (1988)(emphasis added)(annexed as Appendix "A") [hereinafter Proclamation ¶ ____ to 3 C.F.R. ____].

Proclamation No. 5761 significantly declares ***the unalienable personhood of every American from the moment of conception until natural death*** to be "a cardinal principle of all just law, [t]he God-given, unalienable rights possessed by every human being." Proclamation ¶ 1, 3 C.F.R. 3 (1988 Comp.). The "law" that is proclaimed here is unmistakable and unambiguous from the text of Proclamation itself. Sea-Land Services, Inc. v. Interstate Commerce Comm'n., 738 F.2d 1311, 1314 (D.C. Cir. 1984). Furthermore, Proclamation ¶¶ 1, 4, 6-7 declare that the right of "personhood" which exists from the date of conception to be an "unalienable right" and, therefore, the express wording of the Proclamation controls over characterization of the right to an abortion as a "fundamental right" or a "limited constitutional right," Webster v. Reproductive Health Services, 492 U.S. 490, 520 (1989). Proclamation ¶ 4 expressly provides that the "unalienable right to life" from conception to death is protected against federal and state government deprivation without "due process" of law since it specifically grounds the right on the Fifth and Fourteenth Amendments.

B. "Unalienable Personhood From The Moment Of Conception" Is A Nonjusticiable Political Statement Of Positive Law Binding On This Court And The Entire Land Until Otherwise Lawfully Changed

Proclamations are public law -- a legal act by the Executive Branch of the Government. There is no difference between a Proclamation and an Executive Order, except that the latter are directed to subordinates while Proclamations are issued to the public. ***See generally***, Levinson, Presidential Self-Regulation Through Rulemaking: Comparative Comments on Structuring The Chief Executive's Constitutional Powers, 9 Vand. J. Trans. Nat'l. L. 695, 710-12 (1976).

Presidential proclamations which are ***published*** in the Federal Register, such as Proclamation No. 5761, have "general applicability" and therefore the imprimatur of law pursuant to an act of Congress, 44 U.S.C. §1505(a)(1) (1989). Consequently, the ***"unalienable personhood of every American from the moment of conception until natural death"*** declared by Proclamation No. 5761 is a statement of positive federal law applicable to the entire country.

1. Presidential Proclamation No. 5761 is Law in the Face of Congressional Silence

No law of Congress exists which either grants or denies "the unalienable personhood of every American from the moment of conception until natural death." Congress has been stalemated as the debate about abortion and protection of the unborn rages. But, the First Branch of government has taken the initiative and spoken: Presidential Proclamation No. 5761.

In the absence of either a congressional grant or denial of authority, there is what Justice Jackson has referred to as a "zone of twilight in which he [the President] and Congress may have concurrent authority." Youngstown Co. v. Sawyer, 343 U.S. 579, 637 (1952)(Jackson, J. concurring)(interpreting a Presidential proclamation which conflicted with Congress' constitutional authority over interstate commerce) [hereinafter Youngstown Co.]. Justice Jackson went on to say:

> Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

Id. at 637. Proclamation No. 5761 was authoritatively issued in exactly such circumstances.

Justice Jackson wisely observed: "Presidential powers are not fixed, but fluctuate, depending upon their disjunction or conjunction with those of Congress." Id. at 635. The Court can take judicial notice that ***"the unalienable personhood of every American from the moment of conception until natural death"*** is a statement of positive law which was the result of a conscious political choice or decision by President Reagan. It enunciates the public policy of the United States on a highly debatable issue and, therefore, legally determines that ***conception*** is when "persons" are entitled to the constitutional "due process" and "equal protection" guarantees of the Fifth and Fourteenth Amendments. Consequently, when Congress is silent and

has not legislated, the President by proclamation may declare profound changes in the legal status of citizens, as did President Lincoln in the Emancipation Proclamation. Although questions have been raised, the Emancipation Proclamation has never been ruled by any court to have been an invalid exercise of Presidential authority by Lincoln and still today stands as one of the momentous events of American history. ***See, e.g.***, Oregon v. Mitchell, 400 U.S. 112, 253 (1970)(Brennan, White and Marshall, J.J.); Youngstown Co. v. Sawyer, 343 U.S. 579, 685 (1952)(Vinson, C.J. dissenting). Like Executive Orders, Letter Carriers v. Austin, 418 U.S. 264, 273, n.5 (1974), Presidential Proclamations become the law of the land, United States v. Smith, 342 U.S. 225, 227 (1952).

Indeed, Proclamation No. 5761 by President Reagan is just as sweeping as that of President Lincoln in freeing the slaves, both of which guaranteed ***life to humans*** who were defenseless and oppressed. Strongly held opinions on each side of the issue existed. Presidents, in equally critical times in our Nation's existence, have moved politically by way of proclamation to change the course of history.

2. Ample Constitutional and Other Legal Authority Supports Proclamation No. 5761

Independent Meat Packers Ass'n. v. Butz, 526 F.2d 228, 235 (8th Cir. 1975), ***cert. denied***, Consumer Fed. of Am. v. Butz, 424 U.S. 966 (1976), invalidated a Presidential proclamation because it cited no specific source of authority other than generically "the Constitution and laws of the United States." However, Proclamation No. 5761 enumerates eight different bases for its declaration of the ***"unalienable personhood of every American from the moment of conception until natural death"*** as law. They are: 1) the Declaration of Independence; 2) the Constitution (Article II, Section 3) that every President is sworn to preserve, protect and defend; 3) the Fifth Amendment; 4) the Fourteenth Amendment; 5) our history; 6) our heritage; 7) our concepts of justice; and 8) recent medical and scientific evidence. Proclamation ¶¶ 4-6, 3 C.F.R. 3 (1988 Comp.). This Court has unequivocally held that the duty of the President--pursuant to the Constitution, Article 2, Section 3, which obligates him to "take care that the laws be faithfully executed," is not limited to the express laws of Congress and express terms of treaties, but includes "the rights, duties and obligations growing out of the Constitution itself...and all the protection implied by the nature of the government under the Constitution." In Re Neagle, 135 U.S. 1, 64 (1890).

Thus, the scope of the Executive Power extends to the Constitution, its interpretation and execution. Otherwise the President's oath of office to "preserve, protect and defend the Constitution" is meaningless. Consequently, as an independent branch of the government, the Executive is obliged to make his own interpretation of the meaning of the Constitution on matters committed to that office.[1]

It is the duty of the courts to uphold the constitutionality of the President's action. Great weight is accorded the President's own interpretation and construction of his powers. The courts will assume that the President has complied with the requirements of the law. Glendon A. Schubert, Jr., The Presidency and The Courts 354 (1973)(comprehensive listing of Presidential Orders from 1919-1953).

3. The Political Decision of Proclamation No. 5761 Is Nonjusticiable

The words of this Court in United States v. Sandoval, 231 U.S. 28, 46-47 (1913) (deferring to the Executive Branch's decisions regarding Native Americans) rings familiar with respect to the class of unborn children: "The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell," and, "In reference to all matters of this kind, it is the rule of this court to follow the Executive and other political departments of the Government...."

Drawing lines of just when constitutionally protected life begins -- trimester or whenever, is akin to the immigration cases where Congress or the President are involved in the "inevitable process of 'line drawing'," Fiallo v. Bell, 430 U.S. 787, 795, n.6 (1977)(hereinafter Fiallo), where intentional choices are made which provide some aliens preferential privileges and not to others. There is more than just a similitude between "aliens" and "unborn children". Fiallo holds that where policy matters are involved and

> a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary....

Id. at 796. Significantly, Roe v. Wade can be overruled simply on this ground alone: the Roe Court impermissibly

intruded into the political arena and legislated a solution to a problem which was best left to the other branches of government -- the Executive or Legislature. Clearly, five of the six standards listed in Mathews v. Diaz, 426 U.S. 67, 82, n.21 (1976)(any one of which will justify abstention), exist in the case at bar. First, the pro-abortion contention that deciding when human life "begins" is inexorably tied to one's opinion more than empirical fact, evidences that prominent on the surface of this case is a political question which constitutionally and textually is committed to another coordinate political department. Proclamation No. 5761 was self-executing by its own terms and became law since Congress failed to respond with enacted legislation. Second, there may be lacking judicially discoverable standards to resolve this issue -- although Amicus in Section II provides what we believe are sufficient supporting histrionics. Third, the controversy by its very nature lends itself to a policy determination by either the President or Congress, that is, the exercise of nonjudicial discretion. Fourth, the passage of time demonstrates the truth that the prior attempt of the Court in Roe v. Wade to provide a solution has not worked as a practical matter. And fifth, the existence of Proclamation No. 5761 by President Reagan and its decisive pronouncement of law that ***"the unalienable personhood of every American from the moment of conception until natural death"*** clearly presents the need for unquestioning adherence to a political decision ***already made***. Thus, for any one of these five reasons, judicial abstention is warranted.

4. Proclamation No. 5761 Tacitly Overrules ***Roe v. Wade***

In 1988, ***"the unalienable personhood of every American from the moment of conception until***

natural death" of Proclamation No. 5761 became the lawfully declared political determination of President Reagan as law. Therefore, any potential or actual conflict with the 1973 decision of Roe v. Wade must yield in favor of Proclamation No. 5761 in much the same way that congressionally enacted law, contrary to previous Court rulings, prevails. Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158, 167 (1989); Green v. Bock Laundry Machine Co., 490 U.S. 504, 513 (1989); National Labor Relations Board v. Bell Aerospace Co., 416 U.S. 267, 278 (1974).

The underlying policy reason for such deference by the Judiciary can be traced to the traditional role of the President and the Congress as elected representatives of the people to decide major political questions, especially those with serious constitutional law dimensions. This policy consideration and the authorities cited below require the Court to defer to the wording of Proclamation No. 5761 that ***life begins at conception for every American*** and overrule Roe v. Wade.

II. THE UNALIENABLE RIGHT TO LIFE DEFINED IN THE LAW OF NATURE, THE DECLARATION OF INDEPENDENCE AND THE HISTORY OF THE FOURTEENTH AMENDMENT IS "SO ROOTED IN OUR TRADITIONS AND CONSCIENCE AS TO BE FUNDAMENTAL" AND REQUIRES A DETERMINATION THAT AN UNBORN CHILD IS A "PERSON" UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS

The broad sweep of the provisions of the Fourteenth Amendment has provoked considerable debate about meaning and have led historians and scholars to look beyond the usual contemporaneous sources. Amicus contends with several prominent historians that the anti-slavery crusade of 1830-1844 developed all the constitutional dialogue and articulation of purposes that explain the intent of the framers and the meaning of the Amendment. Out of this dialogue can be traced a continual reference to an unalienable right to life that began its formulations in a "higher law" preceding the formation of the Nation, but preserved by the founders in its documents. The brief begins with the earlier developments to show how the unalienable right to life is indelibly woven into the fabric and heart of the Nation, its Constitution and the Fourteenth Amendment.

A. The Moral Laws of Nature and Nature's God Are Contextually Written into The Declaration of Independence and The Constitution Which Protect The Unalienable Right to Life of The Unborn Child

1. The Scriptural Authority of the Law of Nature's God

The historical teaching of the Church taught a consistent condemnation of abortion independent of the question of the "beginning" of life because of the destiny of the conceptus. The law of nature's God in scripture clearly establishes the creation of the personhood of each individual in the womb. By revelation, David (Psalm 139:13-16), Job (Job 10:9, 11-13; 14:14-15), Isaiah (Isaiah 49:1) and Jeremiah (Jeremiah 1:5) all affirm that God created them in the womb, and that there existed a call on and a plan for their lives before birth.

John the Baptist received the baptism of the Holy Spirit in the womb. Luke 1:15. His mother, Elizabeth, received a visit from her cousin, Mary, just after she had conceived Jesus by the Holy Spirit. On Mary's arrival, the most dramatic declaration of ***personhood at conception*** in history occurred: After the embryo -- Jesus -- in Mary's womb entered the room, the six months old unborn child -- John the Baptist -- in Elizabeth's womb "leapt for joy" and Elizabeth declared: "Blessed art thou among women...the Mother of my Lord...." Luke 1:41-44.

Scripture also declares that God is no respecter of persons (Romans 2:11; Acts 10:34) and all are equal because they are created in the image and likeness of God (Genesis 1). Consequently, the person created is sanctified or made "sacred" in the womb because it belongs to God and has a human destiny established before birth. Premeditated killing of a life in the process of creation is a violation of the Mosaic law of Exodus 20 and Deuteronomy 5:17. Proverbs 6:16-19 also declares that the Lord hates hands that shed innocent blood. In this passage there need be no other proof of life than that of innocent blood and its shedding by another.

These passages define a framework of principles of physical and moral law that the Scriptures also declare are revealed to all mankind. The Apostle Paul affirmed that the moral law of God was written on the hearts of unbelievers (Romans 2:14-15) and was set in motion at the creation of all nature that bears witness to its content (Romans 1:20). Consequently, the teaching of the laws of nature's God revealed by the Scripture is that whether one is a Christian, Buddhist, Moslem, or Jew, the law of nature offers a general revelation of creation and its principles that are written on the heart of each individual.

2. Secular Recognition of The Law of Nature and the Law of Nature's God

a. Sir Edward Coke (1552-1634)

The Declaration of Independence referenced the "laws of nature" and "nature's God", using terminology that had its antecedents in the British common law and before that in the canon law of the Catholic church. The law of nature was the eternal moral law governing the universe -- a technical term for "creation law" -- the original plan purposed by Almighty God. G.T. Amos, Defending The Declaration 41 (1989). Sir Edward Coke, in Calvin's case, defined the law of nature as

> that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction, and this is lex aeterna, the moral law...And by the law; written with the finger of God in the heart of man were the people of God a long time governed before the law was written by Moses, who was the first reporter or writer of law in the world....

Calvin v. Smith and Another, Trin. 6 Jac. 1.7 Coke's Reports, 1 (referencing Romans 2:14). Using the writings of the Apostle Paul in Romans, chapter 2 (the law of the gentile nations conforms to the law of nature), Coke defined the law of God as "one" with the law of nature.

b. Blackstone (1723-1780)

One of the most widely read contemporaries of the drafters of the Declaration of

Independence and the framers of the Constitution was Sir William Blackstone, author of Commentaries on the Laws of England (1765). Blackstone affirmed the parallel equality of "the law of nature" (the moral law governing nature and inscribed on the heart of man) and the "law of God" (the revelation of the same law in scripture). Sir William Blackstone, Commentaries on the Laws of England (1765, ed.)(St. George Tucker, ed. Philadelphia: William Young Birch and Abraham Small, 1803; reprint, South Hackensack, N.J. Rothmary Reprints, Inc., 1969), 1:41-42 [hereinafter Blackstone, Commentaries].[2]

Where the "right to life" was concerned, Blackstone and his contemporaries admitted no equivocation or conflict, and reflected contemporary thinking that the right was unalienable, and its arbitrary taking a homicide. Blackstone, Commentaries at 133.

c. John Locke (1632-1704)

This sovereignty of the revealed law was also emphasized by another British philosopher and political theorist having a profound impact on the framers of the Constitution. Locke also recognized the "law of nature" and the "law of God" as two statements of the same law.

Locke specifically denied that fathers or mothers have a right over the lives of their children: "[y]et this [heavenly] Fatherhood is such an one as utterly excludes all pretense of Title in Earthly Parents; for he is King because he is indeed Maker of us all, which no parents can pretend to be of their children." John Locke, Two Treatises of Government (Peter Laslett, ed., 1960), §§153-54, p. 197[hereinafter Locke]

Governments were created to secure these fundamental rights of liberty and life. Locke at §57.

d. Other Recognitions of The Law of Nature or Creation Law

Several examples demonstrate that this law of nature is written on the hearts of mankind, regardless of their religious persuasion or lack of it or where they stand in the abortion debate. In 1963, a Planned Parenthood booklet stated that "an abortion kills the life of a baby after it has begun. It is dangerous to your life and health." Planned Parenthood Federation of America, Plan Your Children for Health and Happiness 1963, as cited by George Grant, Grand Illusions, The Legacy Of Planned Parenthood 73 (1989). The National Opinion Research Center, a non-profit polling organization, has been asking the same questions since 1965 that focus on the circumstances under which the law should permit abortions. Its polling demonstrates a consistent public opinion held by large majorities of Americans (75% to 90%) that the law should permit legalized abortion only in the "hard cases" -- to protect the mother's life, rape, incest, etc., representing less than 2% of all abortions today. Tom W. Smith, Trendlets, Abortion After Webster, GSS News, September, 1990[3]. As a 1989 headline of the Boston Globe (a strident pro-abortion newspaper) reported concerning its own poll: Bromer, Most In U.S. Favor Ban On Majority Of Abortions, Poll Finds, Boston Globe, Mar. 31, 1989, at 1. These opinions are evidence of the lex aeterna -- the moral law. A Los Angeles Times poll about the same time concluded: "Most Americans personally consider abortion to be immoral -- in fact, 'murder'." Shelton, Most Americans Think Abortion is Immoral, Los Angeles Times, Part I., Mar. 19, 1989, at 2.[4]

3. Codification in Our Seminal Political Documents -- The Declaration of Independence and The Constitution

By the time Jefferson penned the Declaration of Independence, the unalienable right to life and equal protection founded in the law of nature had become more than "self-evident", they were axiomatic. Amos at 78 and 79.

The Declaration references the "laws of nature and nature's God" as its primary authority:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness, that to secure these rights, governments are instituted among men....

1 U.S. Statutes at Large 1 (1856); ***see*** Boyd, The Papers of Thomas Jefferson Vol. 1, 1770-1776 (1950) at 427. Jefferson also declares in the present tense that "all men ***are*** created equal [emphasis added]". Consequently, the Declaration of Independence speaks of a present and continuing endowment of unalienable rights, including life, for each person. Jefferson reflected the thinking of his time that the rights to equality and life are endowed to each person. They are unalienable because they cannot be sold, traded or compromised without denying the image of God so created. To deny those rights in a man is to deny that he is a human being. Amos at 104.

Since Jefferson referenced the creation of each man, the question under the law of nature is not "When does life begin?" or "When does the unborn child become a person?" The question determining the ***vesting*** of this unalienable right to life becomes "When does the creation process for each man begin in the law of nature?" The answer is ***at conception***. Any law--state or federal--permitting an abortion after conception violates this law of nature of the Declaration, and is void, absent some compelling state interest of equal import to the life being taken.

The Declaration is not, of course, the Constitution itself, but was the only federal constitution that existed in the United States until the Articles of Confederation were ratified and its principles were subsequently incorporated in the Constitution. The equality protected by these documents is more accurately described by Martin Diamond, quoting Locke and Abraham Lincoln, who excluded most of the grounds usually given to deny protection for the unborn, in explaining the meaning of "created equal":

> That equal independence of each from all, as John Locke put it, forms a 'Title to Perfect Freedom' for every man...Thus Lincoln wisely interpreted the Declaration: 'The authors of that noble instrument...did not intend to declare all men equal in all respects. ***They did not mean to say all were equal in color, size, intellect, moral developments, or social capacity***.

> They defined with tolerable directness in what rights they did consider all men created equal--equal in certain unalienable rights, among which are ***life*** [emphasis added], liberty, and the pursuit of happiness.'

Martin Diamond, "The Declaration and The Constitution: Liberty, Democracy, and the Founders," The Public Interest, No. 41, Fall, 1975, pp. 39-55, at 46ff.

In a statement with prophetic import affirming his convictions on this point, Jefferson said: "We are not in a world ungoverned by the laws and the power of a Superior Agent. ***Our efforts are in His hand, and directed by it, and He will give them their effect in His own time.***" Jefferson, 1815; quoted by Maxfield, The Real Thomas Jefferson 404, referenced by John Eidsmore, Christianity and the Constitution at 227 (1987).

B. The Anti-Slavery Crusade of The Abolitionists Through The 19th Century Reaffirmed The Unalienable Right to Life in The Law of Nature and The Declaration of Independence and Demonstrates That an Unborn Child Cannot Be Chattel and Is A Person at Conception Under The "Due Process" and "Equal Protection" Clauses of The Fifth and Fourteenth Amendents

The Constitution, ratified by the States in 1789, was silent on the subject of slavery, just as it is silent on abortion. Because of this silence, the arguments surrounding the debates on slavery centered on the principles underlying the document--the laws of nature and nature's God. The arguments are instructive on the subject of abortion as well as the meaning of the Fourteenth Amendment that marked the culmination of the slavery debate.

One of the most comprehensive chronicles of the anti-slavery crusade is found in the writings of Howard J. Graham. Graham traces the origin of the anti-slavery movement by other historians from the earliest days of the Republic in New England and its basis in the principles of the Declaration. H. Graham, Every Man's Constitution 199-200 (1968)[hereinafter Graham].

In seeking the meaning of the Fourteenth Amendment, Graham acknowledges that his focus prior to 1942 had been on the judicial and congressional interpretations and specifically on the problems attendant to the scope and meaning of the word "persons". Subsequently his focus shifted. Graham cites with special emphasis the work begun in 1947 by the late Gilbert H. Barnes, and others as particularly insightful. In the Anti-Slavery Impulse, 1830-1844, Barnes chronicles the campaign of Theodore Weld, the author of numerous anti-slavery pamphlets, James G. Birney, an Alabama lawyer, and others. Their campaign was spawned out of the revival sweeping the nation at the time (1824-1827) led by Charles Grandison Finney.

State constitutional and legislative provisions discriminating against free black Americans and mulattos were numerous in the period 1800-1860. As described by Graham, the pro-slavery forces led by Calhoun and "positive good Deists" had fashioned a constitutional system which promised absolute protection for slavery and that ignored the constitutional reference to slaves as "persons," referring to them wherever possible as ***property***. Graham at 215.

The response by the anti-slavery crusade was essentially a quest for protection of the laws based upon the law of nature reflected in the Declaration of Independence.

There were three distinct features of the Abolitionist Crusade. First, the failure of the law to protect ***all*** humanity was addressed. Graham at 169. Slavery abrogated the unalienable right, privilege and responsibility of self-ownership by its treatment of men as ***chattel***.[5] Birney attributed the legal disabilities of the slaves to a single erroneous source - ***"the assumed right of property"*** in man. "Philanthropist," July 1, 1836, p. 2. Graham at 219. Another early convert of Weld's, Charles Olcott, an attorney, compiled a work entitled, "Two Lectures on the Subject of Slavery and Abolition," which clearly premised his argument just as did Locke and Jefferson on the higher law:

> ***The law of nature clearly...teaches the natural republican equality of all mankind***. Nature revolts at human slavery, is at open war with it...***The law of God renders all Natural Rights unalienable***...Liberty and right, being good and necessary for the welfare of mankind, are the gifts of God (citing James 1:17) and whatever power violates them, violates and abuses God's gift.

Charles Olcott, Two Lectures On The Subject Of Slavery and Abolition at 24-29; Graham at 203.

Second, as the campaign wore on, abolitionists were stoned, egged, tarred and feathered, tortured and hanged for even speaking against slavery. The campaign sought protection not only from governmental action, but also against private action and mob violence.

Third, in addition to concepts of protection, freedom and equality, Birney's letters in particular evidence extensive

use of the "due process" clause of the Fifth Amendment. A representative piece embodying the sweep of all the above features of the attack is found in a paragraph entitled "Natural Equality" appearing in the Anti-Slavery Record in 1835, that affirms the higher law concepts of the destiny of the conceptus and the Jeffersonian suggestion of pre-natal legal protection over the creation of each man. Graham at 170. Responding to the question of what the abolitionists meant by their statements in accord with the Declaration that "all men are created equal":

> That criminals shall not be deprived of their liberty? No. They mean according to the plain dictates of common sense that, ***in coming into this world and going through it*** [emphasis added], all men shall have an equal and fair chance to exercise all their powers of body and mind for their own happiness.

1 Anti-Slavery Record 8 (1835), Graham at 206.

Weld, in one of his most revered arguments, revealed what became the heart of the movement when he spoke of its purpose to protect all human beings in a way that foreshadows the campaigns for the unborn and the contention of this brief:

> To abolish slavery is to ***proclaim and enact that innocence and helplessness***...are entitled to legal protection...Protection is the ***CONSTITUTIONAL RIGHT*** of ***every human being***...who has not forfeited it by crime.

Weld, The Power Of Congress Over The District Of Columbia 41, 42 (1838)(emphasis added), Graham at 304.

The crucial sections of the Fourteenth Amendment were drafted by Rep. John A. Bingham, its primary sponsor, who received his anti-slavery theory during the Weld-Birney Crusade at Franklin College, and strongly believed in the need for the additional amendment.

The speeches of the sponsors stressed the broadest possible application of the Amendment to humanity. Echoing Weld, Bingham also said the rights guaranteed protected "every human being" (Id. at 1089) and that concerning due process protection, "the only question to be asked of a creature claiming its protection is this: ***Is he a man***?" Cong. Globe, 39th Cong., 1st Sess. 542 (1867). Senator Howard of Michigan, the Amendment's Senate sponsor, said that its provisions would protect the rights of "common humanity." (Cong. Globe, 39th Cong., 1st Sess. 2766 (1866)). Sensitive to the powers reserved to the states to regulate property and personal interests, but resolute concerning the purposes of the Amendment, Bingham nevertheless maintained that:

> You do not prohibit murder in the Constitution; ***you guarantee life in the Constitution***.

Id. at 432 (emphasis added).[6]

Even as the anti-slavery campaigns were sweeping the country, the state legislatures, beginning in 1821 in Connecticut, had begun the process of enacting criminal prohibitions against abortion. The American Medical Association, faced at that time with advances in medical knowledge, and mounted a campaign to protect the unborn throughout pregnancy because abortion was the "unwarranted destruction of the unborn life." The Transactions Of The

American Medical Association, 12 American Medical Association 75, 78 (1859), as reported in the Human Life Bill (S. 158): Report by the Subcommittee on Separation of Powers to the Senate Committee on the Judiciary, 97th Cong., 1st Sess. 25 (1981)(hereinafter HLB Report).

From 1848 to 1876, nearly all the states enacted statutes adopting the AMA position that termination of the pregnancy at any point should be a crime. HLB Report at 24. This evidence presents a compelling conclusion concerning the framers' intent:

> Since the 14th Amendment with its broad protection of the lives of all persons was ratified by state legislatures, while these very same legislatures, persuaded by newly discovered scientific and medical evidence, were extending the protection of the criminal law ***to encompass all the unborn from the time of conception or fertilization***, it is a fair assumption that the unborn were not excluded from those 'persons' covered by the Amendment.

Prepared statement of Rosenblum, The Origins and Evolution Of National Policy (emphasis added) 200-225 (1978), as cited in The Human Life Bill: Hearings on S. 158 Before The Subcommittee on Separation Of Powers, Senate Committee on The Judiciary, 97th Cong., 1st Sess. 475, 480 (1981)(hereinafter HLB Hearings).

C. New Scientific Evidence and Revelations

The general revelation of the "law of nature" has occurred through medical and scientific developments about

the beginning of created life in the womb. The campaign by the American Medical Association in the 1800's was based upon discovered evidence leading to a medical opinion that life began at conception. That organization led a campaign to conform the natural law of man in all the states to the law of nature. The Transactions Of The American Medical Association, 12 American Medical Association 75 (1859), as reported in the HLB Report.

In the 1960's, further revelation occurred in fetoscopy enabling photographs of the process of life in the womb. Some of the first pictures appeared in Life magazine in April of 1965, showing fetal development from 3-1/2 weeks to 28 weeks. In the August, 1990 issue of Life, these first pictures were referred to by the magazine as "sacred" images. The same Swedish photographer -- Lennart Nilsson -- published pictures from the moment of conception entitled on the cover, "How Life Begins" and "The first days of ***creation*** (emphasis added)." When asked the question of when life began, Nillson refused to identify a time and said the questioner should look at the pictures for the answer. Lennart Nilsson, The First Days of Creation, Life Magazine, August, 1990, at 26.

What Life magazine revealed pictorially, the medical and scientific community were discovering through advanced technology. In 1981, the U.S. Senate in Hearings on the Human Life Bill heard the testimony of 57 witnesses from the medical and scientific community which confirmed the "overwhelming agreement" that "conception marks the beginning of life of a human being." HLB Report at 24.

Dr. Jerome Lejeune, internationally known as the "dean of geneticists" who discovered the genetic cause of "Downs Syndrome," has offered numerous reports and

testimony concerning extraordinary advances in DNA research. His widely published report is that the beginning of life at conception has been inferred for over 50 years by scientific induction, but was only a hypothesis until 1985, when new developments in DNA research of the genetic code made this a demonstrable scientific fact. Dr. J. Lejeune, Davis v. Davis Testimony, 21 Child and Family 7 (1989)(French embryologist -- a recognized worldwide genetecist -- medical expert on when life begins)(hereinafter Lejeune).

This scientific discovery revealed by Dr. Lejeune is pivotal in a determination of personhood. As Justice White recognized in his Thornburgh dissent, "the fetus is an entity that bears in its cells all the genetic information that characterizes a member of the species homosapiens, and distinguishes an individual member of that species from all other," and "that there is no arbitrary line separating a fetus from a child or, indeed, an adult human being." Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 792 (1986)(White, J. dissenting). Dr. Lejeune reports that this unique personal identification -- the genetic code -- is present in the ***first cell created at conception*** and "the probability that you will find it identical in another person is less than one in a billion." Lejeune at 7. Dr. Lejeune concluded, "I would say that science has a very simple conception of man: ***as soon as he has been conceived, a man is a man***." Lejeune at 7 (emphasis added).

What is clear is that the framers of the Fourteenth Amendment and their prophetic anti-slavery brethren reaffirmed the constitutional and unalienable right to life. The Roe v. Wade ***focus*** on the "right of the ***mother*** to abortion" clearly is ***misplaced*** and has no historical support.

It is contrary to fundamental constitutional protection because it vests in the mother a right of arbitrary power over the life of the unborn child from inception until his or her birth. No other class of humanity is subject to such an arbitrary risk of being burned alive in saline solution or torn limb from limb in excruciating pain. It has spawned a multi-billion dollar industry that is paid handsomely to take the child's life and trade in his or her body parts. In most instances, if not sold for experimentation, the remains are heaped in trash bins and denied any right of burial afforded the rest of humanity.[7] In sum, it commits the fundamental constitutional offense of slavery contrary to the law of God -- it denies the image of God in man, desecrates what the Scriptures refer to as the temple of the Holy Spirit, and makes the "person" a mere ***chattel***. Any characterization of the unborn permitting the termination of their lives after conception and the beginning of the creation process commits ***this*** grave moral and constitutional offense.

III. THE UNALIENABLE PERSONHOOD OF UNBORN CHILDREN DEMANDS THAT THE CHALLENGE BY PETITIONERS TO THE PENNSYLVANIA STATUTES BE REJECTED

Proclamation No. 5761, declaring the unalienable personhood of the unborn from conception and their protection under the Fifth and Fourteenth Amendments, demands that the challenge by Petitioners to the Pennsylvania statutes fail. The Roe court specifically acknowledged that "[if] this suggestion of personhood is established, the [case alleging a right to abortion], of course, collapses, for the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment." 410 U.S. at 156-157. Amicus contends with Respondents that the sections of the Pennsylvania statutes challenged by Petitioners are

constitutional, but Amicus further urges that the decision of this Court affirm the ***unalienable personhood from conception*** of Proclamation No. 5761 to be a constitutional protection for the unborn child. The broad scope and impact such a decision would have on state regulation should lead this Court to follow Brown v. Board of Education, 347 U.S. 483, 495-96 (1954), where further proceedings were set and additional briefs submitted, to determine the scope of the due process and equal protection to be afforded the unborn children.[8]

CONCLUSION

What do the Afro-American slaves prior to the Civil War and today's American unborn children share in common? The highest court in the land declared both to be non-persons or ***chattel*** -- Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857) for slaves and Roe v. Wade for unborn children.

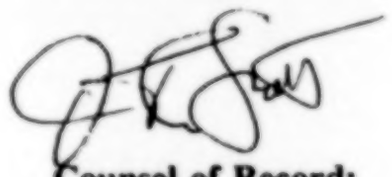
Significantly, the Executive Branch initiated the changes in the law to end both these injustices: President Lincoln's Emancipation Proclamation and President Reagan's Proclamation No. 5761. The situation was redeemed with a stunning series of cases advancing racial equality. Will humanity again be recognized with respect to unborn children -- surely the most helpless, innocent, and defenseless of all clients ever brought before this Court -- or will what masquerades as thinly disguised genocide continue unabated?

Both the lives of dehumanized slaves and unborn children have and are being involuntarily terminated (murdered), without their consent or due process of law, because both were legally classified by judicial decisions as

chattel. The killing fields are not in some distant land for whom foreign people are responsible, but right here in the United States for which each of us are personally accountable. The Scriptures tell us that "[i]n your skirts is found the blood of the souls of the poor innocents," Jeremiah 2:34, which cry out to God for help. Cain, after murdering Abel, asked the Lord: "[A]m I my brother's keeper?" Genesis 4:9. This is precisely the question which is faced today: will the Court declare the Constitution, and therefore each American, to be humanity's keeper as required by Proclamation No. 5761 which mandates protection for unborn children from the ***moment of conception*** to natural death?

Furthermore, America 21, Amicus, urges the Court to overrule Roe v. Wade and set this case for further briefing on the issue of the scope of due process and equal protection to be afforded the unborn children of America.

Respectfully submitted,



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ENDNOTES

1. Thomas Jefferson, in a letter concerning the Alien and Sedition Laws, wrote: "You seem to think it devolved on the judges to decide on the validity of the sedition law. But nothing in the Constitution has given them a right to decide for the Executive, more than to the Executive to decide for them. Both magistrates are equally independent in the sphere of action assigned to them." VIII Writings Of Thomas Jefferson 310 (P. Ford. ed. 1897).

   Echoing Jefferson are the words of Andrew Jackson:

   > The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath swears that he will support it as he understands it, not as it is understood by others.

   A. Tourtellot, The Presidents on The Presidency 35 (1964).

2. Blackstone identified the common source in revelation as the tie binding the symmetrical relationship between the laws of nature and its God. Blackstone makes a distinction between the "law of nature" and "natural law":

> Yet undoubtedly, the revealed law is...of infinitely more authority than what we call the natural law. Because one is the law of nature, expressly declared so to be by God Himself; the other is only what, by the assistance of human reason, we imagine to be that law.

Blackstone, Commentaries at 42.

3. For a survey of the reasons women have abortions, see Torres and Forrest, Why Do Women Have Abortions?, 20 Family Planning Perspectives 169 (1988). Amicus does not contend that exceptions to criminal abortion to save the life of the mother, rape, incest or any other reason are a part of the law of nature or are permitted within the scope of the due process and equal protection provisions of the Fifth and Fourteenth Amendments. Justice Blackmun, in Roe, maintained that lesser penalties for criminal abortion than those imposed for murder, and giving immunity to prosecution to women were inconsistent with equal protection requirements. Roe v. Wade, 410 U.S. at 158, n.54. Several law review articles have maintained that properly structured, exceptions to save the life of the mother were justified under necessity or self-defense theories, and a form of immunity to women through prosecutional discretion could be crafted consistent with equal protection requirements. ***See*** Byrn, An American Tragedy: The Supreme Court on Abortion, 41 Fordham L.Rev. 807

(1973), Destro, Abortion and the Constitution: The Need for a Life-Protective Amendment, 63 Calif.L.Rev. 1250 (1975); Dellapenna, The History of Abortions Technology, Morality, and the Law, 40 U.Pitt.L. Rev. 359 (1979).

Amicus contends that the essential component of an equal protection requirement is a criminal penalty commensurate with those imposed for the taking of the life of a person after birth. In an aggravated case involving malicious conduct, the penalty should be the same as for murder, although it might be reduced for an affirmative defense of diminished capacity. This requirement would achieve two purposes: first, it would provide a substantial prosecutorial tool in stopping "back alley" abortionists who would not be deferred by lesser penalties; and, second, it would prevent any exceptions that might be added by a state from being used by abortionists as an open door for business as usual. Amicus urges the Court to declare that at conception the unborn child is a "person" under the Fifth and Fourteenth Amendments and then set this case for further briefing and reargument on these issues of the scope of "due process" and "equal protection" as it did in Brown v. Board of Education, 347 U.S. 483, 495-96 (1954).

4. Several previous polls asking questions differently have established the percentage of the public believing abortion to be immoral from 40% to 65%. See generally, Adamek, Policy Implications of Recent Polls on Abortion, NRL News, June 22, 1989, at 10.

5. A good history of the inhumanity to Black Americans is summarized in University of California Regents v. Bakke, 438 U.S. 265, 389-90 (1978).

6. Similar positions were offered by Republican William Lawrence, who also traced his anti-slavery roots back to Franklin College before 1838 at the heart of the revival. In a speech of January 6, 1874 on the Supplementary Civil Rights Bill Number 796 (forbidding discrimination by hotels and carriers), Lawrence asserted that a state might deprive its citizens of their unalienable rights by prohibitory laws or a failure to protect any one of them and maintained that both individual invasions ***and state inaction*** were covered by the Fourteenth Amendment:

> Now there are two ways in which a state may undertake to deprive citizens of these absolute, inherent and unalienable rights: either by prohibition laws or by ***a failure to protect*** any one of them [emphasis added]. Id. at 1832. The object of this provision [the equal protection clause] is to make all men equal before the law...What the state permits by its sanction, having the power to prohibit, it does in effect itself.

43 Cong. Reg. 412-414 (1894). Imposing a due process provision on the states that was already imposed on the

federal government, the Fourteenth Amendment incorporated the unalienable right to life and made it binding on the states.

7. More than 1.5 million abortions occur each year in this country. Medical Hopes and Abortion Policies, Chicago Tribune, Mar. 25, 1990, Zone C at 2. A substantial business has developed in providing and selling aborted body parts and fetal tissue. More U.S. Curbs Urged in the Use of Fetal Tissue, N.Y. Times, Nov. 19, 1989, Sec. 1, at 1. In order for trafficking in aborted fetuses to be efficient and practical:

> Mr. Bardsley said, he looks for abortion clinics or doctors who use particular abortion methods. They cannot inject the fetus with saline, urea or other substances to kill it before the abortion because then the fetal tissue would not be usable. Instead, the abortion must be done by dilation and evacuation, in which the doctor essentially pulls the fetus out of the anesthesized woman.

Id. Another article stated:

> At the moment, researchers must get tissue from fetuses that have been fragmented by being sucked through a tube, a

process that kills the fetus as it removes it from the womb. In less than 10 percent of the time are the specimens usable for transplantation, James Bobb, Jr. said.

He then described a more successful technique used by some researchers in Europe, in which brain tissue is obtained by altering the procedure so as to suck out the head first.

'This is the real world. Techniques have been developed to harvest tissue from live fetuses, thereby killing the fetuses. NIH regulations would not prohibit this,' Bopp said.

Wash. Post, Nov. 22, 1991, at A3. P.R. Newswire, Aug. 13, 1990 (Nexus, Exec./Allexe) reported:

'Processing fees for tissue in good condition are giving doctors a financial incentive to schedule abortions so that scientists can get the exact tissue they want', Bopp claims. The processing fees range from $25 to more than $100 per fetus.

The University of Washington runs a 24-hour fetal collection and dispensal service. NIH Skirts Ban on Transplants of Fetal Tissue, Wash. Times, Jan. 6, 1992, at A7.

8. The principal contention of Amicus is that the challenge to the provisions of the Pennsylvania statutes before this Court by Petitioners and Cross-Respondents should fail based on Roe v. Wade that is no longer the law of the land because of the superceding provisions of Proclamation No. 5761. Part of the dilemma of this case is that only those sections of the Pennsylvania statutes challenged by Petitioners are before the Court. 18 Pa. Cons. Stat. §3211(a) is not before the Court, but would permit an abortion at any time up to 24 weeks gestation. Such a provision would be unconstitutional under the contention of this brief.

If it were to merely overrule Roe and approve the constitutionality of the questioned Pennsylvania statutory provisions and delay declaring the personhood and constitutional protection for the unborn child when a more appropriate case is presented, the Court will engage in what can only be described as a piecemeal review and solution. Such a decision would encourage continuing enactment of state statutes in violation of a fundamental constitutional right. President Reagan's Proclamation No. 5761, declaring as law the "unalienable personhood" from the moment of conception, has existed since 1988 and by this brief, is brought directly at issue before the Court. It and the nonjusticiability arguments should actually aid the Court by simplifying its decision making.

The difficulty of ruling on a part and not the whole is manifest when evaluating 18 Pa. Cons. Stat. §3203 (emergency exceptions to abortion), §3205 (informed consent), §3206(a) (parental consent), and §3209 (spousal notice). Each provision ***assumes the legality of abortion*** and can be construed not to grant any independent authorization of abortion inconsistent with the unalienable right to life. For example, the emergency exception under §3203 could be limited to those commonly accepted medical procedures performed with an intent to save the life of the mother and the unborn child, but where a death of the child may be consequence of the procedure. Under such an anlysis, §3203 is constitutional. On the other hand, 18 Pa. Cons. Stat. Ann. §3206(c) and (d), stating that a judge "shall authorize" the abortion of a child may be unconstitutional, but only if it can be construed to authorize abortions inconsistent with an unalienable right to life from the moment of conception without reference to other provisions such as §3211(a) not before this Court. Amicus contends that it cannot and, therefore, it and the other provisions before this Court are constitutional.

APPENDIX A

PROCLAMATION 5761 -- NATIONAL SANCTITY OF HUMAN LIFE DAY, 1988

January 14, 1988

By the President of the United States of America

A PROCLAMATION

America has given a great gift to the world, a gift that drew upon the accumulated wisdom derived from centuries of experiments in self-government, a gift that has irrevocably changed humanity's future. Our gift is twofold: the declaration, as a cardinal principle of all just law, of the God-given, unalienable rights possessed by every human being; and the example of our determination to secure those rights and to defend them against every challenge through the generations. Our declaration and defense of our rights have made us and kept us free and have sent a tide of hope and inspiration around the globe.

One of those unalienable rights, as the Declaration of Independence affirms so eloquently, is the right to life. In the 15 years since the Supreme Court's decision in Roe v. Wade, however, America's unborn have been denied their right to life. Among the tragic and unspeakable results in the past decade and a half have been the loss of life of 22 million infants before birth; the pressure and anguish of countless women and girls who are driven to abortion; and a cheapening of our respect for the human person and the sanctity of human life.

We are told that we may not interfere with abortion. We are told that we may not "impose our morality" on those who wish to allow or participate in the taking of the life of infants before birth; yet no one calls it "imposing morality" to prohibit the taking of life after people are born. We are told as well that there exists a "right" to end the lives of unborn children; yet no one can explain how such a right can exist in stark contradiction of each person's fundamental right to life.

That right to life belongs equally to babies in the womb, babies born handicapped, and the elderly or infirm. That we have killed the unborn for 15 years does not nullify this right, nor could any number of killings ever do so. The unalienable right to life is found not only in the Declaration of Independence, but also in the Constitution that every President is sworn to preserve, protect, and defend. Both the Fifth and Fourteenth Amendments guarantee that no person shall be deprived of life without due process of law.

All medical and scientific evidence increasingly affirms that children before birth share all the basic attributes of human personality -- that they in fact are persons. Modern medicine treats unborn children as patients. Yet, as the Supreme Court itself has noted, the decision in Roe v. Wade rested upon an earlier state of medical technology. The law of the land in 1988 should recognize all of the medical evidence.

Our Nation cannot continue down the path of abortion, so radically at odds with our history, our heritage, and our concepts of justice. This sacred legacy, and the well-being and the future of our country, demand that protection of the innocents must be guaranteed and that the personhood of the unborn be declared and defended

throughout our land. In legislation introduced at my request in the First Session of the 100th Congress, I have asked the Legislative branch to declare the "humanity of the unborn child and the compelling interest of the several states to protect the life of each person before birth." This duty to declare on so fundamental a matter falls to the Executive as well. By this Proclamation I hereby do so.

Now, Therefore, I, Ronald Reagan, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim and declare the unalienable personhood of every American, from the moment of conception until natural death, and I do proclaim, ordain, and declare that I will take care that the Constitution and laws of the United States are faithfully executed for the protection of America's unborn children. Upon this act, sincerely believed to be an act of justice, warranted by the Constitution, I invoke the considerate judgment of mankind and the gracious favor of Almighty God. I also proclaim Sunday, January 17, 1988, as National Sanctity of Human Life Day. I call upon the citizens of this blessed land to gather on that day in their homes and places of worship to give thanks for the gift of life they enjoy and to reaffirm their commitment to the dignity of every human being and the sanctity of every human life.

In Witness Whereof, I have hereunto set my hand this 14th day of January, in the year of our Lord nineteen hundred and eighty-eight, and of the Independence of the United States of America the two hundred and twelfth.

[Filed with the Office of the Federal Register, 10:50 a.m., January 15, 1988]

Note: The proclamation was released by the Office of the Press Secretary on January 15.

FOR ARGUMENT

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1991

PLANNED PARENTHOOD OF
SOUTHEASTERN PENNSYLVANIA, et al.,
Petitioners,

v.

ROBERT P. CASEY, et al.,
Respondents.

ROBERT P. CASEY, et. al.,
Petitioners,

v.

PLANNED PARENTHOOD OF
SOUTHEASTERN PENNSYLVANIA, et al.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE SOUTHERN CENTER FOR LAW & ETHICS AS AMICUS CURIAE IN SUPPORT OF ROBERT P. CASEY, ET AL.

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THIS CASE OFFERS THE COURT AN OPPORTUNITY TO RESTORE THE LEGITIMACY OF THE CONSTITUTIONAL RIGHT OF PRIVACY	4
II. THIS COURT PROPERLY PROTECTED THE REALM OF FAMILY LIFE FOR APPROXIMATELY ONE-HALF CENTURY PRIOR TO *ROE V. WADE*	5
III. *ROE V. WADE* AND ITS PROGENY ARE PART OF A NEW AND DIFFERENT AUTONOMY PRIVACY RIGHT WHICH HAS THREATENED TO DESTROY AND DISPLACE THE COURT'S PRIOR FIFTY-YEAR HERITAGE OF PROTECTING FAMILY PRIVACY	7
IV. THIS COURT'S PRIOR RECOGNITION OF THE "INHERENTLY DIFFERENT" AND INHERENTLY DESTRUCTIVE NATURE OF ABORTION AFFORDS SUFFICIENT REASON TO REMOVE ABORTION FROM THE REALM OF FUNDAMENTAL PRIVACY RIGHTS	12
V. THE OVERRULING OF *ROE V. WADE* WOULD NOT REQUIRE THE REVERSAL OF *GRISWOLD V. CONNECTICUT*	14
VI. THE OVERRULING OF *ROE V. WADE* WOULD NOT REQUIRE THE REVERSAL OF *EISENSTADT V. BAIRD* AND *CAREY V. POPULATION SERVICES, INTERNATIONAL*	17

TABLE OF CONTENTS — (Continued)

		Page
VII.	A CONSTITUTIONAL LINE CAN BE DRAWN BETWEEN CONTRACEPTION AND ABORTION	20
VIII.	THE OVERRULING OF *ROE V. WADE* WOULD NOT SANCTION STATE-COERCED ABORTION OR CONTRACEPTION	24
CONCLUSION		26

TABLE OF AUTHORITIES

Cases:	*Page*
Bartels v. Iowa, 262 U.S. 404 (1923)	5
Bowers v. Hardwick, 478 U.S. 186 (1986)	9, 12, 14, 19
Caban v. Mohammed, 441 U.S. 380 (1979)	26
Carey v. Population Servs. Int'l, 431 U.S. 678 (1977)	*passim*
Eisenstadt v. Baird, 405 U.S. 438(1972)	*passim*
Farrington v. Tokushige, 273 U.S. 284 (1927)	5
Griswold v. Connecticut, 381 U.S. 479 (1965)	*passim*
Harris v. McRae, 448 U.S. 297 (1980)	*passim*
Kovacs v. Cooper, 336 U.S. 77 (1949)	7
Loving v. Virginia, 381 U.S. 1 (1967)	1, 7, 13
Margaret S. v. Edwards, 488 F. Supp. 181 (E.D. La. 1980)	23
Meyer v. Nebraska, 262 U.S. 390 (1923)	*passim*
Michael H. v. Gerald D., 491 U.S. 110 (1989)	*passim*
Peckmann v. Thompson, Nos. 90-3334 & 90-3445 (7th Cir.)	1
Pierce v. Society of Sisters, 268 U.S. 510 (1925)	*passim*
Planned Parenthood v. Danforth, 428 U.S. 52 (1976)	11, 12
Poe v. Ullman, 367 U.S. 497 (1961)	2, 4, 8, 27
Roe v. Wade, 410 U.S. 113 (1973)	*passim*
Santosky v. Kramer, 455 U.S. 745 (1982)	11, 13, 26
Skinner v. Oklahoma, 316 U.S. 535 (1942)	*passim*

TABLE OF AUTHORITIES — (Continued)

Cases: *Page*

Thornburgh v. ACOG, 476 U.S. 747 (1986) 10, 13

United States v. Carolene Products Co., 304 U.S. 144 (1938) 5, 6

Webster v. Reproductive Health Services, 492 U.S. 490 (1989) ..... *passim*

West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) 5

Other Authorities

Abortion Legislation After Webster v. Reproductive Health Services: *Model Statutes and Commentaries*, David M. Smolin, 20 Cumb. L. Rev. 71, 124, n. 153 (1989) 24

Absence of Chorionic Gondadotropin in Sera of Women Who Use Intauterine Devices, Segal, 44 Fertility and Sterility 214 (1985) 24

Guam Public Law 20-134, Sec. 2 (9 G.C.A. § 31.20) 23

The Jurisprudence of Privacy in a Conservative Supreme Court, 75 Marq. L. Rev. (forthcoming 1992) 4

La. Rev. Stat. § 14:87(A)(1) (West Supp. 1992) 23

Making Choices 3, Alan Guttmacher Institute (1983) 24

New Insights on the Mode of Action of Intauterine Contraceptives Devices in Women, Alvarez, 49 Fertility and Sterility 768 (1988) 24

Plato, *The Republic* bk. v. marginal pagination 461 b-c (P. Shorey trans.) *reprinted in* The Collected Dialogues of Plata 700 (eds. E. Hamilton and H. Cairns 1961) 25

TABLE OF AUTHORITIES — (Continued)

Other Authorities: *Page*

Postcoital Contraception, The Lancet, Apr. 16, 1983 at 855 24

18 Pa. Cons. Stat. Ann. §§ 3203, 3205, 3206, 3207, 3209, 3214 (Supp. 1991) 4, 22

Utah Code Ann. § 76-7-301(1) (Supp. 1991) 23

INTEREST OF AMICUS CURIAE

Amicus curiae, The Southern Center for Law & Ethics (the "Center") is a non-profit corporation founded in January 1985 and based in Birmingham, Alabama. The Executive Director of the Center is J. Scott Houser, and policies are set by a board of directors consisting of four attorneys and six lay persons. The Center furnishes legal counsel and files amicus curiae briefs on a variety of issues, including family and reproductive issues. The Center has been particularly active, through litigation and scholarship, in seeking to develop and promote a proper understanding of the constitutional right of privacy. Thus, the Center has submitted *amicus curiae* briefs in past abortion cases, including *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), and in a pending Seventh Circuit case concerning midwifery. *See Peckmann v. Thompson*, Nos. 90-3334 & 90-3445, (7th Cir.) (amicus brief filed Aug. 12, 1991 concerning midwifery and privacy). In addition, the Center has received inquiries from midwives and home-schooling families concerning appropriate responses to state interference with the practices of home birth and home schooling.

The Center has been supportive of the overruling of *Roe v. Wade*, 410 U.S. 113 (1973), but is particularly concerned that such overturning might lead to an overall weakening of legitimate privacy interests. Thus, an important purpose of this *Amicus* brief is to provide support for a strengthened and reconceptualized privacy right that can survive the demise of *Roe*. Counsel for all parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

This Court properly and legitimately protected a fundamental right of family privacy from its decision in *Meyer v. Nebraska* in 1923 through *Loving v. Virginia* in 1967. This right of family privacy incorporated into the due process clause certain implicit American traditions and understandings regarding the primacy of the family, and family relationships, in relation to

the state. The second Justice Harlan and others made it clear that this realm of family privacy did not extend to traditionally disfavored conduct such as homosexuality, adultery, and fornication. *See Poe v. Ullman*, 367 U.S. 497, 545-46 (1961) (Harlan, J., dissenting).

In dictum in *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), and in its holding in *Roe v. Wade*, 410 U.S. 113 (1973), this Court created an entirely new "privacy" right which has threatened to displace and destroy the Court's prior half-century heritage of protecting family privacy. This new privacy right often favors the "purposeful termination of a potential life," *Harris v. McRae*, 448 U.S. 297, 325 (1980), above the constructive act of childbirth as a part of its generalized constitutional preference for the unconventional over the conventional. *See Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989) (plurality opinion). These preferences for the "inherently different," *Roe v. Wade*, 410 U.S. 113, 159 (1973), and destructive act of abortion, over traditionally-protected procreative and parental rights and interests, "radically departs" from "the balance which our Nation . . . has struck between . . . liberty and the demands of organized society." *See Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

Pennsylvania's modest regulations of abortion in the name of prenatal life, the right of procreation, and parental care and authority give this Court an opportunity to choose between two kinds of privacy: the theory of family privacy protected by this Court for approximately one-half century prior to *Roe v. Wade*, and the newer abortion and autonomy privacy that is less than two decades old. Rejection of the abortion right in the name of family and procreative interests would assist the process of restoring the legitimacy of privacy.

The overruling of *Roe v. Wade* would not affect *Griswold v. Connecticut*'s holding that marital intimacy and marital contraceptive use are constitutionally protected. *Griswold*'s protection of marital intimacy is well within the doctrine of family privacy, and *Griswold*'s protection of marital contraceptive use is a proper corollary of its protection of marital intimacy. By

contrast, *Roe v. Wade* is by its own terms, and necessarily, a case about the "inherently different" and destructive "purposeful termination of a potential life."

The overruling of *Roe v. Wade* would not require the reversal of *Eisenstadt v. Baird*, 405 U.S. 438 (1972) and *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977). *Eisenstadt* and *Carey* are based primarily on the finding that it is irrational to punish nonmarital sexuality by limiting access to contraceptives. In addition, this Court can sever abortion from the realm of fundamental privacy rights because of its "inherently different" and inherently destructive effect of "terminat[ing] a potential life." Such a holding would not require any reexamination of this Court's contraception holdings, because this Court has already acknowledged that abortion is "inherently different" from contraception. *See Roe*, 410 U.S. at 159 (abortion inherently different from situation addressed in *Eisenstadt*); *Harris v. McRae*, 448 U.S. at 325 (abortion inherently different from other medical procedures).

This Court is perfectly capable of drawing a constitutional line between contraception and abortion, and such line would be practically and constitutionally superior to *Roe*'s reliance on birth and viability as lines of demarcation. Such a line can be drawn without subjecting current forms of contraception, such as the IUD and oral contraceptives, to intrusive state regulation.

The overruling of *Roe v. Wade* would not permit state-coerced abortion or contraception. The fifty years of family privacy precedents that preceded *Roe* provide ample protection against state-coerced abortion or contraception. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 401-02 (1923) (Constitution rejects Plato's proposed eugenic infanticide and similar proposals inimical to American institutions); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (marriage and procreation are fundamental rights); *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (plurality opinion) (due process clause prevents "future generations from lightly casting aside important traditional values").

ARGUMENT

I. THIS CASE OFFERS THE COURT AN OPPORTUNITY TO RESTORE THE LEGITIMACY OF THE CONSTITUTIONAL RIGHT OF PRIVACY

The constitutional right of privacy is a legitimate and important part of "the balance which our Nation . . . has struck between . . . liberty and the demands of organized society." *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). Unfortunately, *Roe v. Wade* "radically departs" from the balance of our living constitutional tradition, *see id.*, causing many to question the very legitimacy of privacy itself. This case offers the Court an opportunity to restore the legitimacy of privacy, by properly distinguishing between legitimate and illegitimate privacy claims.[1]

This case involves a conflict between the abortion right created in *Roe* and previously recognized privacy rights that the *Roe* Court claimed were the foundations of *Roe*. Thus, Pennsylvania's efforts to safeguard and recognize the right to procreate, the right to protect one's offspring, and parental rights over decisionmaking by a minor daughter, here collide with *Roe*'s abortion right. In addition, Pennsylvania is seeking to protect prenatal life. Upon examination, it is the rights and interests Pennsylvania is seeking to safeguard and recognize, rather than the abortion liberty with which Pennsylvania's statutes[2] allegedly interfere, that ought to receive greater solicitude and protection by this Court.

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[1] A more fully developed analysis of privacy law, which forms much of the basis of this brief, will appear in a forthcoming article, David M. Smolin, *The Jurisprudence of Privacy in a Conservative Supreme Court*, 75 Marq. L. Rev. (forthcoming 1992).

[2] *See* 18 Pa. Cons. Stat. Ann. §§ 3203, 3205, 3206, 3209, 3207, 3214 (Supp. 1991) (definition of medical emergency, informed consent, parent consent, spousal notice, reporting requirements).

II. THIS COURT PROPERLY PROTECTED THE REALM OF FAMILY LIFE FOR APPROXIMATELY ONE-HALF CENTURY PRIOR TO *ROE V. WADE*

The legitimate roots of privacy are found in implicit understandings about the relationship of families and government. Thus, in *Meyer v. Nebraska*, 262 U.S. 390 (1923), this Court for the first time had the occasion to recognize the primacy of the family as an explicit part of our Constitutional scheme. The Court noted that Plato's *Republic* had suggested state-mandated separation of children and parents, and state-mandated infanticide, but concluded that such practices would do "violence to both letter and spirit of the [American] Constitution." 262 U.S. at 401-02. *Meyer* thus found that the Constitution incorporates certain understandings "upon which our institutions rest," *id.* at 402, and that these understandings include the special place of family relations.

Meyer chose to locate the *textual* protections of these implicit understandings in its interpretation of the "liberty" protected by the due process clause. Thus, the Court stated that liberty denotes "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men," including "the right of the individual . . . to marry, establish a home and bring up children." 262 U.S. at 399.

The legitimacy of *Meyer* and its progeny[3] was called into question by the Court's subsequent abandonment of economic substantive due process, beginning with its 1937 decision in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379. One year later, the Court in the famous footnote 4 of *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938), began to suggest new bases and guidelines for heightened judicial review. The *Carolene Products* footnote four suggested that *Meyer* and its progeny properly protected discrete and insular religious and ethnic minorities. *See* 304 U.S. at 152 n.4. Thus, *Carolene*

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[3] *Meyer*'s immediate progeny include its companion case, *Bartels v. Iowa*, 262 U.S. 404 (1923), and two subsequent decisions: *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Farrington v. Tokushige*, 273 U.S. 284 (1927).

Products represents the nascent insight that substantive protection of parental and family rights could facilitate both the political process and the protection of religious and ethnic minorities.

Carolene Products evidences the Court's determination to maintain the validity of *Meyer* and its progeny, despite the abandonment of economic substantive due process. Four years later the Court, in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), invalidated Oklahoma's sterilization of "habitual criminals." Justice Douglas began his opinion by stating that "[t]his case touches a sensitive and important area of human rights." 316 U.S. at 536. Later in the opinion he explained the linkage of this right to the protection of minorities:

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear.

316 U.S. at 541.

In time, it became clear that the Court could distinguish *Meyer* and its progeny from *Lochner* through a direct dichotomy of subject matter. Justice White's concurring opinion in *Griswold v. Connecticut*, 381 U.S. 479 (1965), exemplifies this approach:

> [T]his is not the first time this Court has had occasion to articulate that the liberty entitled to protection under the Fourteenth Amendment includes the right "to marry, establish a home and bring up children," *Meyer*, and "the liberty ... to direct the upbringing and education of children," *Pierce*, and that these are among "the basic civil rights of man." *Skinner*. These decisions affirm that there is a "realm of family life which the state cannot enter" without substantial justification. *Prince*. Surely the right invoked

> in this case, to be free of regulation of the intimacies of the marriage relationship, "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." *Kovacs* (opinion of Frankfurter, J.).[4]

381 U.S. at 502 (case citations shortened).

This Court's opinion in *Griswold* rhetorically echoed *Meyer*'s presumption that the family is more basic than the state and thus deserves judicial and constitutional protection from the state. 381 U.S. at 486 (privacy predates Bill of Rights). Similarly, in *Loving v. Virginia*, 381 U.S. 1 (1967), this Court again reaffirmed that marriage was a fundamental right and held that miscegenation prohibitions violated both the equal protection and due process clauses.

III. *Roe v. Wade* and its Progeny are Part of a New and Different Autonomy Privacy Right Which Has Threatened to Destroy and Displace the Court's Prior Fifty-Year Heritage of Protecting Family Privacy

The Court's concepts of substantive due process and privacy from the 1920's through the 1960's rejected the view that consenting adults (and mature minors) have a generalized fundamental right to make choices, of whatever nature, regarding human sexuality and procreation. The rejection of such a view was clearly stated by Justice Harlan:

> [T]he very inclusion of the category of morality among state concerns indicates that society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well. Indeed to attempt a line between public behavior and

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[4] Justice White's quotation of Justice Frankfurter's *Kovacs* concurence appears to imply that protection of the family, like free speech, is essential to an open society. Cf. *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J, concurring).

> that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal. The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must be built upon that basis.

Poe v. Ullman, 367 U.S. at 545-46; *see also Griswold v. Connecticut*, 381 U.S. at 498 (1965) (Goldberg, J. concurring, joined by Warren, C.J., and Brennan, J.) (statutes prohibiting adultery and fornication are "beyond doubt" constitutional).

Yet, despite such assurances, and Justice Harlan's admonition against judges "roaming at large in the constitutional field," *Griswold*, 381 U.S. at 502, the process of transforming the privacy right began with Justice Brennan's 1972 *dictum* in *Eisenstadt v. Baird*:

> If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

405 U.S. at 453.

Justice Brennan's reference to "the decision whether to bear or beget a child," written at a time when *Roe* was before the Court, appears to include the abortion decision. This *dictum* implied a constitutional equivalency between childbirth and abortion and between marital and nonmarital sexuality. Thus, in a few words Justice Brennan signaled the creation of a broad new right that protected as a fundamental right abortion, fornication, and sodomy. ***This new individualistic, purportedly value-neutral right of choice was in actuality a different right than that recognized by the Court during the preceding fifty years.***

The Court's privacy decisions since the early 1970's have been confused. This confusion has been caused by the inability of any single theory of privacy to completely dominate the Court's decisions. Thus, Justice Brennan's view that fornication and sodomy are included as fundamental privacy rights has been rejected, *see Bowers v. Hardwick*, 478 U.S. 186, 195-96 (1986) (refusing to protect adult consensual sodomy in part because such a holding would necessarily extend to other consensual adult conduct), even as his view that abortion is included was accepted. Similarly, the Court rejected Justice Brennan's view that the abortion right requires equal funding of abortion and childbirth. *See, e.g., Harris v. McRae*, 448 U.S. 297 (1980); *id.* at 329 (Brennan, J., joined by Marshall and Blackmun, JJ., dissenting). This precedential confusion is a product of the varying views of Chief Justice Burger and Justices Powell and Stewart, who sometimes sided with, and sometimes against, the new theory of privacy-as-autonomy. Thus, Justices Brennan, Blackmun, Marshall, and Stevens were unable fully to translate their new vision of privacy into binding authority. Overall, however, it is clear that Justice Brennan's *individualistic* privacy, which this brief shall label *privacy-as-autonomy*, has overshadowed the preexisting theory of marital and family privacy, particularly in the area of abortion.

Privacy-as-autonomy has purported to protect all choices concerning certain subjects equally, thus rejecting Justice Harlan's teaching that the Constitution must reflect deeply rooted American moral traditions regarding sexuality and pro-

creation. In practice, however, privacy-as-autonomy has failed to achieve value neutrality. Thus, privacy-as-autonomy has in practice demonstrated a marked preference for protecting traditionally immoral or destructive conduct such as abortion over traditionally protected conduct such as childbirth and parental rights. This preference can be seen in three ways.

First, since privacy-as-autonomy appeared in the early 1970's, the Court's development of family privacy as a doctrine has atrophied. Thus, the Court has ignored significant conflicts in the last two decades over issues such as midwife-assisted home birth and home-schooling. The Court's activism in the area of abortion has corresponded to disinterest in childbirth and parental authority.

Second, the Court's decisions on abortion have betrayed a preference for abortion over childbirth. This preference is well illustrated in the Court's holding in *Thornburgh* regarding Pennsylvania's prior informed consent law. *Roe* purported to take a morally-neutral position and protect both the abortion decision and the traditionally-protected decision to give birth. This moral neutrality was supposedly consonant with a constitutionally-enforced relativism regarding the moral status of the fetus. Presumably the individual woman, rather than the state, was to evaluate the worth of the fetus. Yet when Pennsylvania tried to ensure that women make this decision with access to the facts of fetal development, the Court characterized the information as "inflammatory," 476 U.S. at 762 n.10, and rejected the attempt, stating that the information "may serve only to confuse and punish her and to heighten her anxiety." 476 U.S. at 762. The Court complained that the information "is designed not to inform the woman's consent but rather to persuade her to withhold it altogether." *Id.* Yet *Thornburgh*'s author, Justice Blackmun, personally views fetal characteristics as highly relevant to the valuation of the fetus. *See Webster v. Reproductive Health Serv.*, 492 U.S. 490, 552-53 (1989) (Blackmun, J., dissenting) (quoting *Thornburgh*, 476 U.S. at 778-79 (Steven, J., concurring)) (state's interest in fetus grows as fetus develops capacities to respond, feel pleasure and pain,

and survive). *Thornburgh*'s holding that accurate and relevant information is constitutionally suspect because it discourages women from choosing abortion indicates that *Roe* is a pro-abortion, rather than a pro-choice, decision.

Third, privacy-as-autonomy's preference for unconventional and destructive rights, over traditional family and marital rights has appeared in cases where the interests and rights represented by the two theories of privacy collide. This occurs in parental involvement statutes. Parental involvement statutes are a way of facilitating and protecting several interests under the traditional family sphere theory of privacy. Such interests include the parent's authority over their minor daughter's decisionmaking, parental involvement in the important events of their children's lives, the parental right to raise and instruct their offspring within a particular culture and belief system, and the integrity of the family unit. These rights and interests are inherent in this Court's acknowledgment of the primacy of the family over the state in *Meyer* and *Pierce*. Yet when this well-established parental right conflicted with the newly invented abortion autonomy right, Justice Blackmun's majority opinion broadly concluded that:

> Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.

Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1976).

Similarly, spousal involvement statues facilitate, recognize and protect several interests under the traditional family sphere theory of privacy. Thus, *Meyer* recognized the liberty interest of men and women "to marry, establish a home and bring up children." 262 U.S. at 399. *Skinner v. Oklahoma* recognized that "marriage and procreation" are fundamental rights while invalidating a program of male sterilization. Thus, the Court has recognized that men possess a fundamental right to procreate within marriage. Similarly, men possess, like women,

a fundamental right to the care and custody of their children, *see, e.g., Santosky v. Kramer*, 455 U.S. 745 (1982), which includes a fundamental right to preserve the life and health of their children, both born and unborn. Yet, when these traditional rights and interests collided with the newly-created abortion right, Justice Blackmun's majority opinion clearly chose the new form of autonomy privacy over the fifty-year-old right of marital and family privacy. *See Danforth*, 428 U.S. at 69-71. Justice White's dissent aptly protested this choice:

> It is truly surprising that the majority finds in the United States Constitution ... a rule that the State must assign a greater value to a mother's decision to cut off a potential human life by abortion than to a father's decision to let it mature into a live child.

428 U.S. at 93.

Thus, abortion autonomy theory has gone beyond Justice Blackmun's call, in his dissenting opinion in *Bowers v. Hardwick*, for a morally-neutral privacy right, *see* 478 U.S. at 205-06, to a deliberate preference for the unconventional over the conventional. *See Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989) (plurality opinion of Scalia, J.). Thus, *privacy-as-autonomy has illegitimately incorporated the arbitrary value preferences of the Justices into the Constitution, while denigrating the deeply-rooted traditions of the American people.* Most disturbingly, this preference for the "unconventional" has included elevating to a super-protected status the inherently destructive act of destroying fetal life.

IV. THIS COURT'S PRIOR RECOGNITION OF THE "INHERENTLY DIFFERENT" AND INHERENTLY DESTRUCTIVE NATURE OF ABORTION AFFORDS SUFFICIENT REASON TO REMOVE ABORTION FROM THE REALM OF FUNDAMENTAL PRIVACY RIGHTS

This Court has been aware, from the beginning, of the inherently destructive nature of abortion. Thus, in *Roe* Justice Blackmun noted that

> [t]he pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. See Dorland's Illustrated Medical Dictionary 478-79, 547 (24th ed. 1965). The situation therefore is *inherently different* from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt* and *Griswold, Stanley, Loving, Skinner*, and *Pierce* and *Meyer* were respectively concerned.

410 U.S. at 159 (emphasis added).

Similarly, the Court majority in *Harris v. McRae* specified that "[a]bortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." 448 U.S. 297, 325 (1980). Thus, this Court has specified that abortion is "inherently different" from previously accepted privacy claims, and from other medical procedures. One would have thought that this inherent difference would have been sufficient, at the very outset, to lead to a rejection of the claim that the abortion "liberty" was a fundamental right. Thus, although it is clear that parents have a right to the care and custody of their children, *see, e.g., Santosky v. Kramer*, 455 U.S. 745 (1982), it has never been stated that parents possess a fundamental right to kill, torture, or abuse their children. *See Thornburgh v. ACOG*, 476 U.S. 747, 793 & n.2 (1986) (White, J., dissenting) (fundamental right of parents to make decisions regarding upbringing of children does not extend to assaults committed upon child). Similarly, although marital partners possess a fundamental right to marital intimacy, *see Griswold v. Connecticut*, 381 U.S. 479 (1965), it has never been suggested that a husband possesses a fundamental right to rape his wife. *Cf. Michael H. v. Gerald D.*, 491 U.S. 110, 124 n.4 (1989) (implying that rapist lacks fundamental right to the care and custody of child begotten through the rape).

One would have hoped that even a morally-neutral, individualistic theory of privacy would have recognized that inher-

ently destructive acts cannot be considered fundamental rights. Unfortunately, however, the current abortion privacy doctrine has not only recognized the abortion choice as a fundamental right, but has also elevated it above the more constructive choices. There is simply no credible explanation for why the "inherently different" act of abortion, *see* Roe, 410 U.S. at 159, — "inherently different" because it "involves the purposeful termination of a potential life," *Harris*, 448 U.S. at 325 — should be constitutionally elevated above more traditional privacy rights such as procreation and parental care and authority. The inherent difference, in logic and in law, between abortion and procreation, between destroying dependent life and protecting and preserving it, must, in accordance with the history and traditions of *this* people, cut against, rather than for, recognition of abortion as a fundamental right.

V. THE OVERRULING OF *ROE V. WADE* WOULD NOT REQUIRE THE REVERSAL OF *GRISWOLD V. CONNECTICUT*

The overruling of *Roe v. Wade*, including the exclusion of the abortion choice from the fundamental privacy right, would merely eliminate the worst excess of privacy-as-autonomy. Indeed, reversing *Roe v. Wade* on the ground of the "inherently different" and destructive nature of abortion would not even preclude reversal of *Bowers v. Hardwick*, since consensual adult sodomy, even if immoral, cannot be as inherently destructive as "the purposeful termination" of an innocent, biologically human life. Moreover, even if the reversal of *Roe* is combined with *Bowers v. Hardwick* to represent the repudiation of privacy-as-autonomy, such should not constitute the end of privacy itself. Privacy-as-autonomy began with Justice Brennan's *dictum* in *Eisenstadt* in 1972, or the holding of *Roe* in 1973, and thus is entirely severable from the older family sphere privacy which dominated the Court's decisions from 1923 to 1967. Indeed, the elimination of privacy-as-autonomy could strengthen the older family privacy, by restoring the

legitimacy of privacy as a doctrine, and by eliminating privacy-as-autonomy's tendency to disfavor traditional family rights.

Griswold illustrates the divisibility of family privacy from privacy-as-autonomy. *Griswold*'s holding and language is squarely based on the special place of marriage within American society. *See* 381 U.S. at 485-86. *Griswold*, in other words, is a case about the fundamental right of consensual *marital intimacy*. The Court's holding that marital intimacy is a fundamental right is, of course, firmly in line with the line of family privacy cases beginning with *Meyer*, and thus is supportable without any reference to privacy-as-autonomy.

One can ask why the Court in *Griswold* was justified in focusing on the general issue of consensual marital intimacy, rather than the more specific issue of marital use of contraception. *See, e.g., Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (plurality, concurring and dissenting opinions discussing level of generality for privacy analysis). There are several reasons. First, in *Griswold* the State of Connecticut failed to argue that its statute was based on the moral judgment that marital contraception was immoral, and instead claimed that a ban on marital contraception was necessary to discourage extra-marital relations. 381 U.S. at 498 (Goldberg, J., concurring); *id.* at 505 (Harlan, J., concurring). Since the state did not morally or otherwise object to the very act it was prohibiting — the *use* of contraceptive articles within marriage — there was no need to restrict the constitutional analysis to the greatest level of specificity represented by the prohibition. Second, even if the State had supported its statute with a moral objection to marital contraception, there were obvious dangers that enforcing a ban on marital contraceptive use would interfere more broadly with marital intimacy. *See Griswold*, 381 U.S. at 485. This threat to marital intimacy made it appropriate to evaluate the statute in terms of American traditions regarding such intimacy. Third, even those who view consensual marital contraception as inherently immoral would acknowledge that such an immoral act does not cause the destruction of an innocent other. Marital contraception therefore is not an inherently destructive

act, in the same sense that assault, homicide, or rape are inherently destructive acts. The absence of an innocent victim lessens the need to evaluate American traditions at the greatest possible level of specificity.

By contrast, it is clear that in *Roe* the Court quite properly looked to the issue of abortion itself, rather than focusing more broadly on childbirth or procreation. First, in *Roe v. Wade* the state directly objected, in strong terms, to abortion itself, claiming that it constituted the wrongful taking of human life. *See* 410 U.S. at 159. In response, the *Roe* Court focused specifically on the history of *abortion*, rather than focusing more broadly on childbirth, procreation, or pregnancy. *See* 410 U.S. at 129-52. Second, the enforcement of abortion restrictions does not practically or otherwise endanger the freedom to carry a child to term, or any other freedom traditionally protected under family privacy. Thus, abortion is severable from childbirth and other family privacy rights far more easily than marital contraception can be severed from marital intimacy. This easy severability again suggests the importance of focusing abortion cases specifically on abortion. Third, inherently destructive acts logically must be constitutionally evaluated at a high level of specificity, even when those acts occur within a traditionally protected relationship. The *Roe* Court thus implicitly acknowledged its necessary focus on abortion, rather than broader privacy interests, when it stated that:

> The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus. . . . The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education. . . .

410 U.S. at 159.

Thus, a claim that infanticide is constitutionally protected would necessarily be evaluated in regard to American traditions regarding infanticide, rather than American traditions more broadly focused on parental authority. Similarly, a claim

that marital rape is constitutionally protected would be evaluated in regard to American traditions regarding rape, rather than American traditions regarding marital intimacy. Abortion, since it almost always involves feticide ("the purposeful termination of" fetal life), similarly should be evaluated in terms of American traditions regarding abortion, without regard to broader traditions that are "inherently different," *id.*, such as "procreation." *Id.* Acts that are inherently destructive necessarily must be constitutionally evaluated in terms of American traditions regarding those specific, and destructive, acts.

Thus, *Griswold* quite properly should be viewed as a case about *marital intimacy*, while *Roe* necessarily stands or falls as a case about *abortion*.

VI. THE OVERRULING OF *ROE V. WADE* WOULD NOT REQUIRE THE REVERSAL OF *EISENSTADT V. BAIRD* AND *CAREY V. POPULATION SERVICES INTERNATIONAL*

This Court's holding in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), is simply that Massachusetts's limitations on the distribution of contraception violates the equal protection clause of the Fourteenth Amendment. The Court's four member majority refused to reach the question of whether the statute infringed a fundamental privacy right, *see* 405 U.S. at 453, and therefore applied the rational basis test. *See* 405 U.S. at 447. Thus, *Eisenstadt* is not, by its own terms, a privacy decision. The overruling of *Roe*, and application of the rational basis standard of review to abortion, therefore would have no affect on the Court's holding in *Eisenstadt*. The broad *dictum* in *Eisenstadt* implying that the right of privacy includes, as a fundamental right, the decision whether "to bear . . . a child," is completely gratuitous to the Court's holding. This dictum's apparent attempt to suggest the result in *Roe*, rendered when *Roe* was before this Court, is entirely severable from *Eisenstadt*'s holding.

Carey v. Populations Servs. Int'l, 431 U.S. 678 (1977), invalidated a Massachusetts law prohibiting the distribution of contraceptives to minors, and forbidding anyone other than a licensed pharmacist from distributing contraceptives to adults.[5] The majority of Justices rejected the application of heightened judicial scrutiny to the provision affecting minors;[6] the holding therefore is dependent on the view that the restrictions applicable to minors are irrational. Thus, this rational basis holding, like the rational basis holding in *Eisenstadt*, would not be affected by an overruling of *Roe*. However, a majority of Justices applied a form of strict scrutiny to the statute requiring a pharmacist to distribute contraceptives to adults. This majority concluded that this limitation on distribution infringed the privacy rights of individual adults to access contraceptives.

Overruling *Roe* would not require overruling of *Carey*'s holding regarding the access of adults to contraceptives. First, this Court could sever abortion from the realm of fundamental privacy rights because of its "inherently different" and inherently destructive effect of "terminat[ing] a potential life." *See Roe*, 410 U.S. at 159; *Harris v. McRae*, 448 U.S. at 325; section IV, *supra*. Such a holding would not require any reexamination of this Court's contraception holdings because abortion is "inherently different" from contraception. *See, e.g. Roe*, 410 U.S. at 159 (abortion inherently different from situation addressed in *Eisenstadt*); *Harris*, 448 U.S. at 325 (abortion inherently different from other medical procedures).

Second, the core holding of *Carey*, invalidating the limitation of contraceptive distributors to pharmacists, is sustainable

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[5]The New York statute specifically permitted pharmacists to distribute contraceptives to those 16 and over. The Court's discussion viewed this as a limitation upon distribution to "adults." *See* 431 U.S. at 686. The Court also invalidated a limitation on contraceptive advertising on free speech grounds.

[6]*See* 431 U.S. at 702-03 (White, J., concurring); *id.* at 705-07 (Powell, J., concurring); *id.* at 713-16 (Stevens, J., concurring); *id.* at 717-19 (Rehnquist, J., dissenting); *id.* at 702 (Burger, C.J., dissenting without opinion).

under rational basis analysis, or under *Griswold*, insofar as the pharmacist requirement lacked any rational relation to health concerns and applied to both married and unmarried persons. *Cf. Eisenstadt*, 405 U.S. at 460-65 (White, J. concurring) (state failed to demonstrate health need for forbidding nonpharmacist from distributing vaginal foam to woman of unknown marital status), *cited with approval*, *Carey*, 431 U.S. at 687, 688, 690.

Third, *Carey* clearly rejected the view that recognizing the right to access or use contraceptives necessarily implied a recognition of a right "to put contraceptives to their intended use" by engaging in a sexual act. *See Carey*, 431 U.S. at 678 (Stevens, J., concurring); *id.* at 688 n.5 (majority opinion); *id.* at 694 n.17 (plurality opinion); *id.* at 702 (White, J., concurring); *see also Bowers v. Hardwick*, 478 U.S. at 195-96 (rejecting claim that all voluntary sexual conduct between consenting adults is within fundamental privacy right). Thus, *Carey, even if broadly interpreted*, granted a right for the unmarried to "use" contraceptives in only a very attenuated sense, in that the states were still free to prohibit the act of putting the contraceptive articles "to their intended use" by engaging in nonmarital sexual acts. One does not normally speak of having a right to "use" something if the state may prohibit its only intended "use." This paradox of permitting the prohibition of nonmarital sexual acts, while invalidating limitations on nonmarital contraceptive use and access, illustrates that even *Carey* does not depend on acceptance of a full-fledged autonomy right in the area of consensual sexuality. Rather, *Carey* stands for the proposition that it is irrational to punish nonmarital sexuality by limiting access to contraceptives, particularly given the negative personal and social consequences of single parenthood and sexually-transmitted diseases. *See Carey*, 431 U.S. at 695 (quoting *Eisenstadt*, 405 U.S. at 448); *Carey*, 431 U.S. at 715 (Stevens, J., concurring) (state cannot dramatize its disapproval of motorcycles by forbidding use of safety helmets).

This view of *Carey* as granting unmarried individuals the right to ameliorate the negative consequences of illegal, immoral, or dangerous sexual activity through the use of contraceptives, also readily distinguishes the Court's contraceptive cases from *Roe* and its progeny. Avoiding the negative personal and social consequences of unwanted pregnancy through the "purposeful termination of a potential life," *Harris*, 448 U.S. at 325, an act which this Court acknowledged to be "inherently different" from contraception, *see Roe*, 410 U.S. at 159 (distinguishing *Eisenstadt*), is unjustifiable because it permits one person to displace the negative consequences of their own behavior upon an innocent, developing human life. By contrast, *Carey* permits avoidance of the negative consequences of one's behavior through a means — the use of contraception — that in itself has no effect upon innocent life. Similarly, the state's compelling interest in fetal life is directly served by abortion-restrictive legislation, whereas the state interest in protecting the health and life of contraception users is hindered, rather than served, by laws limiting access to nonmarital use of contraception.

Thus, there are ample and multiple approaches by which this Court could retain its holdings in *Eisenstadt* and *Carey* while overruling *Roe v. Wade*.

VII. A CONSTITUTIONAL LINE CAN BE DRAWN BETWEEN CONTRACEPTION AND ABORTION

The *Roe* Court implicitly criticized the view that life begins at conception, claiming that

> [s]ubstantial problems . . . are posed . . . by new embryological data that purport to indicate that conception is a "process" over time, rather than an event, and by new medical techniques such as menstrual extraction, the "morning-after" pill, implantation of embryos, artificial insemination, and even artificial wombs.

410 U.S. at 161 (footnote omitted).

More recently, Justice Stevens has claimed that a declaration that life begins at conception "implies regulation not only of previability abortions, but also of common forms of contraception such as the IUD and the morning-after pill." *Webster*, 492 U.S. at 563 (footnote omitted). Justice O'Connor has suggested that "[i]t may be correct that the use of postfertilization contraceptive devices is constitutionally protected by *Griswold* and its progeny." 492 U.S. at 523.

Despite these claims and concerns, this Court is quite capable of drawing a constitutional line between contraception and abortion. Indeed, drawing a constitutional line by reference to the biological event of conception would be easier than, or as easy as, reliance on the biological demarcations of birth and viability which the *Roe* Court employed.

The *Roe* Court clearly drew a constitutional line at birth, holding that the unborn are not constitutional persons for purposes of the due process clause. 410 U.S. at 156-59. Yet birth, like fertilization, is clearly a "process over time." Is a fetus a constitutional person during the second stage of labor, as the woman pushes the fetus through the birth canal? Must the cord be cut before the fetus attains constitutional personhood? These questions are no easier than the question of whether one chooses the beginning point of fertilization, when the sperm enters the ovum, or the point, approximately 24 hours later, when the process of the sperm and ovum genetically uniting has been completed. Certainly, there is nothing particularly problematic about the fact that the fertilization process takes 24 hours, given the fact that birth itself, beginning with the first stage of labor, can take several days. If this Court can draw a constitutional line by reference to the biological process of birth, it can surely also do so by reference to the biological process of fertilization.

Similarly, the *Roe* Court employed the biological concept of "viability" to determine when the State's interest in fetal life became "compelling." 410 U.S. at 163. Viability is a far less precise biological concept than fertilization. First, viability is not an inherent characteristic of the fetus, but rather is a con-

sequence of the relationship between the fetus and changing medical technology. Second, different fetuses' achieve viability at different stages, making it difficult to draw a generalized line. Third, the determination of viability requires a difficult medical determination in which physicians can easily err by as much as four weeks. *See Webster*, 109 S.Ct. at 3055 (citing finding by District Court). Even the *Roe* Court could do no more than generalize that "[v]iability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." 410 U.S. at 160 (footnote omitted). Clearly, a constitutional line can be drawn far more easily at fertilization or conception, than could be done at viability.

The purpose of comparing a fertilization line to a birth or viability line, is not to support the Court's prior uses of birth or viability, but merely to demonstrate the specious nature of a claim that fertilization cannot serve as a constitutional line. It can also be asked, however, whether fertilization *should* serve as a constitutional dividing point. The primary argument against the use of such a line has been that it would interfere with "common forms of contraception such as the IUD and the morning-after pill." 492 U.S. at 563 (Stevens, J. dissenting).

This fear is largely illusory. First, there is no indication that any State wishes to prohibit any currently legal forms of contraception. Pennsylvania's current effort to regulate abortion incorporates that State's 1982 definition of abortion, which limits abortion to:

> [t]he use of any means to terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child except that, for the purposes of this chapter, abortion shall not mean the use of an intrauterine device or birth control pill to inhibit or prevent ovulation, fertilization or the implantation of a fertilized ovum within the uterus.

18 Pa. Cons. Stat. Ann. § 3203 (Purdon 1983).

Similarly, Guam's post-*Webster* prohibition of abortion, which is currently pending before the Ninth Circuit, defines abortion as "the purposeful termination of a human pregnancy *after implantation of a fertilized ovum*. . . ." Guam Public Law 20-134, Sec. 2 (9 G.C.A. § 31.20). Utah's post-*Webster* prohibition also only applies "after implantation of a fertilized ovum." Utah Code Ann. § 76-7-301(1) (Supp. 1991). Thus, Pennsylvania, Guam and Utah by their definitions of abortion have excluded from coverage the period prior to implantation, with the obvious intent of avoiding possible applications to contraceptives; Pennsylvania has made this intent most explicit by expressly excluding application to the IUD and birth control pill.

Louisiana's post-*Webster* prohibition defines abortion to include certain acts performed with "the specific intent of terminating a pregnancy." La. Rev. Stat. § 14:87(A)(1) (West Supp. 1992). This specific intent requirement would limit the act of performing an abortion to those instances where the woman was specifically known to be pregnant when the drug was prescribed or the device inserted. Thus, this specific intent requirement alone would exclude any application to currently used contraceptives. *Cf.* Op. La. Att'y Gen. No. 91-419 (August 29, 1991) (current Louisiana abortion prohibition does not apply to IUD, oral contraceptives, or morning-after pill); *Margaret S. v. Edwards*, 488 F. Supp. 181, 190-91 (E.D. La. 1980) (holding that prior Louisiana definition of abortion does NOT include the IUD, morning-after pill, and birth control pills).

Thus, Pennsylvania's regulations, along with the post-*Webster* abortion prohibitions, do not implicate currently-used contraceptives, and usually exclude from coverage the period prior to implantation.

In addition, there are in fact no commonly used forms of contraceptives whose *primary mechanism* is that of an abortifacient. Thus, the prior belief that the IUD works primarily by preventing implantation has since been superseded by new research indicating that its primary mechanism is to prevent

fertilization.[7] Similarly, current research demonstrates that the primary mechanism of oral contraceptives, including low-dose oral contraceptives, is to prevent fertilization.[8] The adoption of a constitutional fertilization line would presumably classify contraceptives according to their primary and known anti-fertilization effects. Thus, the existence of low or speculative back-up abortifacient effects would not subject contraceptives to state regulation, even under a fertilization standard.

The morning-after pill also poses no true dilemma. First, this treatment currently has too many side-effects to recommend its regular use in place of true contraceptives.[9] Thus, its only real use is with rape victims. Generally, such use with rape victims would not be classified as an abortion, because definitions of abortion generally either exclude the period prior to implantation, or at least require (sometimes through an intent requirement) that the woman be known to be pregnant. Thus, early treatment of the rape victim, when it is not known whether she has been impregnated, could not be classified as an abortion. In addition, the abortion prohibitions passed in a post-*Roe* era are likely to contain express or implied rape and incest exceptions. Under these circumstances, it is extremely unlikely that any state would bar the only practical use of the morning-after pill.

This Court need not resolve the question of whether the constitutional line between abortion and contraception

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[7] *See* Alvarez, *New Insights on the Mode of Action of Intrauterine Contraceptive Devices in Women*, 49 Fertility and Sterility 768 (1988); Segal, *Absence of Chorionic Gonadotropin in Sera of Women Who Use Intrauterine Devices*, 44 Fertility and Sterility 214 (1985). The abortion rights brief in *Webster* submitted on behalf of the Association of Reproductive Health Professionals agreed, based on the Alvarez study cited *supra*, that "[t]he most likely working mechanism of an IUD is to prevent fertilization." ARHP Amicus Brief at 34, *Webster*, (No. 88-605).

[8] *See, e.g.*, Alan Guttmacher Institute, Making Choices 3 (1989); David M. Smolin, *Abortion Legislation After* Webster v. Reproductive Health Services: *Model Statutes and Commentaries*, 20 Cumb. L. Rev. 71, 124 n.153 (1989) (citing studies on oral (including low-dose) contraceptives).

[9] *See, e.g., Postcoital Contraception*, The Lancet, Apr. 16, 1983, at 855.

should be drawn at fertilization, or at implantation, until a real controversy implicating this distinction comes before the Court. It is unlikely that any such dispute would come before this Court, at least in the context of contraception and abortion. Speculative conflicts between a fertilization and implantation standard, or unfounded and speculative claims regarding threats to contraceptive rights, should not distract from the conclusion that *either a fertilization or an implantation standard* would be preferable to *Roe*'s viability/birth standard.

VIII. THE OVERRULING OF *ROE V. WADE* WOULD NOT SANCTION STATE-COERCED ABORTION OR CONTRACEPTION

The fifty years of family privacy precedents that preceded *Roe v. Wade* provide ample protection against state-coerced abortion or contraception. Thus, the *Meyer* Court, at the very outset of the family privacy doctrine, concluded that state-mandated infanticide would violate the "letter and spirit of the Constitution," 262 U.S. at 402, despite the apparent endorsement of a policy of eugenic infanticide by Plato in Book V of *The Republic*. Plato's eugenic proposals in Book V also extended to state-mandated abortion.[10] *Meyer* requires this Court to protect women, whether married or single, from state-coerced practices that are inimical to the "ideas touching the relation between individual and State . . . upon which our institutions rest." 262 U.S. at 402. Thus, *Meyer* in itself provides an ample basis for invalidating state-mandated abortion and contraception.

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[10] "But when . . . the men and the women have passed the age of lawful procreation, we shall leave the men free to form such relations with whomsoever they please . . . first admonishing them preferably not even to bring to light anything whatever thus conceived, but if they are unable to prevent a birth to dispose of it. . . ." Plato, *The Republic*, bk. v, marginal pagination 461 b-c (P. Shorey trans.), *reprinted in* The Collected Dialogues of Plato 700 (eds. E. Hamilton & H. Cairns, 1961).

In addition, a pregnant woman, whether single or married, represents a family dyad of mother and unborn child, and under this Court's family privacy precedents the State cannot arbitrarily interfere with a constructive, nurturing parent-child relationship. *See Caban v. Mohammed*, 441 U.S. 380, 405 n.10 (1979) (Stevens, J., dissenting) (psychological bond between mother and child develops during pregnancy); *see, e.g., Santosky v. Kramer*, 455 U.S. 745 (1982). Finally, cases such as *Skinner v. Oklahoma*, protecting individuals, whether single or married, from state-mandated sterilization, afford an ample basis to reject state-coerced abortion or contraception.

Thus, the reversal of *Roe v. Wade* would not sanction state-coerced abortion or contraception, or any other state mandates affecting procreation or the family that are inimical to the "ideas ... upon which our institutions rest." Given the history and traditions of *this* people, which place a high value on unborn life and the right to procreate and bear children, state-coerced abortion and contraception would be unconstitutional. *Cf. Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989) (plurality opinion) (due process clause prevents "future generations from lightly casting aside important traditional values").

CONCLUSION

Pennsylvania in this case has attempted to regulate abortion in a modest way, in the service of interests and rights that have been central to the development of the doctrine of privacy. Pennsylvania's modest incursions into the abortion "liberty" in the name of prenatal life, the right of procreation, and parental care and authority give this Court an opportunity to choose between two kinds of privacy: the theory of family privacy protected by this Court from 1923 to 1967 and the newer abortion and autonomy privacy that is less than two decades old. *Amicus curiae* submits that the abortion right invented by this Court in *Roe* represents a radical departure from "the balance struck by this country," while the family privacy right represents a sound

interpretation of our living constitutional traditions. *Cf. Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). This radical departure has exacerbated deep divisions within this nation by severely limiting the ameliorating possibilities for legislative activity and compromise. The healing of these deep divisions cannot begin until this Court restores the privacy doctrine to its proper foundations.

Amicus curiae urges this Court to uphold the constitutionality of the Pennsylvania statutes under review, and to adopt a rational basis standard of review that makes it plain that abortion is not within the right of privacy.

Respectfully submitted,

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In the

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OCTOBER TERM, 1991

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Petitioners and Cross-Respondents,

v.

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Respondents and Cross-Petitioners.

On writs of certiorari to the United States Court of Appeals for the Third Circuit

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Brief *Amicus Curiae* of the National Legal Foundation in support of Respondents and Cross-Petitioners

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in upholding the constitutionality of the following provisions of the Pennsylvania Abortion Control Act:

   a. 18 Pa. Cons. Stat. Ann. Sec. 3203 (definition of medical emergency)

   b. 18 Pa. Cons. Stat. Ann. Sec. 3205 (informed consent)

   c. 18 Pa. Cons. Stat. Ann. Sec. 3206 (parental consent)

   d. 18 Pa. Cons. Stat. Ann. Secs. 3207, 3214 (reporting requirements)?

2. Did the Court of Appeals err in holding 18 Pa. Cons. Stat. Ann. Sec. 3209 (spousal notice) unconstitutional?

TABLE OF CONTENTS

QUESTIONS PRESENTED ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT

I. Petitioners Have Failed To Meet Their Heavy Burden In Attacking The Statute "On Its Face." 4

II. The State Has Demonstrated That The Provisions Of The Act Bear A Rational Relationship To A Legitimate State Interest Or In The Alternative, Are "Reasonably Related" To A Compelling State Interest. 6

A. The State Demonstrated That The Term "Medical Emergency," When Properly Construed, Is Not Unduly Burdensome. 8

B. The Informed Consent Provision Bears A Rational Relationship To A Legitimate State Interest. 11

C. The Parental Consent Provision Bears A Rational Relationship To Legitimate State Interest 16

D. The Spousal Notice Provision Bears A Rational Relationship To A Legitimate State Interest 19

E. The Reporting Requirements Bears A Rational Relationship To A Legitimate State Interest 21

III. The Reasonableness Of The Statutes Provision Are A Matter For The Legislature Not The Court. 26

CONCLUSION 29

TABLE OF AUTHORITIES

Cases Page(s)

Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) ..... 14 - 17

Doe v. Bolton, 410 U.S. 179 (1973) 10

Harris v. McRae, 448 U.S. 297 (1988) 28

Hodgson v. Minnesota, 110 S.Ct. 2926 (1990) 6, 7, 17, 18

Maher v. Roe, 432 U.S. 464 (1977) 12

Maynard v. Hill, 125 U.S. 190 (1888) 20

Ohio v. Akron Center for Reproductive Health, 110 S.Ct. 2972 (1990) 3-6, 19

Planned Parenthood of Southeastern Pennsylvania v. Casey, 686 F. Supp. 1089 (E.D. Pa. 1988) 9, 17, 18, 21-23

Planned Parenthood of Southeastern Pennsylvania v. Casey, No. 90-1662, slip op. at 37 (3d Cir. Oct. 21, 1991) 10

Planned Parenthood v. Ashcroft, 462 U.S. 476 (1983) 16, 17

Planned Parenthood v. Casey, 744 F. Supp. 1323 (E.D. Pa 1990) 9

Planned Parenthood v. Danforth, 428 U.S. 52 (1976) 20

Powell v. Pennsylvania,
127 U.S. 678 (1888) 27

Scheinberg v. Smith,
659 F.2d 476 (5th Cir. 1981) 20

Sosna v. Iowa,
419 U.S. 393 (1975) 20

Thornburgh v. American College of Obstetricians and Gynecologists,
476 U.S. 747 (1986) 6-8, 14

United States v. Raines,
362 U.S. 17 (1960) 5

United States v. Salerno,
481 U.S. 739 (1987) 6

Vance v. Bradley,
440 U.S. 93 (1979) 29

Webster v. Reproductive Health Services,
492 U.S. 490 (1989) 3-7

Constitution and Statutes

18 Pa. Cons. Stat. Ann. Sections 3201-3220
(1983 & Supp. 1991) 3, 4

18 Pa. Cons .Stat. Ann. Sec. 3203 9

18 Pa. Cons. Stat. Ann. Sec. 3205 ..... 11-14, 17, 18, 23

18 Pa. Cons. Stat. Ann. Sec. 3206 ..... 16, 17

18 Pa. Cons. Stat. Ann. Sec. 3207 ..... 24, 25

18 Pa. Cons. Stat. Ann. Sec. 3209 ..... 19, 20

18 Pa. Cons. Stat. Ann. Secs. 3210, ... 23

18 Pa. Cons. Stat. Ann. Secs. 3211 ..... 23, 24

18 Pa. Cons. Stat. Ann. Secs. 3214 ..... 21, 22, 24, 25

28 Pa. Code Section 553.12(8) 13

40 P.S. Section 1301.103 13

65 Pa. Cons. Stat. Ann. Section 66.1 26

65 Pa. Cons. Stat. Ann. Section 66.2 25

Other Sources

Handbook on the Reporting of Induced Termination of Pregnancy, U.S. Department of Health and Human Services 22

Nos. 91-744 and 91-902

In the

Supreme Court of the United States

OCTOBER TERM, 1991

Planned Parenthood of Southeastern Pennsylvania, *et al.*,

Petitioners and Cross Respondents,

v.

Robert P. Casey, *et al.*,

Respondents and Cross-Petitioners.

On writs of certiorari to the United States Court of Appeals for the Third Circuit

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Brief *Amicus Curiae* of the National Legal Foundation in support of Respondents and Cross-Petitioners

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INTEREST OF AMICUS CURIAE

The National Legal Foundation is constituted for the purpose of advocacy in support of First Amendment freedoms and other inalienable rights. While typically this involves the Foundation on the side of individual plaintiffs, in this instance, it argues in support of legitimate and historically acceptable governmental efforts to protect the lives of unborn children. The Court's decision in this case will dramatically affect the ability of our elected state officials to extend the guarantees of life and

liberty found in the Declaration of Independence to all men and women regardless of their vulnerability or stage in life. When such protection is denied to the unborn, the door is opened for arbitrary withdrawal of such guarantees to all men and women.

The National Legal Foundation is a non-profit corporation organized to defend, restore, and preserve constitutional liberties, family rights and other inalienable freedoms.

Counsel of record for *Amicus Curiae*, Robert K. Skolrood is Executive Director and Tracy Louise Winn is Staff Attorney for The National Legal Foundation. Counsel for *Amicus Curiae* specialize in constitutional litigation and have participated in significant cases relating to First Amendment and other constitutional freedoms.

The National Legal Foundation believes the experience of its attorneys will be of assistance to the Court in evaluating this case.

The parties have consented to the filing of this brief; their letters to that effect have been filed separately in this Court.

SUMMARY OF ARGUMENT

As the provisions of Pennsylvania's Abortion Control Act 18 Pa. Cons. Stat Sec 3201 - 3220 (1990) (289a - 304a),[1] have not been allowed to go into effect, Petitioners are restricted to a facial challenge to the constitutionality of the Act. As such, Petitioners have not met the heavy burden of demonstrating that "no set of circumstances exists under which the Act would be valid." *Webster v. Reproductive Health Services,* 492 U.S. 490, 524 (1989) (O'Connor, J., concurring) (quoting *United States v. Salerno,* 481 U.S. 739, 745 (1987).

It is insufficient under this standard of proof for Petitioners to assault the Court with a "worst-case analysis that may never occur," *Ohio v. Akron Center for Reproductive Health,* 110 S.Ct. 2972, 2981 (1990) and to argue that these scenarios may render the Act's application unconstitutional and then maintain that they have met their burden.

Moreover, since the State has proven that the Act *can* be applied constitutionally in a wide variety of circumstances, Petitioners, by definition, have not met their burden. Consequently, their facial challenge must fail.

It is important to note that in mounting this facial challenge, the Petitioners' heavy reliance upon the findings of the District Court was misguided. Many of the findings of fact, as they pertained to the reasonableness of the statute, were properly a matter for the Pennsylvania legislature and not the court.

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1. For ease of reference, citations are to the Appendix filed with the Petition for Writ of Certiorari in No 91-744 as "____a." Citations to the Joint Appendix are as "J.A. ____." Citations to the Appendix below are as "App. ____."

ARGUMENT

I. Petitioners Have Failed To Meet Their Heavy Burden In Attacking The Statute "On Its Face."

The Petitioners, five abortion clinics and one physician, raise a facial constitutional challenge to certain 1988 and 1989 amendments to the Pennsylvania Abortion Control Act of 1982 (the Act), see 18 Pa. Cons. Stat. Sections 3201-3220 (1983 & Supp. 1991).

Such an undertaking on the part of Petitioners requires a review of the proper standards for a challenge asserting that provisions of a statute are unconstitutional "on their face."

This Court has elucidated the burden on a challenger mounting a facial attack to a legislative act by stating:

> A facial challenge to a legislative act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that *no set of circumstances exists* under which the act would be valid. The fact that the [relevant statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment.

Webster v. Reproductive Health Services, 492 U.S. 490, 524 (1989) (O'Connor, J., concurring) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)); See also *Ohio v. Akron Center for Reproductive Health*, 110 S.Ct. at 2972, 2980 - 81 (1990) (emphasis added).

Recently, this Court has gone further to state that extreme scenarios are not to be relied upon as grounds for invalidating a state statute. Justice O'Connor in *Ohio v. Akron Center for*

Reproductive Health, 110 S.Ct. 2972, 2981 (1990) (O'Connor, J., concurring) stated, "The Court of Appeals should not have invalidated the Ohio statute on a facial challenge based upon a worst-case analysis that may never occur." Justice O'Connor was clearly drawing upon the wisdom of earlier pronouncements of this Court where it has been said:

> Very significant is the incontrovertible proposition that it 'would indeed be undesirable for this Court to consider *every conceivable situation* which might possibly arise in the application of complex and comprehensive legislation.' The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to *hypothetical cases thus imagined*. The Court further pointed to the fact that a limiting construction could be given to the statute by the court responsible for its construction if an application of doubtful constitutionality were in fact concretely presented. We might add that application of this rule frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy.

United States v. Raines, 362 U.S. 17, 21-22 (1960) (quoting *Barrows v. Jackson* 346 U.S. 249, 256 (emphasis added).

Indeed, Petitioners cloud the true issues by distracting the Court with a "worst-case" analysis of the Act's application "that may never occur." In so doing, they have not met their burden constitutionally. Rather, they must establish that "no set of circumstances exists under which the act would be valid." *Ohio,* 110 S.Ct. at 2980-81 (quoting *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (O'Connor, J., concurring)).

Petitioners fail to meet that challenge. Since this is the standard that Petitioners are required to meet, it stands to reason that if the State has demonstrated instances where the

law would be constitutional, Petitioners would be indeed *unable* to meet their burden.

Admittedly, the Court has indicated how heavy a burden this is for Petitioners in *United States v. Salerno*, 481 U.S. 739, 745 (1987) where the court said: "We think Respondents have *failed to shoulder their heavy burden* to demonstrate that the Act is 'facially' unconstitutional," yet the provisions must stand if they can be shown to be constitutional in some circumstances.

II. The State Has Demonstrated That The Provisions Of The Act Bear A Rational Relationship To A Legitimate State Interest Or In The Alternative Are "Reasonably Related" To A Compelling State Interest.

In its decision below, the Court of Appeals applied the undue burden standard in analyzing the constitutionality of the Pennsylvania Abortion Control Act. The court took this standard from the plurality opinions in *Webster*, *Hodgson v. Minnesota*, 110 S.Ct. 2926 (1990), and *Ohio*.

In *Webster*, four members of the Court, indicated that they believed that the right of privacy as it relates to abortion implicates a "liberty interest protected by the Due Process Clause" and that laws regulating abortion are subject only to a "rational basis" test. 492 U.S. at 520. Justice O'Connor, however, refused to join that portion of Justice Rehnquist's opinion. Instead, she stated that she continues to adhere to the "undue burden" standard expressed in her dissenting views in *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 452 (1983) (O'Connor J., dissenting) and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting) because the majority in those cases "had distorted and misapplied its own standard for evaluating state regulation of abortion which the Court had

applied with fair consistency in the past: that, previability, 'a regulation imposed on a lawful abortion is not unconstitutional unless it unduly burdens the right to seek an abortion,'" *Webster*, 492 U.S. at 530. (O'Connor, J., concurring) (quoting *Akron*, 462 U.S. at 453 (O'Connor, J., dissenting)).

Based on these views, Justice O'Connor provided the crucial fifth vote to uphold the Missouri viability testing requirement because it "[did] not impose an undue burden on a woman's abortion decision." *Id.* Again, in *Hodgson* Justice O'Connor provided the fifth vote in striking down the two-parent notice requirement absent a bypass procedure. She did so on her understanding that "[i]f the particular regulation does not 'unduly burde[n]' the fundamental right, . . . then our evaluation of that regulation is limited to our determination that the regulation rationally relates to a legitimate state purpose." *Hodgson*, 110 S.Ct. at 2949-50 (O'Connor, J., concurring) (quoting *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 453 (1983) (O'Connor, J., dissenting)).

In *Thornburgh*, Justice O'Connor set forth her understanding of the "undue burden" standard under which abortion laws should be reviewed:

> Under this Court's fundamental-rights jurisprudence, judicial scrutiny of state regulation of abortion should be limited to whether the state law bears a rational relationship to legitimate purposes such as the advancement of [the state's] compelling interests, with heightened scrutiny reserved for instances in which the state has imposed an "undue burden" on the abortion decision. An undue burden will generally be found "in situations involving absolute obstacles or severe limitations on the abortion decision," not wherever a state regulation "may 'inhibit' abortions to some degree." And if a state law does interfere with the abortion decision to an extent that is unduly burdensome, so that it becomes "necessary to apply an exacting standard of

review," the possibility remains that the statute will withstand the stricter scrutiny.

Thornburgh, 476 U.S. at 828 (O'Connor, J., dissenting) (citations omitted).

Under the undue burden standard, a court must first determine whether the challenged provision involves "absolute obstacles or severe limitations on the abortion decision." *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting). If it does not, the regulation must be upheld if it "bears a rational relationship to legitimate [state] purposes." *Id.*

Under this part of the test, it is Petitioners' burden to prove that the statute imposes an absolute obstacle or severely limits the abortion decision. If they do not meet this burden the commonwealth need only show that the provision is *rationally related* to a legitimate state interest.

Even where a statute does involve an undue burden, it may be upheld if it is "reasonably related" to a compelling state interest. *Id.* If Petitioners can meet their burden of proving that the statute imposes an undue burden, the burden shifts to the Commonwealth to show that the provision *reasonably furthers* a compelling state interest.

What follows is a section by section analysis of the provisions of the Act that will demonstrate that all the provisions bear a rational relationship to a legitimate state interest or in the alternative, are reasonably related to a compelling state interest.

A. The State Demonstrated That The Term "Medical Emergency," When Properly Construed, Is Not Unduly Burdensome.

Petitioners have claimed that the definition of "medical emergency" is unduly burdensome as it pertains to the various provisions of the Act because it is narrower than other

definitions of medical emergency found in some Pennsylvania laws. Section 3203 of the Act defines "medical emergency" to mean:

> That condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function.

18 Pa. Cons. Stat. Ann. Section. 3203 (Supp. 1991).

In reviewing Petitioners' challenge to the medical emergency language, it is important to note that the Act does not prohibit abortions, absent a medical emergency, as Petitioners imply. Rather, the Act simply regulates the general practice of abortion in various ways and then exempts the physician from complying with those regulations when he judges that a medical emergency exists.

The District Court found three conditions: preeclampsia, inevitable abortion and premature ruptured membrane, to be outside the definition of a medical emergency. Cf. *Planned Parenthood v. Casey*, 744 F. Supp. 1323 at 1378 (E.D. Pa. 1990). By so doing, the District Court Judge ignored the rules of statutory construction.

The Court of Appeals rightly concluded that the issue was a matter of statutory interpretation to be governed by Pennsylvania law stating:

> It is thus apparent that our initial issue for resolution is one of statutory interpretation and is governed by Pennsylvania law. There is no helpful Pennsylvania case law construing the medical emergency provision of the Act. There are, however, Pennsylvania cases indicating that statutes of the Commonwealth should be construed to sustain their constitutionality. See *Commonwealth v.*

Blystone, 549 A.2d 81, 87 (Pa. 1988) ("Any doubts are to be resolved in favor of sustaining the legislation.") *Hughes v. Commonwealth Dept. of Transportation*, 523 A.2d 747, 750-751 (Pa. 1987) ("We must presume that an Act of the legislature is intended to be constitutional and wherever a legislative act can be preserved from unconstitutionality it must be preserved."); see also *Webster*, 492 U.S. at 514 (statutes should be interpreted to avoid constitutional difficulty); *Frisby v. Schultz*, 487 U.S. 474, 483 (1988) (same).

Planned Parenthood of Southeastern Pennsylvania v. Casey, No. 90-1662, slip op. at 37 (3d Cir. Oct. 21, 1991).

The State demonstrated that it was possible to construe the term "medical emergency" in a manner that would include these conditions thereby sustaining their constitutionality.[2]

The Court of Appeals agreed that the conditions did indeed fall within the definition of a medical emergency and so the Petitioners' challenge must fail.

Additionally, Petitioners are not required to know precisely whether a particular condition *will result* in substantial and irreversible impairment of a major bodily function. Rather, they need only determine, in their good faith clinical judgment, that a serious *risk* of such impairment exists in order to avail themselves of the medical emergency exception. These are medical "judgment[s] that physicians are obviously called upon to make routinely whenever surgery is considered." *Doe v. Bolton*, 410 U.S. 179, 192 (1973).

Since Petitioners are exempt from liability whenever they have acted upon their "good faith clinical judgment," there is no possibility that they will be found to have violated any provision of the Act due to a medical emergency unless they, in bad faith, determined that such an emergency existed. The definition of

2. *See* App. 887-897 (Testimony of Dr. Bowes, State's Expert Witness).

medical emergency clearly is not unconstitutionally vague for purposes of this facial challenge and Petitioners' attempts to have it struck on that ground must be rejected.

B. The Informed Consent Provision Bears A Rational Relationship To A Legitimate State Interest.

Absent a medical emergency, Section 3205 of the Act requires that a physician, prior to performing an abortion upon a woman, obtain her voluntary and informed consent to the performance of the abortion. Consent is only considered to be voluntary and informed if the woman is informed of the minimal information set forth in the Act at least 24 hours prior to the abortion.[3]

Section 3205 does not prevent any woman from obtaining an abortion -- it simply requires that she be provided with certain information. Thus, it does not impose an "absolute obstacle or severe limitation on the abortion decision." Indeed, the informed consent requirement enhances rather than burdens a woman's decision-making ability by requiring that she be provided with a minimum amount of information (which is accurate and objective) which may be relevant to her abortion

3. Section 3205 specifies that the physician or referring physician must inform the woman of the nature of the proposed procedure, risks and alternatives to the procedure, the probable gestational age of the unborn child, and any risks of carrying the child to term. A person to whom the responsibility has been delegated must also inform the woman: 1) medical assistance benefits may be available for prenatal care, childbirth and neonatal care; 2) that the Department of Health publishes printed materials describing the unborn child, listing agencies which offer alternatives to abortion, and explaining the availability of medical assistance benefits and that the woman has a right to review these materials if she chooses; and 3) that the father of the unborn child is liable to assist in support of their child even if he has offered to pay for an abortion.

decision.[4] Therefore, Section 3205 does not constitute an "undue burden" on abortion.

Since it does not constitute an undue burden, it must be upheld in that it is rationally related to a legitimate state interest. The Commonwealth seeks to promote several legitimate interests in requiring that this information be provided to pregnant women considering abortion. The Commonwealth has a legitimate interest in protecting pregnant women by ensuring that they are provided with information sufficient to enable them to make an informed choice regarding abortions.

Since a woman has a constitutional right to carry her unborn child to term, *Maher v. Roe*, 432 U.S. 464, 472 n.7 (1977), the Commonwealth also has an interest in ensuring that she does not relinquish that right without being fully informed. In addition, because abortion is unlike all other medical procedures in that it involves purposeful termination of a human life, the Commonwealth has an interest in ensuring that the decision to abort should be made only after careful examination of all relevant or potentially relevant facts.

Section 3205 requires that the patient be given information on the nature of the procedure, risks, and alternatives. This information is routinely provided to patients considering surgery.[5] The right to informed consent is listed among the Patient's Bill of Rights in the Pennsylvania Code. 28 Pa. Code Section 553.12(8). As defined in the Health Care Services Malpractice Act, informed consent means "[t]hat prior to consent having been given, *the physician or podiatrist has informed the patient* of the nature of the proposed procedure or treatment and of those risks and alternatives to treatment or diagnosis that a reasonable patient would consider material to the decision whether or not to undergo treatment or diagnosis." 40 Pa. Stat. Ann. Section 1301.103 (emphasis added). Thus, the information required by Section 3205(1)(i) clearly relates to legitimate state interests and must be upheld.

In addition, information on the probable gestational age of the unborn child, Section 3205(1)(ii), is relevant not only to the risks associated with the performance of an abortion,[6] but also to

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4. Dr. Rue testified that such information provided to the woman would impact her decision: Research by Mary Cunningham Agee indicated [when] she asked the question of women that had obtained abortions, if you had known that there were *other options* for you, *would you have elected an abortion*? And 90 percent said they would *not* have. App. 797. (emphasis added).
Moreover, Dr. Bowes related the following story.

> Q. Now, when you counsel women regarding informed consent, do you offer them the opportunity to see pictures regarding fetal development?
> A. Yes.
> Q. And in your experience have women wanted to see those pictures?
> A. Yes, it often is helpful in really making more clear than just a simple description of fetal development. If I can give you an example, we recently had a young woman with a fairly far advanced tumor, it's called a neuroectodermal tumor, which is a highly malignant tumor, was referred to us because she became pregnant during her --during her course of therapy. And the oncologist, the physicians who were caring for the patient and treating her, recommended that an abortion be done. And in counseling this patient, *she in fact wanted to see this material and elected to review it and, after doing so, was inclined and in fact chose to continue her pregnancy, in spite of considerable risks* to her. But all of the options were provided to her and she was very grateful for having that opportunity. So there are occasions when it can make a very big difference.

App. 912-913. (emphasis added).

5. Dr. Bowes testified: "Informed consent involves providing the patient with the - - with information about the risks of the condition that she happens to have at the time, the risk of the - - any medical or surgical procedures or therapies which are advised and the risks of alternative therapies or alternative procedures." App. 911.

6. Dr. Bowes testified that, because gestational age is directly related to abortion procedures and related risks, gestational information should be provided to the woman to enable her to give informed consent to the procedure:

> Q. Now in your experience or practice, do you have an opinion whether this requirement is beneficial to the woman?
> A. I think providing them the option of reviewing this material is beneficial and is part of a reasonable informed consent.
> Q. Now, why do you believe that?
> A. The period of gestation, the duration of gestation is important because it may affect how the patient views the, not only the risks which should be provided by the physician, but the development of the fetus. She may not be aware of the nature of fetal development and I think that's part

the psychological well-being of the woman.[7] As Justice O'Connor stated in *Thornburgh*, the information required by Section 3205(1)(iii) concerning the medical risks association with carrying a child to term "is the kind of balanced information I would have thought all could agree is relevant to a woman's informed consent." 476 U.S. at 830 (O'Connor, J., dissenting). Likewise, the information required by Section 3205(2) is "indisputably relevant in many cases [to the woman's decision] and would not appear to place a severe limitation on the abortion decision." *Thornburgh*, 476 U.S. at 831 (O'Connor, J., dissenting).

Since the information required by Section 3205 rationally relates to the state's legitimate interests, it is constitutional.

Petitioners' also claim that the 24-hour waiting period is unduly burdensome and unconstitutional and must be rejected. As Justice O'Connor stated in *Akron*:

> Although the waiting period may impose an additional cost on the abortion decision, this increased cost does not unduly burden the availability of abortions or impose an absolute obstacle to access to abortions. Further, the State is not required to 'fine-tune' its abortion statutes so as to minimize the costs of abortions. *H.L. v. Matheson*, 450 U.S. at 413.
>
> Assuming, *arguendo*, that any additional costs are such as to impose an undue burden on the abortion decision, the States' compelling interests in maternal physical and mental health and protection of fetal life clearly justify the waiting period. As we acknowledged in *Danforth*, 428 U.S. at 67, the decision to abort is 'a stressful one' and the waiting period reasonably relates to the State's interest in ensuring that a woman does not make this serious decision in undue haste. The decision also has grave consequences for the fetus, whose life the State has a compelling interest to protect and preserve . . . . The waiting period is surely a small cost to impose to ensure that the woman's decision is well considered in light of its certain and irreparable consequences on fetal life, and the possible effects on her own.

Akron, 462 U.S. at 473-474 (O'Connor, J., dissenting).

It is incongruous that that Petitioners would claim that the 24-hour waiting period is unduly burdensome in light of the fact that routine clinic practices require women to make two trips to the facility, one for the initial pregnancy test, and another for the abortion.[8] Therefore, Petitioners' challenge to this provision as being unduly burdensome must fail.

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of her having a fully - - being able to make a fully informed decision about pregnancy termination. App. 912-913

7. Dr. Rue testified that such information would prevent psychological harm to the woman:

> A. My opinion that offering her the opportunity to be educated with respect to biological and scientific facts, this opportunity which is voluntary is certainly not going to provide the basis of any psychological trauma for a person considering an abortion.
>
> Q. Now what –
>
> A. If anything, I would say, if I could add, this will help her utilize her own personal values and that those values be informed and based upon some facts.
>
> If, after reviewing these materials, she were to believe that this is, indeed, a human fetus, then she may act and decide accordingly. If, on the other hand, after reviewing these materials she makes the decision that this is not a human fetus and proceeds, *I think she is preventing probable increased psychological damage from being misled or receiving fetal – information* about fetal stages of development *after the abortion* at some later date or in the context of medical care in a wanted pregnancy later on. App. 795 (emphasis added).

8. Petitioners' witness testified:

> Q. In those instances would a woman have an abortion, if she chose to have an abortion on the same day as her initial pregnancy test?
>
> A. That would be *highly unusual* for someone *to have a pregnancy test positive for the first time and have an abortion on the same day.*
>
> Q. Under what circumstances might that occur?
>
> A. Probably the only time that it would occur is if she were at such a point in her pregnancy that a delay of even 24 hours meant that she would have to go – move from a 12-week to a 13, 14-week procedure or from that level to a second trimester procedure or perhaps not have the

C. The Parental Consent Provision Bears A Rational Relationship To Legitimate State Interest.

"[T]he relevant legal standards with respect to parental-consent requirements are not in dispute." *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 490 (1983). A state may require the consent of one parent as long as it provides "an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests." *Akron v. Akron Center for Reproductive Health*, 462 U.S. at 439-40 (1983).

Absent a medical emergency, Section 3206 of the Act prohibits the performance of an abortion on a minor unless the doctor has first obtained the informed parental consent of one of the minor's parents or has received court authorization to perform the abortion without parental consent. Thus, it broadly

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procedure at Women's Health Services at all, but she would have to be referred out of state. App. 699-700 (emphasis added).

Moreover, Dr. Bowes testified that other surgical procedures required lengthier waiting periods. For example, before a woman may be sterilized, she must consider her decision carefully for 30 days:

Q. With an informed consent do you consider a 24-hour waiting period to be beneficial?
A. Yes.
Q. Why is that?
A. I think that there is a very serious decision having to be made and the time to assimilate and digest, if you will, and consider the information that's been provided is beneficial to making that, to making an appropriate decision. One example of a similar type of situation when the -- the Medicaid provisions require that women having sterilization procedures must wait 30 days from the time they have initially made a decision and been informed about it until they make a final decision before they can have a sterilization procedure. Now, that's a 30-day waiting period because it's felt to be an important -- a decision of such importance. And that's regarded as being very straightforward now, we do that all the time.
Q. So do you consider time to be an important part of informed consent?
A. Yes, time to consider the facts.

Sterilization, under some circumstances, may be reversed. Abortion can never be reversed.
App. 920-921

complies with the standards set forth in *Ashcroft* and *Akron*. Moreover, Section 3206 undoubtedly furthers the Commonwealth's legitimate and compelling interests in protecting the rights of parents to direct the upbringing of their children and in protecting children who often lack the ability to make fully informed choices that take account of both immediate and long-range consequences of their decisions.

The Court's second concern regarding the narrowness of the medical emergency definition in the context of the parental consent provisions appears to have been needless. The Minnesota law upheld by the Supreme Court in *Hodgson* required parental notice prior to the performance of an abortion unless "[t]he attending physician certifies in the pregnant minor's medical record that the abortion is necessary to prevent the woman's death and there is insufficient time to provide the required notice." 110 S.Ct. at 2930. The emergency exception to notice upheld in *Hodgson* is far more narrow than that provided by Section 3206. Section 3206 is not limited to circumstances where an abortion is necessary to prevent death. Rather, it also exempts the physician from compliance where, in his or her good faith clinical judgment, "delay will create a serious *risk* of substantial and irreversible impairment of major bodily function." The physician is, therefore, provided much greater flexibility under the medical emergency exception contained in the Pennsylvania Act.

Petitioners continue to claim that the Act requires an in-person visit by parents to receive informed consent. As the District Court correctly held in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 686 F. Supp. 1089 (E.D. Pa. 1988), the Act does not require any such in-person visit. The court stated: "In order for consent to be 'informed' within the meaning of the Act, the physician must have *orally informed* the parent" according to the requirements of Section 3205. *Id.* at 1126 (emphasis supplied). "The Act is easily susceptible of an interpretation which would allow telephone consultation." *Id.* at

1127.[9] Moreover, since several days routinely pass between the time the minor contacts the clinic and the performance of the abortion, this Court observed that "[t]he clinic can easily mail a consent form to the parent" along with any information or printed materials which have been requested by the parent pursuant to Section 3205(2). *Id.*

Here, Petitioners state that they intend to require in-person visits and thereby impose more stringent requirements upon themselves than the Act itself requires.[10] They are free to do so. They may not, however, claim that such self-imposed requirements are mandated by the Act. Nor may they claim that the additional costs and delays which they anticipate due to this additional self-imposed requirement are caused by the Act and thus render it unconstitutional.

Petitioners' numerous other arguments concerning the alleged burdens of additional costs and delays necessitated by the parental consent requirement, in general, were also made in, and rejected by the court in, *Hodgson* and *Ohio*. For example, arguments regarding the increased health risks due to delays of a week or more were clearly important in causing Justice Marshall to dissent. *Hodgson*, 110 S.Ct. at 2954 (Marshall, J., dissenting). Yet these arguments failed to persuade the majority of the court that the challenged statutes were unconstitutional. *See, e.g.,*

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9. Petitioners' witness testified:
   Q. Is it possible to provide information over the telephone to a woman, and then follow it up with a face-to-face meeting another day?
   A. You mean to get a –
   Q. To obtain an informed consent?
   A. To obtain the informed consent. That should be possible...
App. 537

10. Petitioner's witness testified:
   If the act goes into effect we will require parental accompaniment to the clinic when the patient comes for her procedure. In difficult situations of which I anticipate there will be many, a visit at a separate time to the clinic with the minor would be possible, but parental presence at the clinic would be required absolutely. App. 90-91

Ohio, 110 S.Ct. at 2981 ("the mere possibility that the [judicial bypass] procedure may require up to twenty-two days [delay] in a rare case is plainly insufficient to invalidate the statute on its face.").

Finally, Petitioners' claim that the statute may not go into effect until the Commonwealth has established that its courts are prepared to implement it must be rejected. "Absent a demonstrated pattern of abuse or defiance, a state may expect that its judges will follow mandated procedural requirements." *Ohio*, 110 S.Ct. at 2981. Given that Petitioners have made a facial challenge to the Act, it is impossible for them to demonstrate any such pattern of abuse or defiance. This Court must assume that the Pennsylvania courts will follow the law. Thus, the Act should go into effect without further delay.

D. The Spousal Notice Provision Bears A Rational Relationship To A Legitimate State Interest

Section 3209(a) prohibits the performance of an abortion upon a married woman unless the physician has received a signed statement from the woman indicating that she has notified her spouse of her impending abortion. Spousal notice is not required if a medical emergency exists. 18 Pa. Cons. Stat. Ann. Section 3209(c). Nor is the verification of spousal notice required if the woman provides the physician with a signed statement certifying that at least one of the exceptions listed in subsection (b) applies to her. Those exceptions are: (1) her spouse is not the father of the child; (2) her spouse, after diligent effort, could not be located; (3) the pregnancy is the result of spousal sexual assault which has been reported to a law enforcement agency; and (4) the woman has reason to believe that giving notice to her spouse is likely to result in bodily injury to her.

Section 3209 is unlike the spousal *consent* statute struck in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), which gave to the husband "a veto power exercisable for any reason whatsoever or for no reason at all." *Id.* at 71. Section 3209 does not provide any veto power. Regardless of her husband's wishes, the woman may obtain an abortion once she has notified her spouse. Thus, the spousal notice requirement does not impose an "absolute obstacle or severe limitation on the abortion decision." Accordingly, it does not constitute an "undue burden" on abortion.

Since the spousal notice requirement does not constitute an "undue burden" on abortion it is constitutional if it rationally relates to legitimate interests the Commonwealth seeks to protect. As set forth in Section 3209, the Commonwealth seeks to protect three substantial interests: (1) promoting the integrity of the marital relationship; (2) protecting a spouse's interest in having children within marriage; and (3) protecting a spouse's interests in protecting the prenatal life of his jointly-conceived child. These interests are clearly legitimate. "[S]tatutory regulation of domestic relations [is] one that has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). The state "prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effect upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution." *Maynard v. Hill*, 125 U.S. 190, 205 (1888). Thus, "a state may single out abortion for special legislative regulation because of its unique character and profound ramifications." *Scheinberg v. Smith*, 659 F.2d 476, 486 (5th Cir. 1981). The reproductive choice at stake in the context of abortion is different from all other reproductive choices in that it involves the purposeful termination of a jointly-conceived human life. Therefore, it is reasonable for the Commonwealth to treat it differently from those other reproductive choices.

E. The Reporting Requirements Bears A Rational Relationship To A Legitimate State Interest.

Section 3214(a) requires each abortion performed in the Commonwealth to be reported to the Department of Health on forms prescribed by it. Section 3214(h) requires each physician who provides medical care to a woman because of a complication resulting from abortion, to file the report with the Department of Health on forms prescribed by it. As this Court stated in *Casey*: "It is important to note at the outset that the information reported under Sections 3214(a) and 3214(h) will, by statute, remain confidential." 686 F. Supp. at 1130.

Neither Section 3214(a) nor Section 3214(h) imposes an absolute obstacle or severe limitation on the abortion decision. Indeed, since these sections require reports only after an abortion has already been performed, it is difficult to imagine how they would have any impact whatsoever on a woman's abortion decision. Accordingly, these provisions do not place an "undue burden" on abortion and must be upheld if they rationally relate to a legitimate interest of the Commonwealth.

The Commonwealth seeks to promote several legitimate interests in requiring that the information specified under Section 3214(a) be reported to the Department of Health. As set forth in the statute itself, the information required to be reported is sought "for the purpose of promotion of maternal health and life by adding to the sum of medical and public health knowledge through the compilation of relevant data, and to promote the Commonwealth's interests in protecting the unborn child." 18 Pa. Cons. Stat. Ann. Section 3214(a). In addition to these interests, the Commonwealth also seeks the information for legitimate demographic and public health reasons. As the U.S. Department of Health and Human Services recognizes:

> Data from reports of induced termination of pregnancy provide unique information on the characteristics of

> women having induced abortions. Uniform annual data of such quality are no where else available. Medical and health information is provided at various lengths of gestation and by the type of abortion procedure used. Information on the characteristics of the women is used to evaluate the impact that induced abortion has on the birthrate, teenage pregnancy, and out-of-wedlock births. The data also helps measure the role that induced abortion plays in birth prevention as compared with contraception.

Handbook on the Reporting of Induced Termination of Pregnancy, U.S. Department of Health and Human Services, pp. 2-3.

Finally, the Commonwealth has a legitimate interest in requiring reporting to aid in its enforcement of the Act.

The Federal Standard Report of Induced Termination of Pregnancy, a copy of which is appended to the Health and Human Services Handbook, was developed by the federal government to serve as a model for the states' use. Each item included on the report is evaluated thoroughly for its registration, statistical, health and research value. Thus, the information which is required to be reported on the federal form is clearly related to legitimate interests of the state. Pennsylvania's reporting form is nearly identical to the federal report, except insofar as it requires some additional information specifically required by the Act. To the extent that it is like the federal form, the Pennsylvania form is constitutional because it furthers the same legitimate interest.

This Court correctly held that several items required to be reported under Section 3214(a) were permissible because they reasonably relate to the Commonwealth's legitimate interest in protecting maternal health. *Casey*, 686 F. Supp. at 1130-31. Thus, only those items that were held to be invalid in *Casey* or that were added by the 1989 amendments and are presently enjoined, will be addressed below.

The referring physician is capable of giving informed consent required by Section 3205 and making the determination of gestational age required by Section 3210. As set forth above, his or her identity will not be made known to the public and will be kept confidential. In *Casey*, this Court upheld the requirement that the performing physician's identity be reported because "[t]he performing physician would be the person best able to answer questions which may arise as to the information contained on the report, or to provide missing information." 686 F. Supp. at 1130. Given the important role which the referring physician may play in conforming to the requirements of Section 3205 and Section 3210, his or her identity is likewise reasonably related to the State's legitimate interest in obtaining this type of follow-up information.

The requirement that the identity of the concurring physician and second physician required by Sections 3211(c)(2) and 3211(c)(5) be reported also rationally relates to the legitimate and compelling interests of the Commonwealth. These items apply only to reports of abortions performed on unborn children of 24 or more weeks gestation.[11]

Relatively few abortions are performed at this stage in pregnancy, and it can hardly be argued that in those few instances where such abortions are performed, the reporting requirement is unduly burdensome. The information required to be reported is of a type which would readily be available to the physician and would normally be documented in the patient's medical chart. In addition, the information on fetal weight must be reported on either a fetal death certificate if the baby died, or on a birth certificate, if the baby survives. Thus, the reporting of this information to the Department of Health on an individual abortion reporting form can cause little additional burden to the

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11. We note that none of the Petitioners perform abortions on fetuses of 24 or more weeks gestation and, therefore, they lack standing to challenge Section 3214(a) as it relates to such abortions.

physician. Moreover, given the state's compelling interest in protecting the unborn child when viability is possible, reporting of the concurring physician, second physician, and the basis for performing an abortion pursuant to Section 3211(b)(1) all reasonably relate to the Commonwealth's compelling interest in protecting the unborn child.

Likewise, information on the basis for medical judgments with respect to the existence of a medical emergency are also relevant to the Commonwealth's interest in protecting maternal health. Such information will add to the sum of medical knowledge available with respect to high risk obstetrics and the necessity for abortion in such instances. It is also rationally related to the state's legitimate interest in enforcing the various provisions of the Act.

Information required to be reported in relation to the determination of gestational age is also rationally related to the state's legitimate interest in protecting maternal health and in protecting the unborn child. Performing an abortion without making the necessary accurate diagnosis of gestational age under such circumstances endangers not only the life of the unborn child but also the life of the pregnant patient.

Finally, the state has a compelling interest in requiring that spousal notice be given prior to an abortion. Thus, it is legitimate for the state to require that the reasons for failure to provide this notice be reported.

Section 3207(b) requires facilities at which abortions are performed to report: (1) the name and address of the facility; (2) the name and address of any parent, subsidiary or affiliated organization, corporation or association having contemporaneous commonality of ownership, beneficial interest, directorship or officership with any other facility. Section 3214(f) requires facilities to report the total number of abortions performed each quarter at the facility. These are hardly intrusive or burdensome requirements. They plainly promote the Commonwealth's interest in learning where abortions are

being performed in Pennsylvania, how many are performed at various facilities, and who owns the facilities so as to assure that appropriate practitioners are providing the services. Petitioners do not dispute this.

Petitioners object to the fact that the reports may be available for public inspection if the facilities receive public funds. On this point, Petitioners argue that the Commonwealth has no interest in disclosure and the facilities are subject to harassment because of the reports.

First, any argument that the operation of these sections is a direct link to actions of violence or harassment against the Petitioners' facilities is pure speculation. All that Petitioners can demonstrate is that they sometimes are the subjects of anti-abortion demonstrations and that this happens presently even without the operation of Sections 3207(b) and 3214(f). None of the information which would be made available (the identity of Petitioners and the numbers of abortions they perform) is of a nature which would incite more anti-abortion activity. For example, Petitioners all advertise in telephone directories and elsewhere that they provide abortion services.[12] Thus, anyone who wishes to know where such a facility is located need not go to the trouble of contacting the Department of Health for a Section 3207(b) report. The person need only check the telephone book.

Finally, despite Petitioners' low regard for the public's interest in knowing where and how its tax dollars are being spent, this is nevertheless an important state interest. The people, through their representatives, have determined that every "public record" of a government agency in this state "shall, at reasonable times, be open for examination and inspection by any citizen" of the Commonwealth. 65 Pa. Cons. Stat. Ann. Section 66.2. Public record is defined as "any account, voucher or contract dealing with the receipt or disbursement of funds by an

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12. *See* Court exhibits 8, 23, 20, and 35. App. 1305, 1358, 1415, and 1443.

agency. . . ." 65 Pa. Cons. Stat. Ann. Section 66.1. Thus, there is an important public interest in allowing the citizens of this state to see where and how public funds are spent and to patronize those facilities where abortions are not performed. These provisions rationally relate to that interest and are, therefore, constitutional.

III. The Reasonableness Of The Statutes Provision Are A Matter For The Legislature Not The Court.

After having demonstrated the reasonable nature of the provisions of the Act, we now turn to a consideration of the unreasonableness of the District Court is treatment of the Act. Petitioners and Cross-Respondents in this case begin with a misleading statement concerning the record below. Petitioners state:

> The District Court carefully documented the record evidence supporting each of its 387 findings of fact, none of which was reversed on appeal. Given the complete absence of "an extraordinary reason" to examine the District Court's findings, they must be accepted by this Court. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

Brief for Petitioners at 4.

Petitioners would lead this Court to believe that there is no reason to inquire into the District Court's findings and that they must be accepted in the absence of an "extraordinary reason." Why Petitioners would make such an argument -- in light of the fact that the Court of Appeals ignored certain findings of the District Judge as being irrelevant to the issues before the court, reached conclusions contrary to the District Court Judge or stated that some of his findings were without support in the

record[13] -- becomes clear when one considers how heavily Petitioners rely on such "findings" for argument in their brief.

Petitioners do nothing more than attempt to "lobby" the justices of this Court in an effort to persuade them to their political view of abortion.[14] The so-called "findings" of the District Court Judge serve to act as the ammunition for this tactic thereby transforming the chambers of this Court into a pseudo-Senate floor.

No one would deny that the debate about abortion has been a heated one for our nation. There are groups that stand diametrically opposed to one another on all issues. Yet when the Constitution has left with the Legislature the authority to regulate those areas, it is a matter for the those duly elected representatives of the people to decide the nature of any such rights and the contours of the law defining those rights. When the court under the guise of "fact finding" attempts to take issue or overrule the judgment of a particular legislature on the same point, it becomes clear that the court is attempting to sit as a super-legislature outside the constraints of the democratic process.

In the past, this Court has condemned such judicial interference. In *Powell v. Pennsylvania*, 127 U.S. 678, 686, (1888) the Court has said:

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13. An examination of the record will show that the Court of Appeals found some of the District Court's factual findings unsupported by the record (38a-40a, 79a-80a, 83a), or insufficient to establish an undue burden. (*e.g.* 46a, 49a; 51a, 53a-54a, 78a). The Respondents did challenge the District Court's factual findings on appeal. (*See* Brief for Appellant, at 15, 22).

14. Justice Scalia reminded the Court that it was needless "to prolong this Court's self-awarded sovereignty over a field where it has little proper business since the answers to most of the cruel questions posed are political and not juridical - a sovereignty which therefore quite properly, but to the great damage of the Court, makes it the object of the sort of organized public pressure that political institutions in a democracy ought to receive."
Webster v. Reproductive Health Services, 492 U.S. 490, 532. (1989) (Scalia, J., concurring).

> If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive . . ., their appeal must be to the Legislature, or to the ballot-box, not to the judiciary. The latter can not interfere without usurping powers committed to another department of government.

Recently, this Court has shown great respect for one of the other branches of our tripartite government with regard to any inquiry into the reasonableness of laws. In the past, this Court has corrected lower courts who have attempted to substitute their judgment for that of the legislature. In *Harris v. McRae*, 448 U.S. at 326, where the District Court after conducting a year-long evidentiary hearing regarding the public funding of abortion and reached conclusions contrary to the legislature, the U.S. Supreme Court said:

> In making an independent appraisal of the competing interests involved here, the District Court went beyond the judicial function. Such decisions are entrusted under the Constitution to Congress, not the courts. It is the role of the courts only to ensure that congressional decisions comport with the Constitution. . . . It is not the mission of this Court or any other to decide whether the balance of competing interests reflected in the statute is wise social policy. If that were our mission, not every Justice who has subscribed to the judgment of the Court today could have done so. But we cannot, in the name of the Constitution, overturn duly enacted statutes simply because they may be unwise, improvident, or out of harmony with a particular school of thought. Rather, when an issue involves policy choices as sensitive as those implicated [here] . . . the appropriate forum as their resolution in a democracy is the legislature.

Id. at 326 (citations and internal quotation marks omitted).

Again in *Vance v. Bradley*, 440 U.S. 93, 97 (1979) this Court has recognized that the "Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted."

CONCLUSION

It is a heavy burden to attack a state statute as being unconstitutional on its face. Petitioners have failed to demonstrate that the Act is unconstitutional. Petitioners, rather than relying upon sound juridical arguments, have relied upon arguments that are more political in nature.

The legal standards in this area are clear. Justice O'Connor's undue burden standards are reasonable and workable. The state has demonstrated this quite aptly in the lower courts.

Accordingly, this Court should affirm the United States Third Circuit Court of Appeals opinion in upholding the constitutionality of Sections 3203 (medical emergency), 3205 (informed consent), 3206 (parental consent), and 3207, 3214 (reporting requirements) of the Pennsylvania Abortion Control Act and should reverse the decision with regard to Section 3209 (spousal notice).

Respectfully submitted,

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(35) (29)

Nos. 91-744 and 91-902

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *et al.*,
Petitioners and Cross-Respondents,

v.

ROBERT P. CASEY, *et al.*,
Respondents and Cross-Petitioners.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF AMICUS CURIAE OF HON. HENRY J. HYDE, HON. CHRISTOPHER H. SMITH, HON. ALAN B. MOLLOHAN, HON. HAROLD L. VOLKMER, HON. ROBERT G. SMITH AND OTHER UNITED STATES SENATORS AND MEMBERS OF CONGRESS IN SUPPORT OF RESPONDENTS ‡

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICI	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. *ROE v. WADE* IS A WEAKENED DECISION WITH LIMITED PRECEDENTIAL VALUE, AT ODDS WITH RECENT DECISIONS OF THIS COURT, AND SHOULD BE EXPRESSLY OVERRULED	3
II. THE DOCTRINE OF STARE DECISIS DOES NOT PRECLUDE RECONSIDERATION OF *ROE v. WADE*	8
III. DECLINING TO OVERRULE *ROE v. WADE* SERVES NONE OF THE INTERESTS OF STABILITY, PREDICTABILITY, OR CONSISTENCY THAT ARE FURTHERED BY THE DOCTRINE OF STARE DECISIS	13
IV. OVERRULING *ROE v. WADE* IS CONSISTENT WITH PRIOR OVERRULINGS OF CONSTITUTIONAL DECISIONS BY THIS COURT	21
V. THE MOST PRUDENT COURSE IN ADDRESSING THE PROBLEMS POSED BY *ROE v. WADE* IS TO OVERRULE THAT DECISION EXPRESSLY AND RETURN TO THE POLITICAL BRANCH OF GOVERNMENT ITS RIGHTFUL AUTHORITY TO REGULATE THE PRACTICE OF ABORTION	27
CONCLUSION	30

TABLE OF AUTHORITIES

CASES

	Page
Adkins v. Children's Hosp., 261 U.S. 525 (1923)	22
Aguilar v. Texas, 378 U.S. 108 (1964)	26
Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968)	26
American College of Obstetricians and Gynecologists v. Thornburgh, 737 F.2d 283 (3d Cir. 1984), *aff'd*, 476 U.S. 747 (1986)	16
Arizona v. Ramsey, 467 U.S. 203 (1984)	14
Beal v. Doe, 432 U.S. 438 (1977)	10
Bellotti v. Baird (I), 428 U.S. 132 (1976)	11
Bellotti v. Baird (II), 443 U.S. 662 (1979)	11
Booth v. Maryland, 482 U.S. 496 (1987)	25
Bowers v. Hardwick, 478 U.S. 186 (1986)	23
Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1931)	8, 9
Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793)	9
City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983)	*passim*
Coe v. Melahn, No. 90-1552 (8th Cir. Mar. 2, 1992) (WL 37328)	14, 18
Colautti v. Franklin, 439 U.S. 379 (1979)	10, 15
Connecticut General Co. v. Johnson, 303 U.S. 77 (1938)	9
Daniels v. Williams, 474 U.S. 327 (1986)	22
Diamond v. Charles, 476 U.S. 54 (1986)	11
Doe v. Bolton, 410 U.S. 179 (1973)	6, 7, 16
Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857)	9
Edwards v. Arizona, 451 U.S. 477 (1981)	6
Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990)	26
Erie Ry. Co. v. Tompkins, 304 U.S. 64 (1938)	26, 27
Ferguson v. Skrupa, 372 U.S. 726 (1963)	17
First Nat'l Bank v. Maine, 284 U.S. 312 (1932)	23
Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)	13, 26, 27
Gideon v. Wainwright, 372 U.S. 335 (1963)	7
Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939)	9
Griswold v. Connecticut, 381 U.S. 479 (1965)	24, 25

TABLE OF AUTHORITIES—Continued

	Page
Guardians Ass'n v. Civil Service Comm'n of New York City, 463 U.S. 582 (1983)	9
Hammer v. Dagenhart, 247 U.S. 251 (1918)	6
Harris v. McRae, 448 U.S. 297 (1980)	19
Hodgson v. Minnesota, 110 S. Ct. 2629 (1990)	*passim*
Hudgens v. NLRB, 424 U.S. 507 (1976)	26
Illinois v. Gates, 462 U.S. 213 (1983)	26, 28, 29
Kerlin's Lessee v. Bull, 1 U.S. (1 Dall.) 175 (1786)	13
Lambert v. California, 335 U.S. 225 (1957)	7
Liggett Co. v. Baldridge, 278 U.S. 105 (1929)	22
Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949)	22
Lochner v. New York, 198 U.S. 45 (1905)	6, 23
Mapp v. Ohio, 367 U.S. 643 (1961)	29
Margaret S. v. Edwards, 488 F.Supp. 181 (E.D. La. 1980)	16
Michael H. v. Gerald D., 491 U.S. 110 (1989)	23
Miranda v. Arizona, 384 U.S. 486 (1966)	6
Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974)	10
National League of Cities v. Usery, 426 U.S. 833 (1976)	13, 26
North Dakota Pharmacy Board v. Snyder's Drug Stores, 414 U.S. 156 (1973)	22
Ohio v. Akron Center for Reproductive Health, 110 S. Ct. 2972 (1990)	*passim*
Oregon v. Mitchell, 400 U.S. 112 (1970)	9
Parratt v. Taylor, 451 U.S. 527 (1981)	22
Patterson v. McLean Credit Corp., 491 U.S. 164 (1989)	28
Payne v. Tennessee, 111 S. Ct. 2597 (1991)	*passim*
Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52 (1976)	11, 16
Planned Parenthood Ass'n of Kansas City v. Ashcroft, 462 U.S. 476 (1983)	11
Planned Parenthood of Southeastern Pennsylvania v. Casey, 947 F.2d 682 (3d Cir. 1991)	*passim*
Planned Parenthood of Southeastern Pennsylvania v. Casey, 744 F.Supp. 1323 (E.D. Pa. 1990)	11
Planned Parenthood v. Minnesota, 910 F.2d 479 (8th Cir. 1990)	18

TABLE OF AUTHORITIES—Continued

	Page
Poelker v. Doe, 432 U.S. 519 (1977)	11
Pollack v. Farmers' Loan & Trust, 157 U.S. 429 (1895)	9
Ragsdale v. Turnock, 841 F.2d 1358 (7th Cir. 1988)	16
Robbins v. California, 453 U.S. 420 (1981)	26
Roe v. Wade, 410 U.S. 113 (1973)	*passim*
Rust v. Sullivan, 111 S. Ct. 1759 (1991)	5
Schulte v. Douglas, 567 F. Supp. 522 (D. Neb. 1981), *aff'd per curiam sub nom. Women's Services, P.C. v. Douglas*, 710 F.2d 465 (8th Cir. 1983)	16
Singleton v. Wulff, 428 U.S. 106 (1976)	11
Smith v. Allwright, 321 U.S. 649 (1944)	10
South Carolina v. Gathers, 490 U.S. 805 (1989)	6, 25
State Tax Comm'n v. Aldrich, 316 U.S. 174 (1942)	23
Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842)	26
Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986)	*passim*
United States v. Darby, 312 U.S. 100 (1941)	6
United States v. Ross, 456 U.S. 798 (1982)	26
Webster v. Reproductive Health Services, 492 U.S. 490 (1989)	*passim*
West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)	22
Williams v. Zbaraz, 448 U.S. 358 (1980)	11
Constitutional Provisions	
U.S. Const. Art. V	9
U.S. Const. Amend IV	26
U.S. Const. Amend. X	26
U.S. Const. Amend. XI	9
U.S. Const. Amend. XIII	9
U.S. Const. Amend. XIV	*passim*
U.S. Const. Amend. XVI	9
U.S. Const. Amend. XXVI	9
Statutes and Regulations	
41 U.S.C.S. Sec. 1396 *et seq.* (1985 ed. and 1990 Supp.)	19

TABLE OF AUTHORITIES—Continued

	Page
Legal Ramifications of the Human Life Amendment: Hearings before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary on S.J. Res. 3, 98th Cong., 1st Sess. (1983)	19
Org. of Amer. Treaty Series No. 36, at 1-21, Official Records, OAS/Ser.A/16	24
Proclamation No. 5761, 53 Fed. Reg. 1464 (1988)	19
S323 102nd Cong., 1st Sess. Cong. Rec. S10113-21, 24-25 (July 16, 1991)	1
The Human Life Bill—S. 158: Report by the Subcomm. on Separation of Powers, Senate Comm. on the Judiciary, 97th Cong., 1st Sess. (1981)	11
Other Authorities	
Americans United for Life, *Abortion and Moral Beliefs, a Survey of American Opinion* (1991)	11, 12
Blake, *The Supreme Court's Abortion Decisions and Public Opinion in the United States*, 3 Population and Dev. Rev. 45 (1977)	12
A. Blaustein & G. Flanz, *Constitutions of the Countries of the World* 20 vols. (1971-Current)	24
A. Blaustein & C. Willner, *Stare Decisis*, work in progress, (1993 publication anticipated)	8
Blaustein & Field, *"Overruling" Opinions in the Supreme Court*, 57 Mich. L. Rev. 151 (1958)	8, 21
R. Bork, *The Tempting of America: The Political Seduction of the Law* (1990)	12, 17, 20
Congressional Research Service, *The Constitution of the United States, Analysis and Interpretation* (1987)	8
Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 Cornell L. Rev. 401 (1988)	13
A. Cox, *The Role of the Supreme Court in American Government* (1973)	12, 20
Dellinger & Sperling, *Abortion and the Supreme Court: The Retreat from* Roe v. Wade, 138 U. Pa. L. Rev. 83 (1989)	5, 14

TABLE OF AUTHORITIES—Continued

	Page
Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735 (1949)	9
Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920 (1973)	12, 20
Epstein, *Substantive Due Process by Any Other Name*, 1973 Sup. Ct. Rev. 159	12, 21
Ezzard, *State Constitutional Privacy Rights Post* Webster: *Broader Protection Against Abortion Retrictions?*, 67 Denver U. L. Rev. 401 (1990)	5, 20
Forsythe & Grant, *Two Ships Passing in the Night: An Interpretivist Review of the White-Stevens Colloquy on* Roe v. Wade, 6 St. Louis Pub. L. Rev. 43 (1987)	12
Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 Geo. Wash. L. Rev. 68 (1991)	15, 20, 23
Henshaw, *The Characteristics and Prior Contraceptive Use of U.S. Abortion Patients*, 20 Fam. Planning Perspectives 158 (1988)	29
Higginbotham, *Text and Precedent in Constitutional Adjudication*, 73 Cornell, L. Rev. 411 (1988)	9
D. Horan, E. Grant & P. Cunningham eds., *Abortion and the Constitution* (1987)	18
Howard, Garcia *and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles*, 19 Ga. L. Rev. 789 (1985)	27
Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 Wis. L. Rev. 467	8
McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 Yale L.J. 1501 (1989)	20
Mitchell Opposes Proposed Abortion-Rights Legislation, Wash. Post, Feb. 4, 1992 at A13, col. 1	11
Morgan, Roe v. Wade *and the Lessons of Pre-*Roe *Case Law*, 77 Mich. L. Rev. 1724 (1979)	20
M. Perry, *Morality, Politics and Law* (1988)	20
Reed, *Stare Decisis and Constitutional Law*, 9 Pa. Bar A. Q. 131 (April 1938)	14

TABLE OF AUTHORITIES—Continued

	Page
Rehnquist, *Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement? Or: Privacy, You've Come a Long Way Baby*, 23 Kan. L. Rev. 1 (1974)	21
J. Thayer, *John Marshall* (1920)	10
Torres & Forrest, *Why Do Women Have Abortions?*, 20 Fam. Planning Perspectives 169 (1988)	12, 29
Transcript of Arguments Before High Court on Abortion Case, N.Y. Times, April 27, 1989, at Y15 col. 1	25
L. Tribe, *Abortion: The Clash of Absolutes* (1990)	5
Views on Abortion Remain Divided, N.Y. Times, Jan. 22, 1989, at 17, col. 1	12
Wardle, *Rethinking* Roe v. Wade, 1985 B.Y.U.L. Rev. 231	19, 20
Wardle, *"Time Enough":* Webster v. Reproductive Health Services *and the Prudent Pace of Justice*, 41 Fla. L. Rev. 881 (1989)	19, 20
Wash. Post, Nov. 13, 1988, at C6, col. 1	19
Wechsler, *Toward Neutral Principles in Constitutional Adjudication*, 73 Harv. L. Rev. 1 (1959)	13

BRIEF AMICUS CURIAE OF HON. HENRY J. HYDE, HON. CHRISTOPHER H. SMITH, HON. ALAN B. MOLLOHAN, HON. HAROLD L. VOLKMER, HON. ROBERT G. SMITH AND OTHER UNITED STATES SENATORS AND MEMBERS OF CONGRESS IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICI

The *amici*, Members of Congress and Senators, have substantial interests in the disposition of this case. Congressional debates on legislation with provisions similar to the challenged sections of the Pennsylvania Abortion Control Act often center on the constitutionality of such requirements. *See, e.g.*, S323 102nd Cong., 1st Sess. Cong. Rec. S10113-21, S10124-25 (July 16, 1991) (parental notification required for minor who requests abortion). A decision from this Court upholding all of the challenged provisions and articulating a clear standard of review would resolve lingering doubts of constitutional infirmity that plague much abortion-related legislation and, therefore, would directly affect Congress' continued attempts to act in this area. More fundamentally, the decision of the court of appeals, abandoning the standard of review enunciated in *Roe v. Wade*, 410 U.. 113 (1973), draws into question the continuing viability of *Roe*, a question only this Court can answer definitively. Congress is keenly interested in the Court's answer as it holds the key to restoring the essential balance between legislative authority and judicial review under the federal Constitution.

SUMMARY OF ARGUMENT

This Court's recent decisions have begun the process of dismantling "the mansion of constitutionalized abortion-law, constructed overnight in *Roe v. Wade*." *Webster v. Reproductive Health Services*, 492 U.S. 490, 537 (Scalia, J., concurring in part, concurring in the judgment). A majority of the Court has questioned or repudiated *Roe*'s trimester framework; has recognized com-

pelling state interests in maternal health and fetal life throughout pregnancy; and has employed a more relaxed standard of review in evaluating the constitutionality of abortion regulations. *Roe* is an impaired decision. Some lower federal courts have begun to recognize, and the country increasingly understands, that *Roe* has been limited. Overruling *Roe v. Wade* would not represent an abrupt about-face in the Court's abortion jurisprudence but rather would be the final step in a journey that began several years ago.

Stare decisis, a doctrine of diminished importance in the field of constitutional law, provides no basis for declining to overrule the multiple errors of *Roe v. Wade*. On 214 occasions this Court has overturned previous decisions. In nearly three-fourths of those cases, the Court overruled because the earlier decision had wrongly interpreted the Constitution.

The reasons for this self-correction—the difficulty of addressing constitutional error through amendment or legislation; the primacy of the text of the Constitution over the interpretations placed upon it; and the inappropriateness of the nation's highest tribunal perpetuating constitutional error—apply with special force to *Roe*. Moreover, the interests furthered by stare decisis are not served by retaining *Roe;* indeed, they are at cross-purposes. The doctrines of *Roe* have caused great instability and unpredictability in the law. Recent decisions of this Court exacerbate this uncertainty. Statements from the lower federal courts, as well as state and federal elected representatives, amply demonstrate the confusion resulting from attempts to read this Court's recent abortion decisions against the backdrop of *Roe v. Wade*.

Overruling *Roe* also would be consistent with past willingness to admit error. This Court has corrected decisions which, like *Roe*, have misinterpreted the "liberty" clause of the Fourteenth Amendment by placing an unwarranted strait-jacket on legislative authority.

And it has renounced the role of "super-legislature," sitting in judgment on the wisdom of state statutes. Doctrines on which long-standing social institutions and conventions were established have been overturned, as have doctrines on which scores of criminal convictions were predicated. The overturning of such decisions has often caused change, some of it disruptive. But in appropriate circumstances it also has returned to the political branches of government their rightful authority to respond to the pressing moral and social issues at the root of such change. *Roe*, contrary to this tradition, has usurped the legislative function, and has aggravated the social turmoil over abortion.

Finally, although this Court has shown a proper reluctance to overrule constitutional decisions where a less severe remedy is available, it is appropriate to overrule *Roe v. Wade* in this case. *Roe* is no longer viewed as stable or fully intact; this uncertainty concerning a decision so demonstrably unworkable and devoid of constitutional basis divests the decision of any rightful sway over the Court's decision here. *Roe* is constitutional error of the most radical variety, and the traditions of this Court call for such error to be dispatched without ambiguity or equivocation.

ARGUMENT

I. *ROE v. WADE* IS A WEAKENED DECISION WITH LIMITED PRECEDENTIAL VALUE, AT ODDS WITH RECENT DECISIONS OF THIS COURT, AND SHOULD BE EXPRESSLY OVERRULED.

Unlike the situation presented in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), where the Court was asked to overrule *Roe v. Wade*, 410 U.S. 113 (1973), only three years after its expansion and reaffirmation in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), this case presents the question three years after a plurality

of the Court expressly rejected central tenets of the *Roe* doctrine.[1] *Webster*, 492 U.S. 490 (1989).

Webster demonstrates that a majority of this Court finds *Roe*'s trimester framework "unworkable," "flawed," and "problematic." 492 U.S. at 518 (Rehnquist, C.J., joined by Kennedy, J., and White, J.); *id.* at 529 (O'Connor, J., concurring in part, concurring in the judgment); *see also*, *id.* at 532 (Scalia, J., concurring in part, concurring in the judgment). A majority also now treats the state's interest in unborn human life as compelling throughout pregnancy. *Id.* at 519 (Rehnquist, C.J., joined by Kennedy, J., and White, J.); *id.* at 529-30 (O'Connor, J., concurring in part, concurring in the judgment); *id.* at 532 (Scalia, J., concurring in part, concurring in judgment). And a majority has also rejected *Roe*'s generalized fundamental right to abortion and accordingly Roe's strict scrutiny standard of review. *Id.* at 518 n.15 (Rehnquist, C.J., joined by Kennedy, J., and White, J.); *id.* at 530 (O'Connor, J., concurring in part, concurring in the judgment); *id.* at 532 (Scalia, J., concurring in part, concurring in the judgment). In *Hodgson v. Minnesota*, 110 S. Ct. 2629 (1990), and *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990), the Court likewise employed a relaxed standard of review. These decisions marked substantial retreats from *Roe*. Overruling *Roe v. Wade* would merely—but decisively—complete the process begun in *Webster*, *Hodgson* and *Akron Center*.

Recognition that the Court is moving away from the central tenets of *Roe* is widespread. In his dissent in

[1] Whether the Court should overrule *Roe* is appropriately before the Court. While the Court "limited" its grant of review to whether the court of appeals erred in its constitutional determinations regarding the challenged provisions of the Pennsylvania statutes, 112 S. Ct. 931-32 (1992), the court of appeals' conclusions were premised on a determination that the "undue burden standard" and not *Roe*'s strict scrutiny test "is the law of the land." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 947 F.2d 682, 698 (3d Cir. 1991).

Webster, Justice Blackmun stated that "[t]he simple truth is that *Roe* would not survive the plurality's analysis." 492 U.S. at 538.[2] Legal scholars concur that the Court's current abortion jurisprudence departs from *Roe v. Wade*.[3] Although Professor Dellinger urges this Court to "reaffirm" *Roe*,[4] he elsewhere concedes that "the right to have an abortion is no longer fundamental." Dellinger & Sperling, *Abortion and the Supreme Court: The Retreat from* Roe v. Wade, 138 U. Pa. L. Rev. 83, 83 (1989).

However, eroding support on the Court for *Roe* indicates that that decision was seriously weakened even before *Webster;* the Court's decisions in *Webster*, *Hodgson*, and *Akron Center* evolved from a growing consensus on the Court that *Roe* was wrongly decided.[5] Unlike

[2] *See also, Rust v. Sullivan*, 111 S. Ct. 1759, 1786 (1991) (Blackmun, J., dissenting).

[3] *See, e.g.*, L. Tribe, *Abortion: The Clash of Absolutes* 24 (1990) ("[A]fter *Webster, Roe is not what it once was.*"); Ezzard, *State Constitutional Privacy Rights Post* Webster: *Broader Protection Against Abortion Restrictions?*, 67 Denver U. L. Rev. 401, 401 (1990) ("*Webster* sent a message to legislatures around the country that additional state restrictions on abortion are now acceptable because of the Court's new and narrow interpretation of *Roe v. Wade.*").

[4] Brief *Amicus Curiae* of Representatives Don Edwards, Patricia Schroeder, *et al.*, in Support of Petitioners at 2.

[5] The mounting opposition to *Roe* from members of the Court resulted from both later rejection of the decision by those originally counted in the majority, such as Chief Justice Burger, and the addition to the Court of new members dubious of *Roe*'s constitutional grounding. Petitioners and their *amici* disingenuously contend that overruling *Roe* would be—or, at least, would appear to be—an overtly political act. *See* Petitioner's Brief at 22 n.33; Brief *Amicus Curiae* of Representatives Don Edwards, Patricia Schroeder, *et al.*, in Support of Petitioners at 10-11, 13. This contention neglects, however, that the "goal of constitutional adjudication is surely not to remove inexorably 'political divisive' issues from the ambit of the legislative process . . . [but rather] to hold true the balance between that which the Constitution puts beyond the reach of the democratic process and that which it does not." *Webster*, 492 U.S. at 521. Furthermore, as Justice Scalia

other controversial decisions of this Court which over time gained acceptance from the original dissenters,[6] *Roe*'s ever-broadening scope and increasingly detailed legislative character produced narrowing majorities and more strongly worded dissents. As this Court noted in *Payne v. Tennessee*, 111 S. Ct. 2597 (1991), the relative strength of precedents is undermined when the rulings were issued "over spirited dissents challenging the basic underpinnings of those decisions [and when] [t]hey have been questioned by members of the Court in later decisions, and have defied consistent application by the lower federal courts." *Payne*, 111 S. Ct. at 2611.

At the outset, *Roe* and *Doe v. Bolton*, 410 U.S. 179 (1973), were condemned for appropriating the legislative function.[7] Then Associate Justice Rehnquist also criticized

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observed in *Payne v. Tennessee*, 111 S. Ct. 2597 (1991), charges that an overruling court is "exercising power not reason" have it backwards. "[W]hat would enshrine power as the governing principle of this Court is the notion that an important constitutional decision with plainly inadequate rational support *must* be left in place for the sole reason that it once attracted [a majority of the Court]." *Id.* at 2613 (Scalia, J., concurring) (emphasis in original). Moreover, the fact is that "[o]verrulings of precedent rarely occur without a change in the Court's personnel." *South Carolina v. Gathers*, 109 S. Ct. 2207, 2217 (1989) (Scalia, J., dissenting). Petitioners' argument would have precluded the overruling of *Lochner v. New York*, 198 U.S. 45 (1905), and its progeny. It was, after all, majorities largely consisting of President Roosevelt's appointees that eradicated economic due process from our constitutional jurisprudence, a result deemed correct notwithstanding the changed makeup of the Court. *See, e.g., United States v. Darby*, 312 U.S. 100 (1941) (Justice Stone, Black, Reed, Frankfurter, Douglas, and Murphy all appointed by President Roosevelt, voting to overrule *Hammer v. Dagenhart*, 247 U.S. 251 (1918)).

[6] *See, e.g., Edwards v. Arizona*, 451 U.S. 477 (1981) (per White, J.) (confession constitutionally invalid under *Miranda*); *Miranda v. Arizona*, 384 U.S. 486 (1966) (White, J., dissenting).

[7] *Roe*, 410 U.S. at 174 ("judicial legislation") (Rehnquist, J., dissenting); *Doe*, 410 U.S. at 222 ("[The majority decision is] an exercise of raw judicial power . . . This issue . . . should be left with the people and to the political processes the people have devised to govern their affairs.") (White J., dissenting).

the Court for ignoring over a century of American legal history which criminalized abortion.[8] The growing extremity of *Roe* as revealed in *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), and *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), drew increasingly strong dissents from four justices.[9] Most notably in *Thornburgh*, Chief Justice Burger, who concurred in *Roe* and *Doe*, called for the reexamination of *Roe*, 476 U.S. at 785 (Burger, C.J., dissenting), and "agree[d] with much of Justice White's and Justice O'Connor's dissents," which challenged virtually every aspect of *Roe v. Wade*. *Id.* at 782.

The limited deference normally due a constitutional precedent all but evaporates where the decision has been undermined by intervening decisions calling the precedent's basic legitimacy into question. The strong criticism of the fundamental aspects of *Roe*, coming from a majority of the Court's members, has rendered the principles of *Roe* "no longer a reality" and thus ripe for overruling. *Gideon v. Wainwright*, 372 U.S. 335, 351 (1963) (Harlan, J., concurring). Whether termed a "modification" or a "dramatic retrenchment in [the Court's] jurisprudence," *Webster*, 492 U.S. at 544 (Blackmun, J., dissenting), the rejection of *Roe*'s central tenets amounts to an abandonment of the *Roe* analysis, as the court of appeals concluded below. Like so many decisions before it, *Roe* has been essentially discarded and now floats as a "derelict on the waters of the law," *Lambert v. California*, 335 U.S. 225, 232 (1957) (Frankfurter, J., dissenting), and should, therefore, be forthrightly abandoned.

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[8] 410 U.S. at 174-77 (Rehnquist, J., dissenting). *See also* Brief *Amicus Curiae* of Certain American State Legislators in Support of Respondents.

[9] *City of Akron*, 462 U.S. at 452 (O'Connor, J., joined by White, J., and Rehnquist, J., dissenting); *Thornburgh*, 476 U.S. at 782 Burger, C.J., dissenting), *id.* at 785 (White, J., joined by Rehnquist, J., dissenting), *id.* at 814 (O'Connor, J., joined by Rehnquist, J., dissenting).

II. THE DOCTRINE OF STARE DECISIS DOES NOT PRECLUDE RECONSIDERATION OF *ROE v. WADE*.

> Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right. This is commonly true even where the error is a matter of serious concern, *provided* correction can be had by legislation. But in cases involving the Federal Constitution where correction through legislative action is practically impossible, this Court has often overruled its prior decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.

Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-410 (1931) (Brandeis, J., dissenting). On more than 120 occasions since *Burnet*, this Court has exercised its authority to review and overrule its decisions on constitutional law.[10]

The overruling cases of the past 60 years, and most recently this Court's decision in *Payne v. Tennessee*, 111

[10] In *Burnet*, Justice Brandeis identified 28 instances in which the Court had overruled or qualified earlier decisions. An exhaustive study of this Court's decisions by Rutgers University Professor Emeritus Albert P. Blaustein and Carl Willner has yielded a total of 214 implicit and explicit overrulings to date. A. Blaustein & C. Willner, *Stare Decisis* (work in progress, 1993 publication anticipated (not released for publication)). Copies of the chart illustrating the overruling decision, the overruled precedent, the Court's rationale, and vote breakdown for each case have been lodged with the Office of the Clerk simultaneously with the filing of this Brief. *See also* Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 Wis. L. Rev. 467, 494-496 (listing 47 constitutional decisions overturned 1960-1979); Blaustein & Field, *"Overruling" Opinions in the Supreme Court*, 57 Mich. L. Rev. 151, 167, 184-194 (1958) (identifying 60 constitutional law decisions among 90 overrulings of prior Supreme Court decisions); Congressional Research Service, *The Constitution of the United States, Analysis and Interpretation*, 2115-2127, & Supp. (1987) (184 overrulings through 1986).

S. Ct. 2597 (1991), exemplify Justice Brandeis' criteria for permitting greater latitude in overruling constitutional decisions.

First is the unique difficulty of amending the Constitution to correct an erroneous decision, particularly where a legislative reformation of the error is impossible. *Payne*, 111 S. Ct. at 2610. This difficulty extends not only to the super-majoritarian requirements of Article V, but to the task of drafting an amendment that will strike the intended target without unintended effect on other constitutional provisions.[11]

Second, "precedent that conflicts with [constitutional] text is not precedent."[12] Justice Frankfurter stated, "[t]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it." *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 491-92 (Frankfurter, J., concurring.) And Justice Douglas went so far as to say that the place of stare decisis in constitutional law is "tenuous" where a prior decision conflicts with the Constitution itself.[13]

A third and related reason is that it is wrong to go on being wrong. Justice Black wrote "[a] constitutional interpretation that is wrong should not stand." *Connecticut General Co. v. Johnson*, 303 U.S. 77, 85 (Black, J., dissenting). The doctrine of stare decisis is not "an inexorable command" *Burnet*, 285 U.S. at 405, nor should it serve as "an imprisonment of reason." *Guardians Ass'n v. Civil Serv. Comm'n of New York City*, 463 U.S. 582, 618 (1983) (Marshall, J., dissenting). For

[11] Only four decisions of this Court have been overruled by amendment to the Constitution. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (11th Amendment); *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857) (13th and 14th Amendments); *Pollack v. Farmers' Loan & Trust*, 157 U.S. 429 (1895) (16th Amendment); and *Oregon v. Mitchell*, 400 U.S. 112 (1970) (26th Amendment).

[12] Higginbotham, *Text and Precedent in Constitutional Adjudication*, 73 Cornell L. Rev. 411, 411 (1988).

[13] Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 736 (1949).

these reasons, "when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" *Payne*, 111 S. Ct. at 2609 (1991), *quoting Smith v. Allwright*, 321 U.S. 649, 665 (1944). Accordingly, "[i]t is . . . not only [the Court's prerogative but also [its] duty to re-examine a precedent where its reasoning is fairly called into question." *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 627-28 (1974) (Powell, J., concurring). This is particularly so where the Court's decision touches upon a concern of intense moral and political concern. Erroneous removal of such questions from the democratically controlled branches of government, and from the states, may "deaded society's sense of moral responsibility," [14] and preclude the innovation of more just and satisfactory legal solutions. This is the salutary effect, noted by Justice Brandeis, of permitting "trial and error."

Roe v. Wade is the type of constitutional decision for which the doctrine of stare decisis holds diminished importance. First, *Roe* is demonstrably *not* the type of decision where "correction can be had by [state] legislation." Since *Roe*, this Court has decided more than twenty cases involving municipal, state, and federal attempts to regulate abortion or abortion-related activities consistent with the dictates of *Roe;* others have been disposed of summarily; scores more have terminated in the lower federal courts, usually with decisions invalidating the challenged statute under some reading of *Roe*.

As with the present case, several of these decisions involved a state's repeated attempts to implement constitutional regulations, often invalidated because the state imprecisely divined the next expansion of the *Roe* doctrine.[15] *Roe*'s "Procrustean bed," *Webster*, 492 U.S. at

[14] J. Thayer, *John Marshall* 107 (1920).

[15] Pennsylvania: *Beal v. Doe*, 432 U.S. 438 (1977); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986); *Planned Parenthood v. Casey*, Cons. Nos. 91-744, 91-902 (1991); Missouri:

517, also invited constitutional challenge if a state deviated even slightly from the Court's most recent pronouncement. State attempts to establish meaningful, yet constitutional, abortion regulations were treated as "evidence of some sinister conspiracy," *Thornburgh*, 476 U.S. at 798 (White, J., dissenting), and apparently have been used as an independent basis for invalidating abortion legislation. *Planned Parenthood v. Casey*, 744 F. Supp. 1323, 1372 (E.D. Pa. 1990). In addition, although your *amici* do not concede the point, it appears that efforts to correct or ameliorate *Roe* through the Congressional powers of enforcement under the Fourteenth Amendment would likely be held to run afoul of *Roe*.[16]

Second, public opinion polls show consistent majority support for restrictions on abortions far more stringent than allowed by *Roe*.[17] But, the task of organizing public

Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52 (1976); *Singleton v. Wulff*, 428 U.S. 106 (1976); *Poelker v. Doe*, 432 U.S. 519 (1977) (St. Louis); *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 462 U.S. 476 (1983); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989); *Massachusetts: Bellotti v. Baird (I)*, 428 U.S. 132 (1976); *Bellotti v. Baird (II)*, 443 U.S. 622 (1979); Illinois: *Williams v. Zbaraz*, 448 U.S. 358 (1980); *Diamond v. Charles*, 476 U.S. 54 (1986).

[16] Congressional efforts to alter the central holdings of *Roe* have been rendered exceedingly difficult by the widely held legal opinion that Congress lacks the authority to so act. *See, e.g., The Human Life Bill—S. 158: Report by the Subcomm. on Separation of Powers, Senate Comm. on the Judiciary*, 97th Cong. 1st Sess. (1981) (testimony of Robert H. Bork). *See also, Mitchell Opposes Proposed Abortion-Rights Legislation*, Wash. Post, Feb. 4, 1992, at A13, col. 1 (constitutional issues appropriately addressed through Constitutional amendment and not by a vote of Congress).

[17] In 1990, the Gallup Organization conducted the most extensive polling to date on the views of the American people on abortion. *See Americans United for Life, Abortion and Moral Beliefs, a Survey of American Opinion* (Executive Summary) (1991). Copies of the Executive Summary and the complete tabulations have been lodged with the Office of the Clerk simultaneously with the filing of this Brief. When asked under what, if any, circumstances abortion should be permitted, 74% would limit abortion to cases where the

opinion behind a constitutional amendment is greatly complicated by *Roe*'s multiple and confusing holdings.[18] The range and detail of these holdings are more characteristic of legislation than of constitutional law.[19] The resulting task of drafting a constitutional amendment that fairly meets the errors of *Roe* is daunting, if not impossible.

Third, a majority of this Court has abandoned as error central tenets of *Roe*. Unless a majority of this Court finds under renewed scrutiny that *Roe* withstands the arguments made against it and that the decisions in *Webster*, *Hodgson* and *Akron Center* wrongly

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mother's health is threatened, the pregnancy resulted from rape or incest, or there is a substantial likelihood of grave fetal deformity. *Id.* at 5. As revealed in a study conducted by the Alan Guttmacher Institute, women seeking abortions are rarely motivated by such concerns. Maternal or fetal health concerns, or the pregnancy resulting from rape or incest account for at most 7% of the 1.6 million abortions performed annually in the United States. Torres & Forrest, *Why Do Women Have Abortions?*, 20 Fam. Planning Perspectives 169 (1988). The National Opinion Research Center reports that 60 percent of those surveyed oppose the expansive abortion right created in *Roe*. *Views on Abortion Remain Divided*, N.Y. Times, Jan. 22, 1989, at 17, col. 1. Popular support for elective abortion has remained a minority position, approximately 40 percent, since 1973. *See Id.*; Blake, *The Supreme Court's Abortion Decisions and Public Opinion in the United States*, 3 Population and Dev. Rev. 45 (1977).

[18] *See* Forsythe & Grant, *Two Ships Passing in the Night: An Interpretivist Review of the White-Stevens Colloquy on* Roe v. Wade, 6 St. Louis Pub. L. Rev. 43 (1987) (identifying 12 constitutional holdings). Thus, not surprisingly, 89% of the American public fundamentally misunderstands *Roe*. Not only does this make mobilizing public opinion difficult, but it also demonstrates that polls indicating that a majority "supports *Roe v. Wade*," provide no helpful insight. Americans United for Life, Executive Summary, *supra* note 18, at 13-16.

[19] *Webster*, 492 U.S. at 518. *See also*, Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920 (1973); A. Cox, *The Role of the Supreme Court in American Government* 113-114 (1973); Epstein, *Substantive Due Process by Any Other Name*, 1973 Sup. Ct. Rev. 159; R. Bork, *The Tempting of America: The Political Seduction of the Law* 111-17 (1990).

departed from *Roe*, the Court should overrule *Roe*. This Court should not prop up an ailing decision that it is convinced incorrectly interprets the Constitution.[20] Unless independent grounds exist for rehabilitating *Roe*, stare decisis alone stands as no impediment to overruling.[21]

III. DECLINING TO OVERRULE *ROE v. WADE* SERVES NONE OF THE INTERESTS OF STABILITY, PREDICTABILITY, OR CONSISTENCY THAT ARE FURTHERED BY THE DOCTRINE OF STARE DECISIS.

The protection of the stare decisis doctrine is limited by definition.[22] As the full title of the doctrine—*stare*

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[20] "[T]he long tradition of the Court [is] that previous decisions must be subject to re-examination when a case against their reasoning is made." Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 31 (1959). It is no violation of the doctrine of stare decisis, therefore, to consider and act upon a better-reasoned argument that the precedent in question was in error. *See also*, Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 Cornell L. Rev. 401, 408 (1988), *citing*, *Kerlin's Lessee v. Bull*, 1 U.S. (1 Dall.) 175, 178 (1786) ("[I]f a Judge conceives, that a judgment given by a former Court is erroneous, he ought not in conscience to give the like judgment, he being sworn to judge according to the law.").

[21] *Roe* has been defended by this Court almost exclusively on grounds of stare decisis. *See*, *Webster*, 492 U.S. at 458-60 (Blackmun, J., dissenting); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 420 (1983); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 779-781 (1986). This is in marked contrast to the debate occasioned by the overruling of *National League of Cities v. Usery*, 426 U.S. 833 (1976) by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). The *Garcia* dissents did not rest on stare decisis, but on the fundamental principle of federalism, and the specific dictates of the Tenth Amendment. *See id.* at 560-589. *Roe*, however, rests on no such fundamental principle, or textual mandate.

[22] Petitioners and their *amici* concede that this Court could overrule *Roe* if the Court found the decision "'unsound in principle' [or] 'unworkable in practice.'" Petitioner's Brief at 22; *see also*, Brief *Amicus Curiae* for Representatives Don Edwards, Patricia Schroeder, *et al.*, in Support of Petitioners at 17. Overruling Roe in this case is appropriate if any of these conditions is met.

decisis et non quieta movere ("stand by the precedents and do not disturb the calm")[23]—implies, respect for past decisions extends properly only to those doctrines that are "at rest." *Roe v. Wade*, however, is an unsettled doctrine with an unsettling effect. As the court of appeals found, this Court's decisions in *Webster* and *Hodgson* have rendered *Roe*'s central holdings no longer the law of the land, *Planned Parenthood v. Casey*, 947 F.2d 682, 698 (3rd Cir. 1991), thereby further unsettling *Roe*.[24]

1. *Roe v. Wade* ostensibly intended to settle the issue of abortion in American law.[25] However, *Roe* has proven to be inherently difficult to apply in any consistent and principled manner. *Webster*, 492 U.S. at 518-19; *City of Akron*, 462 U.S. at 459. This is highlighted by *Roe*'s progeny, which have produced a growing body of intricate, arbitrary regulations surrounding the abortion decision.[26] Far from settling the debate, these decisions

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Counsel for Petitioner's *amici* acknowledges that the *Webster* plurality has already made the requisite finding for the overruling of *Roe:* that the trimester framework is " 'unsound in principle and unworkable in practice.' " Dellinger & Sperling, *supra* at 85.

[23] Reed, *Stare Decisis and Constitutional Law*, 9 Pa. Bar A. Q. 131, 131 (April 1938).

[24] *Accord, Coe v. Melahn*, No. 90-1551 (8th Cir. Mar. 2, 1992) (WL 37328).

[25] Thus, *Roe* "promises more than it can deliver." *Payne*, 111 S. Ct. at 2618 (Souter, J., concurring). If, as Petitioners and their *amici* claim, there is a need to establish some "special justification" to overrule erroneous precedent, *id.* (Souter J., concurring), citing *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984), such justification abounds here.

[26] For example, the Court has held that a State may require that certain information be given to a woman by a physician or his assistant, *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. at 448, but that it may not require that such information be furnished to her by the physician himself. *Id.* at 449. Likewise, a State may require that abortions in the second trimester be performed in clinics, *Simopolous v. Virginia*, 462 U.S. 506 (1983), but it may not require that such abortions be performed in hospitals. *Akron, supra*, at 437-439.

Webster, 492 U.S. at 518 n.15.

have multiplied confusion and spawned further unanswered questions.[27]

Although the *Webster* plurality expressly repudiated *Roe*'s trimester-based analysis, earlier decisions had already departed from it where necessary to invalidate abortion regulations. Thus, in *Colautti v. Franklin*, 439 U.S. 379 (1979), the Court rejected Pennsylvania's attempt to tie fetal "viability" to *Roe*'s structure. 439 U.S. at 388-89. Similarly, in *City of Akron*, the majority ignored *Roe*'s assurance that the state interest in maternal health became compelling at "approximately the end of the first trimester," 410 U.S. at 163, invalidating a hospitalization requirement for second-trimester abortions.[28] *City of Akron*, 462 U.S. at 433-39.

Instead of seeking guidance in *Roe*'s trimester scheme, the majority in *City of Akron* looked to recently changed ACOG standards, finding that the hospitalization requirement was no longer "reasonable" because it departed from "accepted medical practice," as defined by ACOG. 462 U.S. at 436-38. With ACOG guidelines elevated to constitutional writ, Akron's ordinance was constitutional when enacted in 1978, when reviewed by the district court in 1979, and when reviewed by the court of appeals in 1981. But, it suddenly became unconstitutional in 1982 when ACOG changed its standards.

The unworkability of constitutional standards tied to ever-changing medical technology is manifest.[29] The near

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[27] Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 Geo. Wash. L. Rev. 68, 105-06 (1991) ("Whatever the merits of *Roe*, it has never stabilized; from the beginning it has been criticized by a wide spectrum of politicians and scholars, and has been the subject of constant challenges . . . . It is difficult to see much of an upside to *Roe*'s prolonged instability.")

[28] *Roe* had cited such a requirement as a regulation constitutionally advancing maternal health. 410 U.S. at 163.

[29] *See City of Akron*, 462 at 456 (O'Connor, J., dissenting).

impossibility of drafting statutes according to such a measure of constitutionality is compounded by requirements that abortion regulations accommodate the skill level of each abortion-performing physician.[30] The *Roe*-based medical technology-as-constitutional-diagnostic unacceptably places this Court in the position of acting as "an *ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States." *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 99 (1976) (White, J., concurring in part, dissenting in part).

In addition to the Court departing from *Roe*'s trimester scheme for first- and second-trimester regulations, the ability of states to restrict abortions in the final trimester of pregnancy has proven illusory. According to *Roe*, in the third trimester, states could "restrict, or even prohibit abortions," unless the woman's "health" [31] would be served by an abortion, because the state's interest in protecting the life of the unborn child became "compelling" at viability. 410 U.S. at 163. However, the lower federal courts have shown a uniform hostility to virtually any attempt to limit post-viability abortions.[32] Thus, *Roe*'s promise that the states remain free to protect their compelling interest in near-term fetal life remains unfulfilled. Because *Doe v. Bolton* requires the subordination of the state's compelling interest to any factor related to the woman's emotional

[30] In *Ragsdale v. Turnock*, 841 F.2d 1358 (7th Cir. 1988), the court invalidated outpatient clinic regulations based on the testimony of highly skilled abortion providers that such regulations were not medically necessary to *their* practice of medicine.

[31] *Doe v. Bolton*, 410 U.S. 179, 192 (1973) (health includes "all factors—physical, emotional, psychological, familial, and the woman's age.").

[32] *See American College of Obstetricians and Gynecologists v. Thornburgh*, 737 F.2d 283, 299 (3rd Cir. 1984), *aff'd*, 476 U.S. 747 (1986); *Margaret S. v. Edwards*, 488 F.Supp. 181, 196 (E.D. La. 1980); *Schulte v. Douglas*, 567 F.Supp. 522 (D. Neb. 1981), *aff'd per curiam sub nom. Women's Services, P.C. v. Douglas*, 710 F.2d 465 (8th Cir. 1983).

well-being, a "balancing of interests" in the third trimester is not only unworkable but impossible.

2. Retaining *Roe* requires this Court to continue to "sit as a superlegislature to weigh the wisdom of legislation," *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963), and thus to perpetuate a case-by-case disclosure of permissible abortion regulation. Such progressive revelation forecloses the predictability that the law requires.

Although recent decisions have discarded much of *Roe*'s discredited jurisprudence, questions over the degree to which *Roe* remains hang spectre-like over every attempt to provide meaningful protection for maternal health and unborn human life. The task of dismantling *Roe* "doorjamb by doorjamb," *Webster*, 492 U.S. at 537 (Scalia, J., concurring in part, concurring in the judgment), exacerbates the instability inherent in *Roe*. Until *Roe* is expressly and wholly overruled, this Court can continue to expect *Roe*-based challenges to every abortion regulation that fails to follow to the letter the statute most recently addressed by this Court.[33]

3. The unsettled status of *Roe* is further demonstrated by the divergent analyses of the lower federal courts. Despite this Court's decisions caliing into question the basic tenets of *Roe*, most lower federal courts continue to apply in a wooden fashion an unmodified *Roe*-based analysis.[34] Only three federal decisions since *Webster*

[33] R. Bork, *supra*, note 19, at 116:

> Attempts to overturn *Roe* will continue as long as the Court adheres to it. And, just so long as the decision remains, the Court will be perceived, correctly, as political and will continue to be the target of demonstrations, marches, television advertisements, mass mailings, and the like.

See also, Webster, 492 U.S. at 533, 535 (Scalia, J., concurring in part, concurring in the judgment).

[34] *See*, Brief *Amicus Curiae* of William J. Guste, Louisiana Attorney General, *et al.*, in Support of Petition for *certiorari* in *Robert P. Casey, et al. v. Planned Parenthood of Southeastern Pennsylvania, et al.*, No. 91-902, at 9 n.8.

admit of any modification of *Roe*.[35] This continued reliance on *Roe* works yet another distortion in federal abortion jurisprudence—a distortion *Webster* was intended, but proved unable, to correct. A clear repudiation of *Roe v. Wade* is therefore necessary to bring the lower federal courts into compliance with this Court's standards.

4. Further indication that a doctrine is not "settled" is its effect on legal principles of more general application. In this regard, *Roe* has proven the judicial equivalent of a runaway freight train. As Justice O'Connor has observed, the Court's abortion decisions "have[] worked a major distortion in the Court's constitutional jurisprudence," such that "[n]o legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion arises in a case involving state regulation of abortion."[36] *Thornburgh*, 476 U.S. at 814 (O'Connor, J., dissenting). Because *Roe* arrived on the legal landscape full-grown but without parentage and with no guidance as to the generalizability of its rules, courts have applied it indiscriminately in entirely unrelated areas of the law, often disturbing well-settled principles and preventing the law's natural evolution.[37]

5. Political activity, scholarly analysis, and public opinion also reject the hypothesis that *Roe* is settled law. In the first thirteen years after *Roe* was decided, nearly

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[35] *Planned Parenthood v. Casey*, 947 F.2d 682 (3d Cir. 1991); *Planned Parenthood v. Minnesota*, 910 F.2d 479 (8th Cir. 1990); *Coe v. Melahn*, No. 90-1552 (8th Cir. Mar. 2, 1992 (WL 27328).

[36] In *Thornburgh*, the dissenters identify the Court's abandonment of constitutional doctrine in the following areas: plenary review of preliminary injunctions and standards of appellate review, 476 U.S. at 815-25 (O'Connor, J., dissenting); abstention, *id.* at 830-31; informed consent, *id.* at 798-802 (White, J., dissenting); state regulation of the professions, *id.* at 802-04; statutory construction, *id.* at 810-12. *See generally*, D. Horan, E. Grant & P. Cunningham, eds., *Abortion and the Constitution* 245, 253-255 (1987).

[37] *See* Brief *Amicus Curiae* of National Right to Life, Inc. in support of Respondents.

600 separately numbered resolutions relating to abortion have been introduced into Congress.[38] Of these, 270 were joint resolutions seeking Constitutional amendments that would overturn *Roe*.[39] Congress has also acted broadly, and successfully, to remove direct federal financial support for abortion.[40] Moreover, a 1988 Presidential proclamation declared the unborn to be protected under the Constitution, and directed the executive branch to carry out actions and programs consistent with that declaration.[41]

The strongest evidence of a popular rejection of the abortion right created in *Roe* is seen in the vast number of state legislative actions and public referenda designed to limit or regulate the performance of abortions. During the 1988 elections, a public referendum in Arkansas granted rights to the unborn under the state constitution; Michigan voters eliminated public funding for abortion; and voters in Colorado rejected an attempt to repeal an amendment to their state constitution, prohibiting virtually all public funding of abortions.[42] During the years since *Roe*, state legislatures from all regions have enacted hundreds of laws regulating abortion.[43] In addition, at least 23 state legislatures have sent memorials requesting Congress to propose an anti-abortion amendment to the Constitution, and at least 19 state

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[38] Wardle, *Rethinking* Roe v. Wade, 185 B.Y.U. L. Rev. 231, 247, *citing*, Legal Ramifications of the Human Life Amendment: Hearings before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary on S.J. Res. 3, 98th Cong. 1st Sess. 47, 73-74, App. B (1983) (prepared statement of Lynn D. Wardle).

[39] *See*, Wardle, *supra* note 38 at 247-248, n. 86.

[40] *Harris v. McRae*, 448 U.S. 297 (1980). See also, 42 U.S.C.S. Sec. 1396 *et seq.* (1985 ed. and 1990 Supp.); Wardle, *"Time Enough"*: Webster v. Reproductive Health Services *and the Prudent Pace of Justice*, 41 Fla. L. Rev. 881, 981 (1989).

[41] Proclamation No. 5761, 53 Fed. Reg. 1464 (1988).

[42] Wash. Post, Nov. 13, 1988, at C6, col. 1.

[43] Wardle, *supra* note 40 at 958-980 (comprehensive listing by state of abortion regulations); Wardle, *supra* note 38, at 247, n. 83.

legislatures have passed petitions to convene a constitutional convention to propose a human life amendment to the Constitution.[44] This strong public interest is further borne out in the accelerated legislative activity after *Webster*. More than 1000 pieces of abortion-related legislation have been introduced since 1989, the overwhelming majority seeking to establish greater protection for unborn human life. Several of these measures have been enacted.[45] The democratic branches of government, therefore, have not accepted or endorsed *Roe*.

In academic circles, few, if any, opinions of this Court have attracted *Roe*'s barrage of criticism.

> Rarely does the Supreme Court invite critical outrage as it did in *Roe* by offering so little explanation for a decision that requires so much. The stark inadequacy of the Court's attempt to justify its conclusions . . . suggests to some scholars that the Court, finding no justification at all in the Constitution, unabashedly usurped the legislative function. . . . Even some who approve of *Roe*'s form of judicial review concede that the opinion itself is inscrutable.[46]

Nor has *Roe* exhausted its critics; the stream of published criticism continues from supporters and opponents of legalized abortion.[47] *Roe* was inherently flawed from the outset;[48] its errors have compounded themselves. Most importantly, this Court's recent abortion decisions

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[44] Wardle, *supra* note 38 at 247.

[45] *See* Wardle, *supra* note 40 at 958-980; Ezzard, *supra* note 3, at 401-02 nn. 6, 7.

[46] Morgan, Roe v. Wade *and the Lessons of Pre-*Roe *Case Law*, 77 Mich. L. Rev. 1724, 1724 (1979) (footnotes omitted).

[47] Gerhardt, *supra* note 27 at 105 n. 155 (citing "critics on the right include" R. Bork, *supra* note 19 at 111-17; McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 Yale L.J. 1501, 1539-41 (1989); and "critics on the left include" M. Perry, *Mortality, Politics and Law* 172-78 (1988); A. Cox, *supra* note 19 at 113-14; Ely, *supra* note 19.

[48] Ely, *supra* note 19, at 932, 935-936.

depart from *Roe*'s central holdings. *Roe* should, therefore, be expressly overruled.

IV. OVERRULING *ROE v. WADE* IS CONSISTENT WITH PRIOR OVERRULINGS OF CONSTITUTIONAL DECISIONS BY THIS COURT.

Roe not only exemplifies the type of constitutional decision for which stare decisis has limited application, it also fits the criteria previously established by this Court for a decision whose overruling is either justified or necessary.[49] Furthermore, overruling the specific doctrines of *Roe* is completely consonant with this Court's history of overturning constitutional decisions involving: (1) substantive due process; (2) individual rights; and (3) federalism. The Court has repeatedly addressed the questions posed by overruling *Roe*; such considerations have not prevented this Court from abandoning its perceived errors.

1. *Roe v. Wade* is the modern archetype of substantive due process.[50] Its predecessors, likewise founded on the Fourteenth Amendment's protections of "liberty" and "due process," have generated numerous overruling decisions by this Court. The rationale of these latter decisions applies squarely to *Roe*.

> [The Constitution] speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which

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[49] Blaustein & Field, *supra* 57 Mich L. Rev. at 168-177.

[50] Rehnquist, *Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement? Or: Privacy, You've Come a Long Way, Baby*, 23 Kan. L. Rev. 1, 4-6 (1974); *Epstein, supra* note 19.

> is reasonable in relation to its subject and is adopted in the interests of the community is due process.

West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937), *overruling*, *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923). The determination of those evils which require restraint is, in the absence of a clear constitutional mandate to the contrary, the province of the legislature. "The courts are incompetent to judge the wisdom of state legislatures and may only preempt such wisdom where an act . . . violates an express provision of the Constitution." *Id.* at 398.

Echoing this holding, this Court in *North Dakota Pharmacy Board v. Snyder's Drug Stores*, 414 U.S. 156 (1973), rejected a due process argument against a state law restricting the ownership of drug stores to licensed pharmacists or their corporations. The Fourteenth Amendment "does not make it a condition of preventive legislation that it should work a perfect cure. It is enough that the questioned act has a manifest tendency to cure or at least to make the evil less. [T]wo opposed views of public policy are considerations for the legislative choice." *Id.* at 147, *overruling Liggett Co. v. Baldridge*, 278 U.S. 105 (1929). *See also, Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536-37 (1949).

That such cases concerned an improper expansion of Fourteenth Amendment "liberty" in the economic sphere makes them no less applicable to this case.[51] The point of these decisions is that "liberty" and "due process" cannot be employed to graft onto the Constitution a particular

[51] Moreover, this Court's overruling precedents as overbroad interpretations of Fourteenth Amendment rights is not limited to economic rights. In *Daniels v. Williams*, 474 U.S. 327 (1986), *overruling*, *Parratt v. Taylor*, 451 U.S. 527 (1981), this Court overruled a decision that held that the Fourteenth Amendment provides no basis for a statutory civil rights action alleging negligence on the part of prison officials. "Whatever other provisions of state law or general jurisprudence he may rightly invoke, the Fourteenth Amendment . . . does not afford [plaintiff] a remedy." *Id.* at 336.

view of wise public policy on subjects where the Constitution is otherwise silent. "To do so would be to indulge in the dangerous assumption that the Fourteenth Amendment was intended to give us carte blanche to embody our *economic or moral beliefs* in its prohibitions." *State Tax Comm'n v. Aldrich*, 316 U.S. 174, 181 (1942) (emphasis supplied), *overruling*, *First Nat'l Bank v. Maine*, 284 U.S. 312 (1932).

The extensive reliance placed on the "fundamental" [52] status of abortion under the Constitution as a bar to overruling *Roe* is misplaced. The "implied fundamental right to contract" [53] recognized in *Lochner* and its progeny is no less "fundamental" than the putative right to abort. If anything, the economic due process cases warranted greater protection from overruling than *Roe*'s free-floating penumbral abortion right because "considerations in favor of stare decisis are at their acme in cases involving property and contract rights." *Payne*, 111 S. Ct. at 2610.

Petitioners and their *amici* offer this Court no constitutionally sound basis for distinguishing between the Court's appropriate repudiation of economic due process and the purported inviolability of *Roe v. Wade*. Arguments that *Roe*'s exercise of substantive due process is different because *Roe* involves reproductive freedom is virtually indistinguishable from the value-based defenses of "laissez-faire" economics which sustained the ascendancy of *Lochner v. New York*, 198 U.S. 45 (1905), for more than a generation. And the cloaking of it in constitutional law is even more pernicious where, as in *Roe*, the countervailing interest is in life itself.[54]

[52] *Roe*'s holding that abortion is fundamentally protected is tenuous in light of current substantive due process analysis. *See Bowres v. Hardwick*, 479 U.S. 186 (1986); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

[53] Gerhardt, *supra* note 27 at 106 n.158.

[54] *See* Brief *Amicus Curiae* of Catholics United for Life, *et al.*, in support of Respondents (unborn have protectable right to life under the Fourteenth Amendment). The only international docu-

Moreover, as *Roe* itself recognized, abortion is "inherently different" from any other circumstance in which this Court has recognized privacy interests.

> The pregnant woman cannot be isolated in her privacy. . . . The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt* and *Griswold*, *Stanley*, *Loving*, *Skinner*, and *Pierce* and *Meyer* were respectively concerned.

410 U.S. at 159.[55] *Roe* itself effectively disposes of the claim that its retention is integral to protection for other, less controversial aspects of the Court's privacy jurisprudence. In particular, arguments that distinctions between contraception and abortion are constitutionally insignificant, and therefore arguments that *Griswold v. Connecticut*, 381 U.S. 479 (1965), cannot stand if *Roe* falls are in error.[56] Justice White's dissent in *Roe* and his repeated statements that *Griswold*—in which he concurred—"in no sense necessitates a holding that the liberty to choose abortion is 'fundamental,'" *Thornburgh*, 476 U.S. at 792 n.2, demonstrates that the two interests are different. Instead of an inseparable thread in the fabric of our constitutional law, *Roe* more closely resembles a poorly matched and tattered applique that can be easily removed without causing any harm to the integrity of the underlying constitutional material.

2. This Court's overrulings have also limited the scope of protection afforded under prior case law by certain explicit rights under the Constitution. For example, in *Payne v. Tennessee*, 111 S. Ct. 2597 (1991), the Court overruled *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805 (1989), which barred admission of "victim impact" testimony during the sentencing phase of a capital trial. To illustrate the limited role stare decisis plays in constitutional cases, in a footnote, the Court listed 33 instances in the past 20 terms in which it had overruled constitutional cases.

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ment to address the issue, the American Convention on Human Rights, provides: "Every person has the right to have his life respected by law and, in general, from the moment of conception." Org. of Amer. Treaty Series No. 36, at 1-21. Official Record, OAS/Ser.A/16. Similarly, with the exception of the former Yugoslavia, not one of the world's 180 constitutions expressly protects a right to abortion. The constitutions of five nations, Venezuela, Ireland, Ecuador, Peru, and Chile, provide explicit protection for the unborn. *See* A. Blaustein & G. Flanz, *Constitutions of the Countries of the World* 20 vols. (1971-current).

[55] *See also*, *Thornburgh*, 476 U.S. at 792 (White J., dissenting) (The decision to abort "must be recognized as *sui generis*, different in kind from the others that the Court has protected under the rubric of personal or family privacy or autonomy.").

> That the abortion decision, like the decisions protected in *Griswold*, *Eisenstadt* and *Carey*, concerns childbearing (or, more generally, family life) in no sense necessitates a holding that the liberty to choose abortion is "fundamental." That the decision involves the destruction of the fetus renders it different in kind from the decision not to conceive in the first place. This difference does not go merely to the weight of the state interest in regulating abortion; it affects as well the characterization of the liberty interest itself.

Id. at 792 n.2 (White, J., dissenting).

[56] These arguments evidence a fundamental insecurity over whether abortion itself is constitutionally protected. By linking abortion to less controversial aspects of privacy theory, Petitioners and their *amici* attempt to bootstrap constitutional protection for the abortion right. ("[T]here no longer exists any bright line between the fundamental right that was established in *Griswold* and the fundamental right of abortion that was established in *Roe*." *Transcript of Arguments Before High Court on Abortion Case*, *N.Y. Times*, April 27, 1989, at Y15 (Argument of Frank Susman, for Reproductive Health Services, in *Webster v. Reproductive Health Services*, No. 88-605). In like manner, in an attempt to persuade the Court to retain *Roe* as the "lesser evil," *see Thornburgh*, 476 U.S. at 797 (White, J., dissenting), Petitioners' *amici* concoct Orwellian fantasies in which women, having lost the right to "choose," would be compelled to abort desired pregnancies. For a more developed response to such arguments, *see* Brief *Amicus Curiae* of the Southern Center for Law & Ethics in Support of Respondents.

Likewise, in *United States v. Ross*, 456 U.S. 798 (1982), the Court held that its decision in *Robbins v. California*, 453 U.S. 420 (1981), excluding evidence obtained in a warrantless search despite the existence of probable cause that incriminating evidence would be found, was an overbroad interpretation of privacy rights under the Fourth Amendment. "[T]he doctrine of stare decisis does not preclude this action. Of greatest importance, we are convinced that the rule we apply in this case is faithful to the interpretation of the Fourth Amendment that the Court has followed with substantial consistency throughout our history." 456 U.S. at 824. Also, in *Illinois v. Gates*, 462 U.S. 213 (1983), the exclusionary rule was modified by replacing the rigid "two-pronged" test of *Aguilar v. Texas*, 378 U.S. 108 (1964), with a more flexible rule based upon the totality of the circumstances under which a warrant is obtained and a search conducted.

Previously esteemed fundamentally protected free speech guarantees were likewise limited in *Hudgens v. NLRB*, 424 U.S. 507 (1976), which abandoned the holding in *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968), granting "public forum" status to certain forms of private property.[57]

3. The Court has also overruled decisions implicating the core constitutional value of federalism. Over vigorous dissent that its decision "emasculat[es]" the rights of the states under the Tenth Amendment, 469 U.S. at 572 (Powell, J., dissenting), the *Garcia* opinion overruled *National League of Cities*. And in *Erie Ry. Co. v. Tompkins*, 304 U.S. 64 (1938), this Court, also by a 5-4 vote, overruled the doctrine of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), regarding the existence of a body of federal common law. These two cases demonstrate

[57] *See also, Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990). Writing for the dissent, Justice Blackmun stated that the decision resulted in a "wholesale overturning of settled law concerning the Religion Clauses of our Constitution." *Id.* at 908 (Blackmun, J., dissenting).

that a bare majority of this Court will correct a decision it believes to be erroneous, even where the decision arguably implicates fundamental constitutional values. Again, any argument that *Roe* is more "fundamental" than the interests at stake in *Erie* and *Garcia* is unavailing. The federal structure of government is, in reality, the most basic assurance of individual liberty and protection from excessive governmental power. "Federalism is linked with individual liberty and with the health of the body politic," and thus, "[i]t is no less legitimate and proper for the Supreme Court to concern itself with assuring the health of federalism as it is for the Court to uphold individual liberties as such. In neither case is abdication of the Court's proper role consistent with the principles inhering in the Constitution."[58]

Roe's ongoing breach of the principle of federalism should not be allowed to persist. As *Erie* and *Garcia* demonstrate, such decisions are often controversial. And controversy is certain to ensue no matter what path is taken regarding *Roe v. Wade*. However, perpetuating the erroneous and unworkable holdings of *Roe* cannot be justified for reasons of avoiding political strife. The highest traditions of this Court teach that in such circumstances, the proper resolution is faithfulness to the text and the fundamental values of the Constitution. That text, and those values, determine that *Roe*'s complete curtailment of the states' authority to protect unborn children should be overruled.

V. THE MOST PRUDENT COURSE IN ADDRESSING THE PROBLEMS POSED BY *ROE v. WADE* IS TO OVERRULE THAT DECISION EXPRESSLY AND RETURN TO THE POLITICAL BRANCH OF GOVERNMENT ITS RIGHTFUL AUTHORITY TO REGULATE THE PRACTICE OF ABORTION.

A "wise exercise of the powers confided in this Court" dictates that where prudent, this Court withhold decision

[58] Howard, Garcia *and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles*, 19 Ga. L. Rev. 789, 795, 797 (1985).

on overruling challenged precedent, provided it is possible to resolve the case before it by distinguishing or modifying that precedent. *Illinois v. Gates*, 462 U.S. 213, 224 (1983). However, "the Court's precedents are not sacrosanct, for [it] ha[s] overruled prior decisions where the necessity and propriety of doing so has been established." *Patterson v. McLean Credit Corp.*, 491 U.S. 164, 172 (1989). Accordingly, the traditions of this Court require that where constitutional error is palpable, where such error has caused legal instability and fomented social strife, correction by "gradual erosion" will not suffice. *Webster*'s incrementalist approach has exacerbated, not relieved, the tension in the law and society. More direct action to cure the error is called for. *Roe v. Wade* should be overruled.

1. One prudential reason for a gradualist approach is the citation of the challenged precedent in other cases. This argument, which presumes that outright overruling will be disruptive to the affected body of case law, is not applicable to *Roe*. Although *Roe* has been extensively cited by this Court, as well as by other federal and state courts, these citations, outside the context of abortion regulation, have been largely superfluous to the issues decided in those cases. To the extent courts have placed reliance on *Roe* in the non-abortion context, the result has usually been distorting.[59] Overruling *Roe* would remove an impediment to reasoned decisionmaking and the natural progression of the law, both of which have been severely truncated by the superimposition of *Roe*.

2. *Roe* has not been integrated into American law. And although the practice of abortion on demand is now legal, it has remained intensely controversial, and tainted. The fact that a majority of abortions are performed in free-standing clinics created primarily for that purpose, and often by physicians who specialize in that practice, suggests that abortion on demand has not been accepted, either by the medical profession or by society, for what

[59] *See* Brief *Amicus Curiae* of National Right to Life, Inc. in Support of Respondents.

it has become: a substitute for birth control,[60] which almost never relates to a woman's health.[61]

3. The reconsideration of *Roe*, therefore, does not pose the problems which caused this Court to defer reconsideration of the exclusionary rule in *Illinois v. Gates*. The exclusionary rule enjoyed a long history of acceptance by state courts before it was applied to the states through the Fourteenth Amendment in *Mapp v. Ohio*, 367 U.S. 643 (1961). Moreover, the rule is tied to an explicit provision of the Constitution, the Fourth Amendment. And it functions as a rule of evidence—the type of rule peculiarly within the competence of the Courts to pronounce upon. These factors, plus the acceptance of the rule by law enforcement officials and the criminal justice system, provided reason for deferring reconsideration of *Mapp*. None of these factors, however, applies to *Roe*, which abruptly preempted a field of law left to the common law and state statute from the outset of the nation's history. Moreover, *Roe* adopted a rule of legal tolerance for abortion far more liberal than any of the abortion "reform" laws of modern vintage. *Roe* was out of step with the legal system and public opinion when first written, and it remains so today.

4. Finally, as *Webster* demonstrates, if this Court does not speak decisively, by rejecting *Roe*, the controversy over that decision will continue, unabated. The nation will still look to this Court—as it does now—for a resolution of the problems created by *Roe v. Wade*. If the history of conflict over *Roe* has proven anything,

[60] Henshaw, *The Characteristics and Prior Contraceptive Use of U.S. Abortion Patients*, 20 Fam. Planning Perspectives 158 (1988) (more than 43% of the 1.6 million abortions performed annually were performed on women who had received at least one prior abortion).

[61] Torres & Forrest, *Why Do Women Have Abortions?*, 20 Fam. Planning Perspectives 169, 170 (1988) (93% of abortions performed primarily motivated by reasons unrelated to any maternal or fetal health concern, or because pregnancy resulted from rape or incest).

it is that this Court is ill-positioned to resolve the myriad legal, moral, medical, and social issues that are elements of the abortion debate. Yet, this Court is in a unique position to repair the damage done to this debate, by overruling *Roe v. Wade*. Until this is done, the other branches of government, including Congress, are virtually powerless to act in the protection of unborn life, and to resolve other pressing aspects of this controversy.

CONCLUSION

By its nature, *Roe v. Wade* is a decision meriting a lowered deference under stare decisis. And because of its erroneous holdings and adverse impact upon constitutional law and society, *Roe* deserves to join the two hundred-plus constitutional decisions overruled by this Court. Your *amici* conclude with a plea that this Court act decisively in the matter of *Roe v. Wade*, and to speak definitively, rather than allow the discredited and outmoded doctrines of this decision to survive.

Respectfully submitted,

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PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *et al.*,
Petitioners and Cross-Respendents,

v.

ROBERT P. CASEY, *et al.*,
Respondents and Cross-Petitioners.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE AMERICAN ACADEMY OF MEDICAL ETHICS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS AND CROSS-PETITIONERS ROBERT P. CASEY *et al.*

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

American Cases v

United States Constitution vi

American Statutes, Ordinances and Other Legislative Materials vi

English Cases vii

English Statutes xii

Secondary Authorities xiii

SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

I. THE CONSTITUTIONAL STATUS OF ABORTION MUST BE DETERMINED BY EXAMINING THE DEEPLY-ROOTED TRADITIONS OF ANGLO-AMERICAN SOCIETY AS EMBODIED IN THE COMMON LAW AND THE CONSTITUTION 2

II. *ROE v. WADE*, THROUGH ERRONEOUS READING OF THE HISTORICAL STATUS OF ABORTION UNDER THE COMMON LAW, BROKE SHARPLY WITH THE TRADITIONAL VALUES OF THE COMMON LAW AND OUR CONSTITUTION 3

A. Courts, from *Roe v. Wade* on, Have Relied on a Deliberately Distorted History of Abortion 4

B. In England, from the Beginning of the Common Law, Courts and Other Respected Authorities Consistently Condemned Abortion.. 6

C. English Law Always Prohibited Parents from Killing Unwanted Children, and Parliament and the Courts Took Strong Steps, Gradually Strengthened over Centuries, to Punish Such Acts 14

TABLE OF CONTENTS—Continued

Page

D. These Laws Were Applied Rigorously in the American Colonies 19

E. When Abortion Became More Common than Infanticide with the Development of Technical Means with a Lessened Danger to Her Life, English and American Law Came to Emphasize Abortion as the Primary Evil 21

F. The Shift of Emphasis from Infanticide to Abortion as the Social Evil Represented a Widely-Shared Consensus on the Value of Fetal Life, a Consensus that Included Nineteenth-Century Feminists and Thus Can Hardly Be Characterized as a Conspiracy by Male Physicians and Others to Suppress Women 25

III. LEGISLATURES ARE THE PROPER FORA TO RESOLVE THE COMPETING CLAIMS OF MOTHERS AND THEIR OFFSPRING 27

A. Changes in Medical Technology Are Central to Proper Resolution of the Controversies over Abortion 27

B. Legislatures Are Best Placed to Explore Appropriate Regulatory Response to Changing Reproductive Technologies 29

CONCLUSION 30

APPENDIX A: INTEREST OF THE *AMICUS CURIAE* 1a

APPENDIX B: WHAT REALLY HAPPENED IN REX v. de BOURTON? 2a

APPENDIX C: OTHER REPRESENTATIVE ENGLISH LEGAL MATERIALS RELATING TO ABORTION 12a

Agnes's Appeal (1200) 12a

TABLE OF CONTENTS—Continued

Page

Amice's Appeal (1247) 12a

Juliana's Appeal (1256?) 13a

Rex v. Code (1281) 14a

Rex v. Mercer (1285) 14a

Rex v. Haule (1321) 15a

Rex v. Anonymous (1348) 16a

Selected Readings on the Law of Murder (1455-1510) 16a

Rex v. Lichefeld (1505) 18a

Rex v. Wodlake (1530-31) 19a

Cockaine v. Witnam (1577) 21a

Regina v. Turnour (1581) 22a

Regina v. Sims (1601) 23a

Regina v. Webb (1602) 24a

Sir Edward Coke, *Third Institute* (1644) 25a

Rex v. Anonymous (1670) 25a

Sir Matthew Hale, *History of the Pleas of the Crown* (1736) 26a

Rex v. Beare (1732) 27a

Rex v. Tinkler (1781) 31a

APPENDIX D: REPRESENTATIVE EARLY AMERICAN LEGAL MATERIALS RELATING TO ABORTION 34a

Proprietary v. Mitchell (1652) 34a

The Midwives' Ordinance (1716) 37a

James Parker, *Condutor Generalis: Or, the Office, Duty, and Authority of Justices of the Peace* (1764) 38a

TABLE OF CONTENTS—Continued

	Page
The Evolution of New York's Abortion Statutes (1828-72)	39a
Resolution of the Medical Society of the State of New York (Feb. 5, 1867)	44a
Nineteenth-Century Treatises on American Criminal Law (1858-61)	45a
State v. Moore (1868)	48a

TABLE OF AUTHORITIES

American Cases:	Page
Addington v. Texas, 441 U.S. 418 (1979)	30
Bowers v. Hardwick, 478 U.S. 186 (1986)	2
Burnham v. Superior Court, 110 S. Ct. 2105 (1990)	2
City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983)	30
City of Richmond v. J.A. Croson Co., 469 U.S. 469 (1989)	30
Coker v. Georgia, 433 U.S. 584 (1977)	2
Colony v. Allen, Newport Cnty. Gen. Ct. Trials: 1671-1724A n.p. (Sept. 4, 1683 sess.)	20
Colony v. Powell (Va. 1635), 7 Am. L. Rec. 43 (1954)	20
Commonwealth v. Bangs, 9 Mass. 387 (1812)	24
Commonwealth v. Parker, 50 Mass. (9 Met.) 263 (1845)	24
Commonwealth v. W.M.W., 3 Pitt. Rep. 462 (1871)	16
Doe v. Bolton, 410 U.S. 179 (1973)	29
Dougherty v. People, 1 Colo. 514 (1872)	25
Harmelin v. Michigan, 111 S. Ct. 2680 (1991)	2
In re the Stillbirth of Agnita Hendricks' Bastard Child (Del. 1679), Ct. Rec. of New Castle on Del. 1676-1681 at 274-275 (1904)	20
Lamb v. State, 67 Md. 524, 10 A. 208 (1887)	24
McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)	2
Michael H. v. Gerald D., 491 U.S. 110 (1989)	2
Mills v. Commonwealth, 13 Pa. 630 (1850)	24
Mitchell v. Commonwealth, 78 Ky. 204 (1879)	24
Moore v. State, 37 Tex. Crim. 552, 49 S.W. 287 (1897)	16, 24
New State Ice Co. v. Liebman, 285 U.S. 262 (1932)	30
People v. Sessions, 58 Mich. 594, 26 N.W. 291 (1886)	25
Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976)	30

TABLE OF AUTHORITIES—Continued

	Page
Proprietary v. Brooks, 10 Md. Archives 464-465, 486-488 (1656)	19
Proprietary v. Lambrozo, 53 Md. Achives 387-391 (1663)	19
Proprietary v. Mitchell, 10 Md. Archives 171-186 (1652) [quoted in Appendix D]	19
Proprietary v. Robins, 41 Md. Archives 20 (1658)	19
Robins v. Robins, 41 Md. Archives 85 (1658)	19
Roe v. Wade, 410 U.S. 113 (1973)	*passim*
Smith v. State, 33 Me. 48 (1851)	24, 25
State v. Cooper, 22 N.J.L. 52 (1848)	24, 28
State v. Crook, 16 Utah 212, 51 P. 1091 (1898)	25
State v. Gedicke, 43 N.J.L. 86 (1881)	25
State v. Howard, 32 Vt. 380 (1859)	25
State v. Lee, 69 Conn. 186, 37 A. 75 (1897)	25
State v. Moore, 52 Iowa 128 (1868) [quoted in Appendix D]	25
State v. Murphy, 27 N.J.L. 112 (1858)	23
State v. Reed, 45 Ark. 333 (1885)	24
State v. Slagle, 83 N.C. 630 (1880)	24
State v. Watson, 30 Kan. 281, 1 P. 770 (1883)	25
Thornburgh v. American College of Obstetricians, 476 U.S. 747 (1986)	29
Webster v. Reproductive Health Services, 492 U.S. 490 (1989)	4
Worthington v. State, 92 Md. 222, 48 A. 355 (1901)	23, 24
United States Constitution:	
Fourteenth Amendment	3
American Statutes, Ordinances, and Other Legislative Materials:	
Charters & Gen'l L. of the Colony & Prov. of Mass. Bay 293 (Dane, Prescott, & Story eds. 1814)	20
Ill. Rev. Code § 46 (1827)	28
Me. Rev. Stat., ch. 160, §§ 13, 14 (1840)	28
The Midwives' Ordinance, Ordinance of the City of New York, 3 Min. of the Common Council of N.Y. 122 (1716) [quoted in Appendix D]	20

TABLE OF AUTHORITIES—Continued

	Page
Pa. Daily Legis. Rec. No. 19, at 151 (1860)	23
Resolution of the Medical Society of the State of New York (Feb. 5, 1867)	25
English Cases:	
Agnes's Appeal (1200, 1 Selden Soc'y 39 (no. 82) (1887) [translation in Appendix C]	7
Agnes's Appeal, JUST 1/1011, m.59d (Wiltshire Eyre 1289)	8, 13
Alexandra's Appeal, JUST 1/833, m.23d (Suffolk Eyre 1286)	8
Alice's Appeal, JUST 1/176, m.27d (1249)	8
Amice's Appeal, JUST 1/274, m.14d (1247) [translation in App. C]	8
Beatrix's Appeal, JUST 1/579, m.10d (Norfolk Eyre 1286)	8
Boleheved's Appeal, JUST 1/112, m.9d (Cornwall Eyre 1284)	7
Burel's Appeal (1202), 1 Selden Soc'y 11 (no. 26) (1887)	8
Cecily's Appeal (1249), C. Meekings, *Studies in 13th Century Justice and Administration* 257 (no. 562) (1981)	8
Cockaine v. Witnam (Q.B. 1577), Cro. Eliz. 49, pl. 4 (1586) [quoted in Appendix C]	10
Commonwealth v. Carter (1652), Calendar of Assize Rec.: Kent Indictments, 1649-1659, at 96 (nos. 534, 535) (1989)	12, 13
Commonwealth v. Foxall (1651, 3 Warwick Cnty. Rec., Q. Sess. Order Book 50 (S. Ratcliff & H. Johnson eds. 1937)	12
Commonwealth v. Simpson (1659), 6 N. Riding Q. Sess. Rec. 23 (J. Atkinson ed. 1888)	12
de Pekering's Appeal, JUST 1/369, m.36 (Kent Eyre 1279)	8
Erneburga's Appeal, JUST 1/175, m.38 (1249)	7
Gras's Appeal (1276?), The London Eyre of 1276 at 73-74 (no. 261) (London Rec. Soc'y 1976)	8
Hervest's Appeal, JUST 1/789, m.26d (Hampshire Eyre 1281)	8

TABLE OF AUTHORITIES—Continued

	Page
Isabel's Appeal, The London Eyre of 1276, at 62-64 (nos. 157, 158) (London Rec. Soc'y 1976)	8
Juliana's Appeal (1256?), Somerset Pleas (Civ. & Crim.) from the Rolls of the Itinerant Justices 321 (no. 1243) (C. Chadwyck-Healey ed. 1897) [translation in Appendix C]	7
Joan's Appeal, JUST 1/921, m.23 (Sussex Eyre 1279)	8
la Neweman's Appeal, JUST 1/833, m.7 (Suffolk Eyre 1286)	8
Mabel's Appeal, JUST 1/741, m.33 (Shropshire Eyre 1292)	8
Margaret's Appeal, JUST 1/174, m.40d (1249?)	8
Mill's Appeal, JUST 1/579, m.72 (Norfolk Eyre 1286)	8
Modi's Appeal (1221), 59 Selden Soc'y 560-561 (no. 1336) (1940)	8
Orscherd's Appeal (1249?), Just. 1/174, m.40d	8, 14
Philippa's Appeal (1276?), The London Eyre of 1276 at 51 (no. 187) (London Rec. Soc'y 1976)	8, 14
Phina's Appeal (1246), Just. 1/778, m.57, summarized in C. Meekings, *Studies in 13th Century Justice and Administration* 267 (1981)	8
R. v. Adkyns (1600), Calendar of Assize Rec., Essex Indictments, Eliz. I at 510 (no. 3054) (J. Cockburn ed. 1975)	13
R. v. Anonymous (K.B. 1348, Fitzherbert, Graunde Abridgement, tit. Corone, f. 268r. pl. 263 (1st ed. 1516) [translation in Appendix C]	8, 9, 13
R. v. Anonymous (Bury Assizes 1670), M. Hale, *History of Pleas of the Crown* 429 (1736)	12
R. v. Anonymous (1803), 3 J. Chitty, *Criminal Law* 798-801 (1816)	22
R. v. Beare, 2 The Gentleman's Magazine 931 (Aug. 1732) [quoted in Appendix C]	22
R. v. Benetley, JUST 1/789, m.3 (Hampshire Eyre 1281)	8
R. v. Berry, MJ/GSR/SF79 (1617), 4 (N.S.) Cnty. of Middlesex Calendar to the Sess. Rec. 1615-1616, at 292	12

TABLE OF AUTHORITIES—Continued

	Page
R. v. Boleye, JUST 1/303, m.69d (Shropshire Eyre 1292)	8, 13, 14
R. v. Botevylayn (K.B. 1305), Wiltshire Gaol Delivery & Trailbaston Trials 1275-1306 at 105, 126, 131 (nos. 576, 800, 854) (R. Pugh ed. 1978)	7
R. v. Brente, JUST 1/186, m.30 (Devon Eyre 1281)	7, 14
R. v. Cheney, JUST 1/323, m.47d (Hertfordshire Eyre 1278)	13
R. v. Cliston, JUST 1/1011, m.62 (Wiltshire Eyre 1288)	7, 14
R. v. Cobbeham, JUST 1/547, m.19d (London Eyre 1321)	7, 13
R. v. Code, JUST 1/789, m.1 (Hampshire Eyre 1281) [translation App. C]	7, 22
R. v. Cokkes (1415), 7 Calendar of Inquisitions Misc. (Ch.) Preserved in the Pub. Rec. Off. 1399-1422 at 296 (no. 523) (1968)	7, 13
R. v. Dada, JUST 1/547A, m.19d (1290, ms. dated 1321)	7, 13
R. v. de Bourton, Y.B. Mich. 1 Edw 3, f. 23, pl. 28 (K.B. 1327) [translations in Appendix B]	8, 9
R. v. Eppinge, JUST 1/547A, m.46 (ms. dated 1321) (London Eyre 1304)	7, 13
R. v. Fookes, ERO (Chelmsford), Q/S/R 222/73 (1618), 19 Calendar of Essex Cnty. Rec., 1611-1624, at 328 (no. 73)	12
R. v. Godesman, JUST 1/383, mm.18d, 96 (Kent Eyre 1313)	8, 14
R. v. Hallibred, ERO (Chelmsford) O/S/R 236/102 (1622), 19B Calendar of Essex Cnty. Rec. 1611-1624, at 474 (no. 102)	12
R. v. Haule, JUST 1/547A, m.20d (London Eyre 1321) [translation in App. C]	7, 13
R. v. Hervy, JUST 1/547A, m.40d (1300, ms. dated 1321)	7
R. v. Hodges (1615), 2 Calendar of Middlesex Cnty. Sess. Rec. 1614-1615 at 345 (1936)	12

TABLE OF AUTHORITIES—Continued

	Page
R. v. Hokkestere, JUST 1/547A, m.3 (London Eyre 1298, ms. date 1321)	7
R. v. Hore, JUST 1/1011, m.56 (Wiltshire Eyre 1289)	8, 13
R. v. Houdydoudy (Coroner's Inquest 1326), Calendar of Coroner's Rolls of the City of London A.D. 1300-1378, at 166 (1913)	7, 14
R. v. Kyltavenan (Cork, Ireland 1311), Calendar of Justiciary Roles or Proc. in the Ct. of the Justiciar of Ireland I to VII Years of Edward II, at 193 (Dublin Stationary Off., n.d.)	7
R. v. Lagott, SRO (Somerset) Q/S 62 (1629), 2 Quarter Sess. Rec. for the Cnty. of Somerset, Charles I, 1625-1639, at 228 (no. 16)	12
R. v. le Gaoeler, JUST 1/369, m.37d (Kent. Eyre 1279)	8
R. v. le Petiprestre (1244), The London Eyre of 1244 at 48 (no. 116) (London Rec. Soc'y 1970)	7
R. v. le Raggede (Dublin, Ireland 1311), Calendar of Justiciary Roles or Proc. in the Ct. of the Justiciar of Ireland I to VII Years of Edward II, at 216 (Dublin Stationary Off., n.d.)	8
R. v. Lewis, OB/SP/April 1786, nos. 67, 86 (K.B. 1786)	11
R. v. Lichefeld, K.B. 27/974, Rex m.4 (1505) [translation in Appendix C]	10
R. v. Meddowe, Ass. 35/32, m.34 (1591), Calendar of Assize Rec., Sussex Indictments, Eliz. I, at 233 (no. 1212) (1975)	13
R. v. Mercer, JUST 1/710, m.45 (Oxford Eyre 1285) [translation in App. C]	7
R. v. Mondson, JUST 1/527, m.11d (Lincolnshire Gaol Delivery 1361-62)	7
R. v. Neubyr', JUST 1/924, m.73 (Sussex Eyre 1288)	8
R. v. Parker, 73 Eng. Rep. 410 (1580)	18
R. v. Poope (1589), Calendar of Assize Rec., Kent Indictments, Eliz. I at 289 (no. 1751) (J. Cockburn ed. 1975)	13

TABLE OF AUTHORITIES—Continued

	Page
R. v. Portere (K.B. 1400), The Shropshire Peace Role 1400-1414 at 57-58 (no. 24) (E. Kimball ed. 1959)	7, 13
R. v. Ragoun, JUST 1/547A, m.55d (London Eyre 1310)	7
R. v. Rastone, MJ/SR/552/135, MJ/SBP/1, f. 75 (Middlesex 1616), 3 (N.S.) Cnty. of Middlesex Calendar of the Sess. Rec. 1615-1616, at 277	12
R. v. Reeve, JUST 1/924, m.60 (Sussex Eyre 1288)	8, 14
R. v. Robinson (Middlesex 1615), 3 (N.S.) Cnty. of Middlesex Calendar of the Sess. Rec. 1615-1616, at 175	12
R. v. Robynson, Q/SR 110/68 (Coroner's Inquest 1589)	10
R. v. Rolfe, ERO (chelmsford) QSR/405/64, 160, 184, QSR/406/43, 110, 112-13 (1665), 23 Calendar of Essex Cnty. QSR 65, 74, 76	12
R. v. Scharp. The London Eyre of 1276, at 23 (no. 76) (London Rec. Soc'y 1976)	7
R. v. Scot, JUST 1/547A, m.22 (1291, ms. dated 1321)	7, 13
R. v. Senior, 168 Eng. Rep. 1298 (K.B. 1832)	11
R. v. Sims, 75 Eng. Rep. 1075 (Q.B. 1601) [quoted in Appendix C]	11, 12, 13
R. v. Skel, JUST 1/1098, pt.2, m.79 (Yorkshire Eyre 1293)	8, 13
R. v. Skotard, JUST 1/169, m.25 (Derbyshire Eyre 1330)	7, 14
R. v. Squire, Gaol Del., ref: MJ/SR 1720 (1687)	12
R. v. Surgeon, JUST 1/369, m.37d (Kent Eyre 1279)	8
R. v. Tinckler (1781), 1 E. East, *Pleas of the Crown* 354 (1806) [quoted in Appendix C]	22
R. v. Turner, MJ/SR/543/143 (f. MSR 111.51), MJ/SR/544/44, MJ/SBR/2 (1615), 3 (N.S.) Cnty. of Middlesex Calendar of the Sess. Rec. 1615-1616, at 51	12

TABLE OF AUTHORITIES—Continued

Page

R. v. Turnour, Assize 35/23/29 (Essex 1581), Calendar of Assize Rec., Essex Indictments, Eliz. I at 212 (no. 1225) (J. Cockburn ed. 1978) [translation in Appendix C] 10, 11

R. v. Webb (Q.B. 1602), Calendar of Assize Records, Surrey Indictments, Eliz. I at 512 (no. 3146) (J.S. Cockburn ed. 1980) [quoted in Appendix C] 12

R. v. Whalley, MJ/SR/552/136 (1616), 3 (N.S.) Cnty. of Middlesex Calendar of the Sess. Rec. 1615-1616, at 277 12

R. v. Willson, ERO (Chelmsford) QSR/459/1 (1688), 25 Calendar of Essex Cnty. Quarter Sess. Rec. 30 12

R. v. Wodlake, K.B. 9/513/m.23 (1530), K.B. 29/162/m11d (1531) [translation in Appendix C] .. 10

R. v. Wycherley, 173 Eng. Rep. 486 (N.P. 1838) .. 28

R. v. Wynspere, (Coroner's Inquest 1503), Pub. Rec. Off., ref: Ancient Indictments 434 at 12 10

R. v. Wyntercote, JUST 1/303, m.69d (Hereford Eyre 1292) 8

Rokaf's Appeal, JUST 1/544, m.55d (Middlesex Eyre 1294) 8

Sarah's Appeal, The London Eyre of 1244, at 50-51 (no. 124) (London Rec. Soc'y 1970) 8

Sauter's Appeal (1221), Pleas of the Crown for Gloucester Cnty. 1221 at 16 (no. 69) (F. Maitland ed. 1884) 7

Sibil's Appeal (1203), 1 Selden Soc'y 32 (no. 73) (1887) 7

Sorel's Appeal (1276?), The London Eyre of 1276 at 61 (no. 222) (London Rec. Soc'y 1976) 8

St. Alban's Appeal (1244), The London Eyre of 1244, at 36 (no. 84) (London Rec. Soc'y 1970) .. 8

Swayn's Appeal (1249), Just. 1/359, m.36 8

English Statutes:

Leges Henri Primi, ch. LXX.14 (L.J. Downer ed. 1972) 7

5 Eliz. I, ch. 15 (1573) 11

TABLE OF AUTHORITIES—Continued

Page

"An Act to Prevent the Destroying and Murdering of Bastard Children", 21 James I, ch. 27, sec. 3 (1624) 19

Lord Ellenborough's Act, 43 Geo. III, ch. 58 (1803) 19, 23, 24

The Offenses against the Persons Act, 7 Will. IV & 1 Vict., ch. 85 (1937) 28

Secondary Authorities:

Bruce Ackerman, *The Storrs Lecture: Discovering the Constitution*, 93 Yale L.J. 1013 (1984) .. 2

Susan B. Anthony, *Marriage and Maternity*, 4 The Revolution 4 (July 8, 1869) 26

Avicenna, *Libri Canonis Medicine* (Gerard of Cremona trans. 1595) 17

John Baker, *An Introduction to English Legal History* (3d ed. 1990) 3, 13

John Baldwin, *Reading* (Grays Inn c. 1455/60) 9

Jerome Bates & Edward Zawadski, *Criminal Abortion* (1964) 14, 16, 23

O.W. Bartley, *A Treatise on Forensic Medicine* (1815) 23

Theodoric Romeyn Beck & John Beck, *Elements of Medical Jurisprudence* (1823) 23

Before the Bawdy Court (P.E.H. Hair ed. 1972) 11

Alexander Bickel, *The Least Dangerous Branch* (2d ed. 1986) 2

Alexander Bickel, *The Morality of Consent* (1975) 27

Joel Prentiss Bishop, *Criminal Law* (2d ed. 1858) .. 24

William Blackstone, *Commentaries* (1765-1769) 13

Boke of the Justyces of the Peas (1515), 94 Selden Soc'y 306 (1979) 10

James Boswell, *The Kindness of Others: The Abandonment of Children in Western Europe from Late Antiquity to the Renaissance* (1989) .. 18

Britton (F.M. Nichols ed. 1865) 9

Richard Burn, *The Justice of the Peace and the Parish Officer* (3d ed. 1756) 13

TABLE OF AUTHORITIES—Continued

Page

John Burns, *The Anatomy of the Gravid Uterus* (1799) 23
Sir Edward Coke, *Third Institute* (1644) 12
Compleat Herbal (G. Swindells ed. 1787) 17
Robert Cover, *Violence and the Word*, 95 Yale L.J. 1601 (1986) 2
Henry de Bracton, *On the Laws and Customs of England* (S. Thorne ed. 1968) 9
Joseph Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. Pitt. L. Rev. 359 (1979) ..... *passim*
John D'Emilio & Estelle Freedman, *Intimate Matters: A History of Sexuality in America* (1988) 20, 26
Georges Devereux, *A Study of Abortion in Primitive Societies* (1955) ..... *passim*
Denis Diderot, *Encyclopédie* (1766) 22
John Donnison, *Midwives and Medical Men* (1988) 18
Eliza Bisbee Duffy, *The Relations of the Sexes* (1876) 26
Ronald Dworkin, *Law's Empire* (1986) 2
Sir Edward Hyde East, *A Treatise on the Pleas of the Crown* (1803) 13, 22, 23
Audrey Eccles, *Obstetrics and Gynaecology in Tudor and Stuart England* (1982) 14
Michael Etmullerus, *Description of All Diseases Incident to Men, Women and Children* (3d ed. 1712) 17
Marian Faux, *Roe v. Wade: The Untold Story of the Landmark Supreme Court Decision that Made Abortion Legal* (1988) 4
Fleta (Selden Soc'y ed. 1955) 9
T.R. Forbes, *Early Forensic Medicine in England: The Angus Murder Trial*, 36 J. Hist. Med. 296 (1981) 11, 16
T.R. Forbes, *The Midwife and the Witch* (1966) 18
Estelle Freedman, *Historical Interpretation and Legal Advocacy: Rethinking the* Webster Amicus *Brief*, 12 The Pub. Historian 27 (1990) 6

TABLE OF AUTHORITIES—Continued

Page

Shelley Gavigan, *The Criminal Sanction as It Relates to Human Reproduction: The Genesis of the Statutory Prohibition of Abortion*, 5 J. Leg. Hist. 20 (1984) 9
Mary Ann Glendon, *Abortion and Divorce in Western Law* (1987) 29
Linda Gordon, *Women's Body, Women's Right: A Social History of Birth Control in America* (1976) ..... *passim*
Michael Gordon, *Aesculapius Comes to the Colonies: The Story of the Early Days of Medicine in the Thirteen Original Colonies* (1949) 20
Francis Grose, *A Classical Dictionary of the Vulgar Tongue* (1785) 16
Jacques Guillemeau, *The Nursing of Children* (1612) 19
Sir Matthew Hale, *History of the Pleas of the Crown* (1736) 11, 12, 13
Sir Matthew Hale, *Pleas of the Crown* (1678) 13
William Hawkins, *Treatise on the Pleas of the Crown* (1716) 13
R.H. Helmholz, *Infanticide in the Province of Canterbury in the Fifteenth Century*, 2 Hist. Childhood Q. 379 (1975) 11, 18
Norman Himes, *Medical History of Contraception* (1936) 16, 17
A History of Science (René Taton ed. 1965) 28
Peter Hoffer & N.E.H. Hull, *Murdering Mothers: Infanticide in England and New England 1558-1803* (1981) 18, 20
W.S. Holdsworth, *A History of English Law* (1938) 9, 11, 24
Oliver Wendall Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457 (1897) 2
Ralph Houlbrooke, *Church Courts and the People during the English Reformation 1520-1570* 78 (1979) 11
Paul Kahn, *Community in Contemporary Constitutional Theory*, 99 Yale L.J. 1 (1989) 2
Alfred Kelley, *Clio and the Court: An Illicit Love Affair*, 1965 Sup. Ct. Rev. 119 5

TABLE OF AUTHORITIES—Continued

Page

Mary Kenny, *Abortion: the Whole Story* (1986).. 18
John Keown, *Abortion, Doctors and the Law* (1988) ..... *passim*
Lyle Koehler, *A Search for Power: The "Weaker Sex" in Seventeenth-Century New England* (1980) 20
William Lambard, *Of the Office of the Justice of the Peace* (1st ed. 1581) 10, 18
Jane Larson & Clyde Spillenger, *"That's Not History": The Boundaries of Advocacy and Scholarship*, 12 The Pub. Historian 33 (1990) 6
Peter Laslett, *The World We Have Lost* (1966) 15
Sylvia Law, *Conversations Between Historians and the Constitution*, 12 The Pub. Historian 11 (1990) 5
Sylvia Law, Jane Larson, & Clyde Spillenger, "Historians' Brief" filed in *Webster v. Reproductive Health Services, Inc.* (1989)..... *passim*
Sylvia Law, Jane Larson, & Clyde Spillenger, "Historians' Brief" filed in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) .. *passim*
George Edward Male, *An Epitome of Judicial or Forensic Medicine* (1816) 24
Claudia Pap Mangel, *Legal Abortion: The Impending Obsolescence of the Trimester Framework*, 14 Am. J. L. & Med. 69 (1988) 30
Samuel Evans Massengill, *A Sketch of Medicine and Pharmacy* (2d ed. 1942) 20
Angus McLaren, *Reproductive Rituals* (1984) 14, 15, 17, 18
Cyril Means, Jr. *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411 (1968) (cited as Means I) 4, 21
Cyril Means, Jr., *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right about to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y. L.F. 335 (1971) (cited as Means II) 4, 14, 21

TABLE OF AUTHORITIES—Continued

Page

C.A.F. Meekings, *Studies in 13th Century Justice and Administration* (1981) 8
Arthur Meyer, *The Rise of Embryology* (1939) 28
Mirror of Justices (Selden Soc'y 1895) 18
James Mohr, *Abortion in America* (1978) ..... *passim*
James Mohr, *Historically Based Legal Briefs: Observations of a Participant in the* Webster *Process*, 12 The Pub. Historian 19 (1990) 5
Dr. Bernard Nathanson, *The Abortion Papers* (1983) 29
Dr. Bernard Nathanson, *Aborting America* (1979) 29
Joseph Needham, *A History of Embryology* (1959) 28
John Noonan, *Contraception* (1965) 16, 17
Marvin Olasky, *The Press and Abortion, 1838-1988* (1988) 25, 26
John Parker, *Conductor Generalis: Or, the Office, Duty, and Authority of Justices of the Peace* (1764) 20
John Pechey, *Compleat Herbal of Physical Plants* (1707) 17
Rosalind Petchesky, *Abortion and Women's Choice* (1984) 15, 26
Frederick Pollock & Frederick Maitland, *The History of English Law before the Time of Edward I* (2d ed. 1898) 9, 11, 18
Thomas Pygot, *Reading* (Grays Inn, 1510) 9
G.R. Quaife, *Wanton Wenches and Wayward Wives* (1979) 15
Eugene Quay, *Justifiable Abortion—Medical and Legal Foundations (Pt. II)*, 49 Geo. L.J. 395 (1961) 21
Rhazes, *Liber ad Almansorem* (1497) 17
C. H. Rolph, *A Backward Glance at the Age of 'Obscenity'*, 32 Encounter 23 (June 1969) 18
Sir William Russell, *A Treatise on Crimes and Misdemeanors* (1819) 13

TABLE OF AUTHORITIES—Continued

	Page
Margaret Sanger, *Motherhood in Bondage* (1928)	26
Jane Sharp, *The Midwives Book* (1671)	19
Catherine Scholten, *Childbearing in American Society 1650-1850* (1985)	20
Edward Shorter, *A History of Women's Bodies* (1982)	15, 16, 17, 22
J.A. Simpson, *Letter to Philip Rafferty* (Nov. 23, 1990)	28
Elizabeth Cady Stanton, *Child Murder*, 1 The Revolution 146 (March 12, 1868)	26
William Staunford, *Pleas of the Crown* (1557)	10, 18
Dr. Alice Bunker Stockham, *Tokology* (1887)	26
Dr. Frederick Taussig, *Abortion Spontaneous and Induced* (1936)	14, 16, 18
Dr. Alfred Taylor, *Manual of Medical Jurisprudence* (1842)	24
Laurence Tribe & Michael Dorf, *On Reading the Constitution* (1991)	2
Stephen Veltri, *Book Rev.*, 18 Oh. N.U.L. Rev. 257 (1991)	29
Jeffrey Weeks, *Sex, Politics and Society* (1981)	16
Francis Wharton, *The Criminal Law of the United States* (5th rev. ed. 1861)	24
John Winthrop, *History of New England 1630-1649* (James Kendall Hosmer ed. 1908)	20
James Witherspoon, *Reexamining Roe: Ninteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 St. Mary's L.J. 29 (1985)	21

SUMMARY OF ARGUMENT

In order to determine the proper standard of review with which to judge the Pennsylvania statutes in issue in this case, the Court must reconsider the continuing validity of *Roe v. Wade*, 410 U.S. 113 (1973), as the source of the standard. The majority in *Roe*, following established traditions of constitutional interpretation, analyzed the case through extended discussion of the history of abortion laws. Influenced by deliberately distorted presentations of that history, the Court erroneously concluded that abortion was not a common law crime. The Court's historical errors caused it to break sharply with the traditional values of the common law and our Constitution.

The historical record shows that abortion and other killings of unwanted children were condemned by all respected legal authorities in England from the start of the common law, and those laws were applied with full rigor in the United States during the colonial era. Early on, infanticide was frequently punished; when, with new medical technologies, abortion became more common than infanticide, legal institutions turned their attention from infanticide to abortion.

The common law has always socially controlled abortion in the interest of mother and child, interests that changed as medical technologies developed. Changing abortion technologies affected the desire of some mothers for the procedure while developing medical knowledge reinforced a growing certainty that a conceptus is a person from early stages of gestation, leading to a widely shared consensus in the nineteenth century on the moral worth of the unborn child. The consensus was then shared by even the most militant feminists and opposed only by professional abortionists.

Legislatures are better at assembling the information necessary to assess the import of the changing technologies and at balancing the interests created or reinforced by those technologies. Courts are ill-suited to be boards of review for the implications of changing medical technologies. In the present flux, recourse to states as labora-

tories for social policies is particularly appropriate. The Court should uphold all provisions of the Pennsylvania statute and should overrule *Roe v. Wade*.

ARGUMENT

I. THE CONSTITUTIONAL STATUS OF ABORTION MUST BE DETERMINED BY EXAMINING THE DEEPLY-ROOTED TRADITIONS OF ANGLO-AMERICAN SOCIETY AS EMBODIED IN THE COMMON LAW AND THE CONSTITUTION

The rule of law requires judicial decisions to have a basis other than the judge's personal predilections. We find that basis in historical traditions regarding the relevant behavior. *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991); *Burnham v. Superior Court*, 110 S. Ct. 2105 (1990); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Bowers v. Hardwick*, 478 U.S. 186 (1986); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 400-05 (1819). Even those who reject the original intent as controlling constitutional interpretation have sought to anchor constitutional decisions in evolving national traditions.[1] Only by denying the relevance of anything other than one's own personal vision of a better society can one deny the relevance of historical traditions to constitutional interpretation.

The historical record on abortion is sparse, but the record is clear that abortion and other killings of unwanted

[1] See, e.g., *Coker v. Georgia*, 433 U.S. 584, 592, 595-97 (1977): A. Bickel, *The Least Dangerous Branch* 109-10 (2d ed. 1986); L. Tribe & M. Dorf, *On Reading the Constitution* 13-19, 33, 52-53, 59-60, 70-71, 97-99 (1991). Appeal to an aspirational tradition is at least implicit in appeals to community for social and legal norms if the "community" appealed is to refer to any actual community, as opposed to an "ideal community" wholly a product of one's own imagination. *See, e.g.*, R. Dworkin, *Law's Empire* (1986); Ackerman, *The Storrs Lecture: Discovering the Constitution*, 93 Yale L.J. 1013 (1984); R. Cover, *Violence and the Word*, 95 Yale L.J. 1601 (1986); P. Kahn, *Community in Contemporary Constitutional Theory*, 99 Yale L.J. 1 (1989). *See also* O. W. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 459 (1897): "Law is the witness and external deposit of our moral life."

children were always prohibited in the common law tradition, and, as this Court itself recognized in *Roe v. Wade*, 410 at 159, abortion has always been and now is treated differently from other issues of reproductive privacy. Because of this difference, the precise historical tradition toward abortion alone is relevant to the constitutional power of states to regulate or prohibit abortion.

II. *ROE v. WADE*, THROUGH ERRONEOUS READING OF THE HISTORICAL STATUS OF ABORTION UNDER THE COMMON LAW, BROKE SHARPLY WITH THE TRADITIONAL VALUES OF THE COMMON LAW AND OUR CONSTITUTION

More than half of the majority opinion in *Roe*, 410 at 129-152, 156-162, was given to a history of abortion, used to inform the values at stake in the controversy. The majority concluded that "it now appear[s] doubtful that abortion was ever . . . a common law crime", 410 U.S. at 136, and that American abortion statutes were not generally adopted until after the Fourteenth Amendment was adopted, *id.* at 139. Both conclusions are wrong.

Extensive research since *Roe* has found indictments or appeals of felony for abortions dating back eight centuries.[2] This evidence indicates that abortion, even before quickening, was a crime at common law, a conclusion that was unquestioned (at least for abortions after quickening) until abortion activists adopted a deliberate strategy of challenging it. The nineteenth-century abor-

[2] Many of the indictments and appeals cited in this brief have not been published except as appendixes to briefs similar to this. In addition to my research, Mr. Philip Rafferty of the Los Angeles bar made his extensive research available, as have Dr. J.H. Baker of Cambridge University and Dr. John Keown of the University of Leicester. *See generally* J. Keown, *Abortion, Doctors and the Law* (1988). Dr. Baker's text, *An Introduction to English Legal History* (3d ed. 1990), is a leading text on the topic.

tion statutes served to affirm social policy in the face of technologically-based social change.

A. Courts, from *Roe v. Wade* on, Have Relied on a Deliberately Distorted History of Abortion

The majority in *Roe* relied uncritically on the work of Cyril Means, Jr., who was then general counsel for the National Association for the Repeal of Abortion Laws (NARAL, now the National Abortion Rights action League).[3] Means' distorted doctrinal history of abortion precedents and statutes ignored the larger social and technological context in which those decisions were grounded.[4] Abortion advocates now usually rely on the work of historian James Mohr, as expressed in the "Historians' Briefs" in *Webster v. Reproductive Health Services* and in this case.[5]

These histories of abortion are advocacy pieces with a highly selective examination of the evidence to support a partisan and distorted history of abortion. Mohr and the authors of the "Historians' Briefs" view the law of abor-

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[3] C. Means, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L.F. 335 (1971) ("Means II"); C. Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411 (1968) ("Means I"). The majority cited Means seven times for the history of abortion—without noting that he was the NARAL's general counsel. On Mean's relation to abortion advocacy groups, see M. Faux, *Roe v. Wade: The Untold Story of the Landmark Supreme Court Decision that Made Abortion Legal* 289-92, 297-98 (1988).

[4] *See generally* J. Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. Pitt. L. Rev. 359 (1979).

[5] J. Mohr, *Abortion in America* (1978); *Amicus* Brief of 281 American Historians, *filed in* Webster v. Reproductive Health Services, 492 U.S. 490 (1989) ["*Webster* Brief"]; *Amicus* Brief of 250 Historians, *filed in* Planned Parenthood of S.E. Pa. v. Casey ["*Casey* Brief"].

tion as a story of oppressors and oppressed, shifting their focus from the increasingly clear history of the law of abortion to less determinate questions of the "true" social attitudes toward abortion in our history. Their project of recovering "lost voices"[6] enables them to discount attitudes with which they disagree as aberrations, not truly representative statements, either in favor of similar records of more agreeable attitudes or in favor of presumed but unrecorded opinions of historically mute classes. Their story of oppression is far from a complete history.

Recovering "lost voices" permits one to infer, at will, what the "true" attitudes were. Yet, if the public attitudes of formal, legal institutions did not represent the true values of our society, why did those institutions express themselves in such terms, and why did those unrepresentative terms continue through major changes in social and political structures spanning more than seven centuries? Nor does the "lost voices" project recognize that the Constitution is a legal document. Ultimately, legal traditions must inform the Constitution: Social, medical, and moral contexts usefully illuminate legal traditions, but they are not an independent source of right. Finally, troubling public admissions by the authors of the *Webster* Brief of deliberate distortions of the historical record to achieve more effective advocacy emphasizes the shallowness of their arguments.[7]

Sylvia Law, Counsel of Record on the *Webster* Brief, candidly lamented the authors' "serious deficiencies as truth-tellers."[8] James Mohr does not "consider the brief to be history, as I understand the craft."[9] His-

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[6] *See* Casey Brief, *supra* note 5, at 4. *See also* Law, *Conversations Between Historians and the Constitution*, 12 The Pub. Historian 11, 14 (1990).

[7] *Cf.* A. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 Sup. Ct. Rev. 119, 122 n.13, 144 (decrying "law office history").

[8] Law, *supra* note 6, at 14-16.

[9] J. Mohr, *Historically Based Legal Briefs: Observations of a Participant in the* Webster *Process*, 12 The Pub. Historian 19, 25 (1990).

torian Estelle Freedman, who also worked on the brief, signed the brief despite knowing that her own research demonstrated a very different story, explaining her decision in a passage of remarkable frankness:

> As an historian, my primary difficulty with the earlier versions of the brief had to do with the selective view of evidence, or lack of evidence, to show continuity rather than change, in order to support a particular legal argument about original intent. . . . Yet I realize that for the practical purposes of writing this brief, it was necessary to suspend certain critiques to make common cause and to use the legal and political grounds that are available to us. . . .[10]

The difficulties these admissions present are not resolved simply by asserting, as do the other two lawyers on the *Webster* Brief, that all discourse is necessarily political and that any distinction between scholarship and distortion is illusory.[11] The "Historians' Brief" filed in this case (the "*Casey* Brief") was written by the same attorneys relying on the same historians with only small changes of emphasis. The Historians' Briefs hinge on the twin claims that abortion has always been a common social practice and was a "common law liberty" prior to the Civil War—both of which are demonstrably false.

B. In England, from the Beginning of the Common Law, Courts and Other Respected Authorities Consistently Condemned Abortion

Common law indictments and appeals of felony for abortion are recorded as early as 1200. While the terse records often do not indicate the outcome of the pro-

[10] E. Freedman, *Historical Interpretation and Legal Advocacy: Rethinking the* Webster Amicus *Brief*, 12 The Pub. Historian 27, 32 (1990). Her entire talk makes clear that the problems she addressed were not resolved in the version filed with the Court.

[11] Larson & Spillenger, *"That's Not History": The Boundaries of Advocacy and Scholarship*, 12 The Pub. Historian 33 (1990).

ceedings,[12] the many clear records of punishment[13] and judgments of "not guilty" (rather than dismissal)[14] prove that the indictments and appeals were valid under the common law. Means was simply wrong to assert that

[12] *R. v. Cokkes* (1415), 7 Calendar of Inquisitions Misc. (Ch.) Pres'd in the Pub. Rec. Off. 1399-1422, at 296 (no. 523) (1968); *R. v. Portere* (K.B. 1400), The Shropshire Peace Role 1400-1414, at 57-58 (no. 24) (1959); *R. v. Houdydoudy* (Coroner's Inquest 1326), Calendar of Coroner's Rolls of the City of London A.D. 1300-1378, at 166 (1913); *R. v. Botevylayn* (K.B. 1305), Wiltshire Gaol Delivery & Trailbaston Trials 1275-1306, at 105, 126, 131 (nos. 576, 800, 854) (1978); *Boleheved's Appeal*, JUST 1/112, m.9d (Cornwall Eyre 1284); *R. v. le Petiprestre*, The London Eyre of 1244, at 48 (no. 116) (London Rec. Soc'y 1970); *Sauter's Appeal*, Pleas of the Crown for Gloucester Cnty. 1221, at 16 (no. 69) (1884); *Sibil's Appeal* (1203), 1 Selden Soc'y 32 (no. 73) (1887); *Agnes's Appeal* (1200), 1 Selden Soc'y, *supra* at 39 (no. 82) [see App. C, at 12a].

[13] HANGING: *R. v. Haule*, JUST 1/547A, m.20d (London Eyre 1321) [see App. C, at 15a]; *R. v. Kyltavenan* (Cork, Ireland 1311), Calendar of Justiciary Roles or Proc. in the Ct. of the Justiciar of Ireland I to VII Years of Edward II, at 193 (Dublin Stationary Off., n.d.). IMPRISONMENT: *R. v. Code*, JUST 1/789, m.1 (Hampshire Eyre 1281) [see App. C, 14a]. OUTLAWRY: *R. v. Ragoun*, JUST 1/547A, m.55d (London Eyre 1310); *R. v. Eppinge*, JUST 1/547A, m.46 (ms. dated 1321) (London Eyre 1304); *R. v. Hervy*, JUST 1/547A, m.40d (1300, ms. dated 1321); *R. v. Hokkestere*, JUST 1/547A, m.3 (London Eyre 1298, ms. date 1321); *R. v. Scot*, JUST 1/547A, m.22 (1291, ms. dated 1321); *R. v. Dada*, JUST 1/547A, m.19d (1290, ms. dated 1321); *R. v. Cliston*, JUST 1/1011, m.62 (Wiltshire Eyre 1288); *R. v. Mercer*, JUST 1/710, m.45 (Oxford Eyre 1285) [see App. C, at 14a]; *R. v. Brente*, JUST 1/186, m.30 (Devon Eyre 1281); *R. v. Code*, JUST 1/789, m.1 Hampshire Eyre 1281) [see App. C, at 14a]; *R. v. Scharp*, The London Eyre of 1276, at 23 (no. 76) (London Rec. Soc'y 1976); *Juliana's Appeal* (1256?), Somerset Pleas (Civ. & Crim.) from the Rolls of the Itinerant Justices 321 (no. 1243) (1897) [see App. C, at 13a]; *Erneburga's Appeal*, JUST 1/175, m.38 (1249). *See also Leges Henri Primi* ch. LXX.14 (L.J. Downer ed. 1972) (a 12th-century compilation of Anglo-Saxon law as modified by the early Norman kings).

[14] *R. v. Mondson*, JUST 1/527, m.11d (Lincolnshire Gaol Delivery 1361-62); *R. v. Skotard*, JUST 1/169, m.25 (Derbyshire Eyre 1330); *R. v. Cobbeham*, JUST 1/547, m.19d (London Eyre 1321); *R. v.*

only two cases dealt with abortion before 1600 and that the courts in both cases doubted whether abortion was a crime: *R. v. de Bourton*, Y.B. Mich. 1 Edw. 3, f. 23, pl. 28 (K.B. 1327); and *R. v. Anonymous* (K.B. 1348), Fitzherbert, Graunde Abridgement, tit. Corone, f. 268r, pl. 263 (1st ed. 1516) [see App. C, at 16a].

Godesman, JUST 1/383, mm.18d, 96 (Kent Eyre 1313); *R. v. le Raggede* (Dublin, Ireland 1311), Calendar of Justiciary Roles or Proc. in the Ct. of the Justiciar of Ireland I to VII Years of Edward II, at 216 (Dublin Stationary Off., n.d.); *Rokaf's Appeal*, JUST 1/544, m.55d (Middlesex Eyre 1294); *R. v. Skel*, JUST 1/1098, pt.2, m.79 (Yorkshire Eyre 1293); *R. v. Wyntercote*, JUST 1/303, m.69d (Hereford Eyre 1292); *R. v. Boleye*, JUST 1/303, m.69d (Shropshire Eyre 1292); *R. v. Hore*, JUST 1/1011, m.56 (Wiltshire Eyre 1289); *Agnes's Appeal*, JUST 1/1011, m.59d (Wiltshire Eyre 1289); *R. v. Reeve*, JUST 1/924, m.60 (Sussex Eyre 1288); *R. v. Neubyr'* JUST 1/924, m.73 (Sussex Eyre 1288); *Beatrix's Appeal*, JUST 1/579, m.10d (Norfolk Eyre 1286); *Mill's Appeal*, JUST 1/579, m.72 (Norfolk Eyre 1286); *la Neweman's Appeal*, JUST 1/833, m.7 (Suffolk Eyre 1286); *Alexandra's Appeal*, JUST 1/833, m.23d (Suffolk Eyre 1286); *Hervest's Appeal*, JUST 1/789, m.26d (Hampshire Eyre 1281); *R. v. Benetley*, JUST 1/789, m.3 (Hampshire Eyre 1281); *de Pekering's Appeal*, JUST 1/369, m.36 (Kent Eyre 1279); *R. v. le Gaoeler*, JUST 1/369, m.37d (Kent Eyre 1279); *R. v. Surgeon*, JUST 1/369, m.37d (Kent Eyre 1279); *Joan's Appeal*, JUST 1/921, m.23 (Sussex Eyre 1279); *Gras's Appeal*, The London Eyre of 1276, at 73-74 (no. 261) (London Rec. Soc'y 1976); *Sorel's Appeal*, The London Eyre of 1276, at 61 (no. 222); *Isabel's Appeal*, The London Eyre of 1276, at 62-64 (nos. 157, 158); *Cecily's Appeal* (1249), C. Meekings, *Studies in 13th Century Justice and Administration* 257 (no. 562) (1981); *Swayn's Appeal*, JUST 1/359, m.36 (1249); *Margaret's Appeal*, JUST 1/174, m.40d (1249?); *Orscherd's Appeal*, JUST 1/174, m.40d (1249?); *Alice's Appeal*, JUST 1/176, m.27d (1249); *Amice's Appeal*, JUST 1/274, m.14d (1247) [see App. C, at C—]; *Phina's Appeal*, JUST 1/778, m.57 (1246), summarized in Meekings *supra* at 267; *Sarah's Appeal*, The London Eyre of 1244, at 50-51 (no. 124) (London Rec. Soc'y 1970); *St. Alban's Appeal* (1244), The London Eyre of 1244, at 36 (no. 84); *Modi's Appeal* (1221), 59 Selden Soc'y 560-61 (no. 1336) ((1940); *Burel's Appeal* (1202), 1 Selden Soc'y 11 (no. 26) (1887). BENEFIT OF CLERGY PRECLUDED TRIAL: *Mabel's Appeal*, JUST 1/741, m.33 (Shropshire Eyre 1292) (damaged roll); *Philippa's Appeal* (1276?), The London Eyre of 1276, at 51 (no. 187).

Means (and the *Roe* majority) relied on a faulty text of *R. v. de Bourton* [see App. B, at 2a]. Even their faulty text did not support Means' highly partisan analysis of the case.[15] The faulty text of *R. v. de Bourton* at most demonstrates that courts declined abortion prosecutions if uncertain whether the case was properly before the court for reasons other than the criminality of abortion. The defendant was charged with beating a woman, causing one twin to be born dead and the other to die shortly after birth; the defendant apparently was released on bail to answer for an unspecified different charge. The full record reveals the case actually to have been a dispute over whether the offense was bailable, and not over its criminality. In the end, de Bourton was pardoned; the charges were not dismissed.

In *R. v. Anonymous*, the defendant escaped conviction for killing a child in the mother's womb for the dubious reason that the indictment failed to state a baptismal name for the victim,[16] and because it was impossible to know if the defendant had killed the child. In both *de Bourton* and *Anonymous*, the issues were procedural and evidentiary, not substantive. Early commentators on the common law also declared abortion after quickening to be criminal homicide. 2 H. de Bracton, *On the Laws and Customs of England* 341 (S. Thorne ed. 1968); 1 *Fleta* 60-61 (Selden Soc'y ed. 1955).[17]

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[15] Keown, *supra* note 2, at 4; S. Gavigan, *The Criminal Sanction as It Relates to Human Reproduction: The Genesis of the Statutory Prohibition of Abortion*, 5 J. Leg. Hist. 20, 22-29 (1984). Dellapenna, *supra* note 4, at 368-70.

[16] "Murder", at least until 1340, meant a fine imposed on a district when no one could prove a deceased's identity as an Englishman. 1 W. Holdsworth, *A History of English Law* (1938), at 65-77, 580-632; 1 F. Pollock & F. Maitland, *The History of English Law Before the Time of Edward I* 67-68, 545 (2d ed. 1898); 2 Pollock & Maitland at 480-86. This usage was still common in the Inns of Courts nearly two centuries later. *See* Selected Readings on the Law of Murder, in App. C, at 16a.

[17] Britton disagreed because of the lack of a baptismal name for the victim. 1 *Britton* 114 (F.M. Nichols ed. 1865).

The sixteenth-century cases clearly held voluntary abortions to be crimes. A coroner's inquest held death by abortion to be "felonious suicide"; the man involved was released as an accessory then could not be tried without the principal. *R. v. Lichefeld*, K.B. 27/974, Rex m.4 (1505) [see App. C, at 18a].[18] A man died before trial for providing a potion to induce an abortion. *R. v. Wodlake*, K.B. 9/513/m.23 (1530), K.B. 29/162/m.11d (1531) [see App. C, at 19a]. Accusing a woman of offering abortifacients to another supported an action for slander as such words were sufficient grounds to require a judicial bond for good behavior. *Cockaine v. Witnam* (1577), Cro. Eliz. 49 (1586) [see App. C, at 21a]. A woman was executed for abortion by witchcraft. *R. v. Turnour*, Assize 35/23/29 (Essex 1581) [see App. C, at 22a].[19] A woman was "presented" by a coroner's jury for procuring her own abortion. *R. v. Robynson*, Q/SR 110/68 (Coroner's Inquest 1589).

Two sixteenth-century writers on criminal pleadings denied, however, that abortion was a felony. 1 W. Staunford, *Pleas of the Crown* ch. 13 (1557); W. Lambard, *Of the Office of the Justice of the Peace* 217-218 (1st ed. 1581). Yet a formbook, with four editions from 1506 and 1544, included a form indictment for abortion by physical assault on the mother. *Boke of the Justyces of the Peas* ch. vi, fol. iii (1515). Perhaps Staunford and Lambard reflected the inconclusiveness of the more widely, albeit faultily, reported decisions; or perhaps they meant that abortion was a crime less than a felony or that abortion properly belonged before a court other than the Queen's Bench. They clearly were wrong.

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[18] *See also R. v. Wynspere*, (Coroner's Inquest 1503), Pub. Rec. Off., ref: Ancient Indictments 434, 12; Keown, *supra* note 2, at 6.

[19] The record is not entirely clear as to why she was executed; Turnour was convicted of several acts of witchcraft, only one of which involved abortion, but the abortion was the only witchcraft which would have been a capitol offense. *See* Calendar of Assize Rec., Essex Indictments, Eliz. I, at 212 (no. 1225) (J. Cockburn ed. 1978).

Sixteenth-century legal activity directed at abortion did involve the secularization of ecclesiastical jurisdiction.[20] Ecclesiastical judicial activity directed at abortion declined during the Reformation and common law courts then took full responsibility for abortion.[21] In 1601, two Justices of the Queen's Bench held an abortion in which a child dies after its live birth to be murder on grounds that the birth and subsequent death of the child permitted proof of the cause of death. *R. v. Sims*, 75 Eng. Rep. 1075 (Q.B. 1601) [see App. C, at 23a].[22] In

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[20] *Before the Bawdy Court* 81, 152, 172, 204, 238 (nos. 150, 369, 427, 531) (P. Hair ed. 1972); Keown, *supra* note 2, at 5; Helmholz, *Infanticide in the Province of Canterbury in the Fifteenth Century*, 2 Hist. Childhood Q. 379, 380-81 (1975). Ecclesiastical and legal jurisdiction often were concurrent. Keown, *supra*; Helmholz, *supra* at 386. In English legal theory both temporal and ecclesiastical courts derived their authority from the Crown, and thus both together represented the "law of England." 1 M. Hale, *History of the Pleas of the Crown*, preface (1736). Many modern bodies of law that today are unquestionably secular originated in ecclesiastical courts, including wills, slander, and simple contracts. 1 Holdsworth, *supra* note 16, at 65-77, 455-57, 580-632 (1938); 3 Holdsworth at 408-28, 441-54, 534-36; 5 Holdsworth at 167-69, 197-218, 291-99; 8 Holdsworth at 301-07, 423-417; 15 Holdsworth at 198-208; Dellapenna, *supra* note 4, at 382-87.

[21] R. Houlbrooke, *Church Courts and the People during the English Reformation 1520-1570* 78 (1979). Witchcraft became an indictable crime by the statute of 5 Eliz. I, ch. 15 (1573); within eight years we find *R. v. Turnour, supra*.

[22] Failure of proof was occasionally given as a reason for not prosecuting earlier indictments. On the primitive state of forensic medicine even three centuries later, *see* Forbes, *Early Forensic Medicine in England: the Angus Murder Trial*, 36 J. Hist. Med. 296 (1981). *R. v. Sims* seems to have settled the matter: *R. v. Senior*, 168 Eng. Rep. 1298 (K.B. 1832); *R. v. Lewis*, OB/SP/April 1786, nos. 67, 86 (K.B. 1786). *Sims* was an action in trespass, which then was still a hybrid action combining criminal and civil elements; for the evolution of medieval trespass into modern crimes and torts, *see* 2 Holdsworth, *supra* note 16, at 364-65: 3 Holdsworth, at 317-18, 609-11: 4 Holdsworth at 512-15; 2 Pollock & Maitland, *supra* note 16, at 510-24.

1602, in *R. v. Webb*, Calendar of Assize Rec., Surrey Indictments, Eliz. I 512 (no. 3146) (J. Cockburn ed. 1980) [see App. C, at 24a], a woman apparently was saved from punishment for self-abortion only by a general pardon. The pardon covered entire classes of felony; whether the pardon was before or after her conviction is unclear. Finally, Sir Matthew Hale held that the death of a mother from an abortion was a felony homicide. *R. v. Anonymous* (Bury Assizes 1670), M. Hale, *History of Pleas of the Crown* 429-30 (1736) [see App. C, at 25a].[23]

Sir Edward Coke had argued *R. v. Sims* as Attorney-General and took the case up in his *Third Institute* 50-51 (1644) [see App. C, at 25a], generalizing from it a principle that abortion after quickening was "a great mis-

[23] There were many other 17th-century cases. MISDEMEANOR CONVICTIONS: *R. v. Hallibred*, ERO (Chelmsford) O/S/R 236/102 (1622), 19B Calendar of Essex Cnty. Rec. 1611-1624, at 474 (no. 102); *R. v. Berry*, MJ/GSR/SF79 (1617), 4 (N.S.) Cnty. of Middlesex Calendar of the Sess. Rec. 1615-1616, at 292; *R. v. Rastone*, MJ/SR/552/135 MJ/SBP/1, f. 75 (Middlesex 1616), 3 (N.S.) Cnty. of Middlesex Calendar, *supra*, at 277; *R. v. Whalley*, MJ/SR/552/136 (1616), 3 (N.S.) Cnty. of Middlesex Calendar, *supra*, at 277; *R. v. Robinson* (Middlesex 1615), 3 (N.S.) Cnty. of Middlesex Calendar, *supra*, at 175. ACQUITTALS: *R. v. Squire*, Gaol Del., ref: MJ/SR/1720 (1687); *Commonwealth v. Carter* (1652), Calendar of Assize Rec.: Kent Indictments, 1649-1659, at 96 (nos. 534, 535) (1989). INDICTMENTS WITHOUT RECORD OF THE OUTCOME: *R. v. Willson*, ERO (Chelmsford) QSR/459/1 (1688), 25 Calendar of Essex Cnty. Quarter Sess. Rec. 30; *R. v. Rolfe*, ERO (Chelmsford) QSR/405/64, 160, 184, QSR/406/43, 110, 112-13 (1665), 23 Calendar of Essex Cnty. QSR 65, 74, 76; *Commonwealth v. Simpson* (1659), 6 N. Riding Q. Sess. Rec. 23 (1888); *Commonwealth v. Foxall* (1651), 3 Warwick Cnty. Rec., Q. Sess. Order Book 50; *R. v. Lagott*, SRO (Somerset) Q/S 62 (1629), 2 Quarter Sess. Rec. for the Cnty. of Somerset, Charles I, 1625-1639, at 228 (no. 16); *R. v. Fookes*, ERO (Chelmsford), Q/S/R 222/73 (1618), 19 Calendar of Essex Cnty. Rec., *supra*, at 328 (no. 73); *R. v. Hodges* (1615), 2 Calendar of Middlesex Cnty. Sess. Rec. 1614-1615, at 345 (1936); *R. v. Turner*, MJ/SR/543/143 (f. MSR 111.51), MJ/SR/544/44, MJ/SBR/2 (1615), 3 (N.S.) Cnty of Middlesex Calendar, *supra*, at 51.

prision [serious misdemeanor], and no murder" if the child died in the womb, and murder if the child died after its birth. Coke's proposition was accepted virtually without question.[24] Neither Coke nor Hale cited the precedents available for their conclusions.[25] Means dis-

[24] Coke, often called the "Father of the Common Law," was followed relative to abortion by: 1 W. Blackstone, *Commentaries* 129-30 (1765); 4 Blackstone 198 (1769); R. Burn, *The Justice of the Peace and the Parish Officer* 380 (3d ed. 1756); 1 E. East, *A Treatise on the Pleas of the Crown*, 227-30 (1803); M. Hale, *Pleas of the Crown* 53 (1678); 1 W. Hawkins, *Treatise on the Pleas of the Crown* 80 (1716); 1 W. Russell, *A Treatise on Crimes and Misdemeanors* 617-18, 796 (1819). Two books are attributed to Hale, one that echoed Coke's views and a later book, Hale, *supra* note 20, at 433 [see App. D, at 26a], that denied that an abortion-induced death of a child born alive is murder. Which view truly represents Hale's opinion cannot now be established. On Coke's life and stature, see Baker, *supra* note 2, at 125-26, 164-69, 210, 217-18.

[25] PRECEDENTS FOR *R. v. Sims*: *R. v. Cokkes* (Somerset 1415) (outcome unknown), 7 Calendar of Inquisitions Misc. (Ch.) Pres'd in the Pub. Rec. Off. 1399-1422, at 296 (no. 523) (1968); *R. v. Portere* (K.B. 1400) (convicted), The Shropshire Peace Role 1400-1414, at 57-58 (no. 24) (1959); *R. v. Eppinge*, JUST 1/547A, m.46 (London Eyre 1321) (convicted); *R. v. Scot*, JUST 1/547A, m.22 (London Eyre 1321) (convicted); *R. v. Haule*, JUST 1/547A, m.20d (London Eyre 1321) (convicted) [see App. C, at C—]; *R. v. Dada*, JUST 1/547A, m.19d (London Eyre 1321) (convicted); *R. v. Cobbeham*, JUST 1/547A, m.19d (London Eyre 1321) (acquitted); *R. v. Skel*, JUST 1/1098, pt. 2, m.79 (Yorkshire Eyre 1293) (conviction); *R. v. Boleye*, JUST 1/303, m.69d (Shropshire Eyre 1292) (acquitted); *Agnes's Appeal*, JUST 1/1011, m.59d (Wiltshire Eyre 1289) (appeal of felony not permitted if infant born alive; *R. v. Hore*, JUST 1/1011, m.56 (Wiltshire Eyre 1289) (acquitted); *R. v. Cheney*, JUST 1/323, m.47d (Hertfordshire Eyre 1278) (trespass for accidentally killing child in the womb; child died after live birth). PRECEDENTS FOR *Hale's R v. Anonymous: Commonwealth v. Carter* (1652), Calendar of Assize Rec.: Kent Indictments, 1649-1659, at 96 (nos. 534, 535) (1989) (acquitted); *R. v. Adkyns*, ASS. 35/43/1, m.1 (1600) (convicted), reprinted in Calendar of Assize Rec., Essex Indictments, Eliz. I, at 510 (no. 3054) (1975); *R. v. Meddowe*, Ass. 35/32, m.34 (1591) (convicted), Calendar of Assize Rec., Sussex Indictments, Eliz. I, at 233 (no. 1212) (1975); *R. v. Poope* (1589) (convicted), Calendar

missed Coke's statement on abortion as a "masterpiece of perversion," he found Hale's decision to be "an act of Restoration gallantry." [26] Means did not explain how to recognize the difference.

C. English Law Always Prohibited Parents from Killing Unwanted Children, and Parliament and the Courts Took Strong Steps, Gradually Strengthened over Centuries, to Punish Such Acts

Most cases before 1700 involved crude physical batterings of the mother—often to her serious injury or death (injury techniques).[27] The remaining abortions were induced by "noxious potions" that were nearly as deadly as the batterings (ingestion techniques).[28] One might

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of Assize Rec., Kent Indictments, Eliz. I, at 289 (no. 1751) (1975); *R. v. Skotard*, JUST 1/169, m.25 (Derbyshire Eyre 1330) (acquitted); *R. v. Houdydoudy* (Coroner's Inquest 1326) (outcome unknown), Calendar of Coroner's Rolls of the City of London, A.D. 1300-1378, at 166 (1913); *R. v. Godesman*, JUST 1/383, mm.18, 96 (Kent Eyre 1313) (acquitted); *R. v. Boleye*, JUST 1/303, m.69d (Shropshire Eyre 1292) (acquitted); *R. v. Cliston*, JUST 1/1011, m.62 (Wiltshire Eyre 1288) (convicted); *R. v. Reeve*, JUST 1/924, m.60 (Sussex Eyre 1288) (convicted); *R. v. Brente*, JUST 1/186, m.30 (Devon Eyre 1281) (convicted); *Philippa's Appeal*, London Eyre of 1276, at 51 (no. 187) (London Rec. Soc'y 1976) (benefit of clergy; defendant not tried); *Orscherd's Appeal*, JUST 1/174, m.40d (1249?) (acquitted).

[26] Means II, *supra* note 3, at 359, 363.

[27] Injury techniques ranged from ineffective simple bodily maneuvers to savage assaults, such as cutting the mother and removing the infant.

[28] Appeals or indictments for abortion by potion might have been rarer than for abortion by assault because a potion was part of a magic ritual punishable as witchcraft even if ineffective, but only by an ecclesiastical court before Elizabeth I. Among traditional cultures, anthropologists have found injury techniques to be most common—because of the likelihood of success, G. Devereux, *A Study of Abortion in Primitive Societies* 30-35, 171-358 (1955). *See also* J. Bates & E. Zawadski, *Criminal Abortion* 87-88 (1964); A. McLaren, *Reproductive Rituals* 100-08 (1984); F. Taussig, *Abortion Spontaneous and Induced* 41-45 (1936).

therefore infer that the law was protecting maternal life or health—if one assumes that abortion was always available through relatively safe means.[29] Ingestion and injury techniques then used could be effective only with intense pain and at the risk of death or permanent injury; undergoing either cannot have been popular.[30] Voluntary abortions, abortions that were not crimes against the mother, were rare when the techniques available were tantamount to suicide.[31]

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[29] Mohr, *supra* note 9, at 6-19, lists various methods that he assumed were safe and effective, yet research shows that his assumption was unfounded; even he acknowledged the poisonous nature of at least some of the his "abortifacients", *id.* at 9, 21-22, 55-58, 71-73. For another historian who also assumed that workable techniques existed while recognizing that his own catalogue included only the useless or the fatal, see E. Shorter, *A History of Women's Bodies* 177-191 (1982). Other historians have made the same assumption on even less evidence. A. Eccles, *Obstetrics and Gynaecology in Tudor and Stuart England* 67 (1982); L. Gordon, *Women's Body, Women's Right: A Social History of Birth Control in America* 35-39 (1976); McLaren, *supra* note 28, at 5-7, 107, 111-112; R. Petchesky, *Abortion and Women's Choice* 27-34 (1984); G. Quaife, *Wanton Wenches and Wayward Wives* 118-120 (1979). *See also infra* note 30.

[30] Shorter, *supra* note 29, at 177, concluded that before 1880 only the truly desperate would risk abortion. Quaife describes injury techniques with his analysis of violence, and not with abortion, while conceding that girls were rarely anxious to use ingestion techniques. Quaife, *supra* note 29, at 26, 118. *See also Gordon, supra* note 29, at 39; Petchesky, *supra* note 29, at 30, 49-55.

[31] Devereux, *supra* note 28, at 149-150. *See generally* Dellapenna, *supra* note 4, at 372-76, 393-95. One study of the incidence of abortion in the earlier times, based on church records which do not distinguish between spontaneous and induced abortions, P. Laslett, *The World We Have Lost* 123 (1966), found that abortions in 17th century England amounted to 6-7% of total births; as spontaneous abortions in the 20th century range from 7.5-11% with our more advanced medical technology, *id.* at 266, 17th century figures reveal few, if any, induced abortions. Some assertions in legal proceedings that a potion was given by trick, etc., might have been dissimulation by the mother; this seems unlikely for abortion by savage physical attack.

The unpopularity of injury techniques with women hardly needs demonstration. And, while we cannot know all potions available in medieval England, surveys of the medical literature there and in medically similar societies show that the potions ingested for an abortion were either ineffective (except for possible placebo effects) or highly dangerous.[32] Savin was the "abortifacient" most widely reported in medieval English sources; modern tests have shown that it works by undermining the woman's health generally so she cannot sustain the pregnancy, all too often enfeebling her to the point of death.[33] Perhaps this is why in early English slang "poisoned" meant pregnant![34]

Possibly a safe and effective drug escaped all notice in the legal, medical, and popular literature of the day. Yet

[32] Bates & Zawadski, *supra* note 28, at 14-23, 85-91; Devereux, *supra* note 28, at 36-43, 249, 279; N. Himes, *Medical History of Contraception* 139-151 (1936); J. Noonan, *Contraception* 222-230 (1965); Shorter, *supra* note 29, at 179-188; Taussig, *supra* note 28, at 31-45, 352-357; Dellapenna, *supra* note 4, at 373-376. Ineffective "abortifacients" included goat dung, raw eggs, hops, "ungrateful strong smells", and wine. Drugs, the ingestion of which in dangerous quantities could bring on an abortion, included caster oil, ergot of rye, hellebore, pennyroyal, rue, savin (juniper), tansy tea, thyme, and yarrow. A sufficiently desperate woman could ingest (or be made to ingest) a substance lethal even in small quantities, such as aloes, arsenic, ratsbane (rat poison), snake venom, and various metallic salts. Nineteenth-century courts were well aware of the dangers these potions still posed. *See, e.g., Commonwealth v. W.M.W.*, 3 Pitt. Rep. 462 (1871); *Moore v. State*, 49 S.W. 287 (Tex. Crim. 1897).

[33] One modern study found that savin induced an abortion in 10 of 21 women who consumed it: 9 of the 10 "successful" one died, as did 4 of the "unsuccessful" ones. Taussig, *supra* note 28, at 353. In fact, most modern poisons were discovered in a vain search for safe dosages of "abortifacients." Bates & Zawadski, *supra* note 28, at 88. For a graphic description of a savin death, *see* Forbes, *supra* note 22. *See generally* Mohr, *supra* note 5, at 71-73: Gordon, *supra* note 29, at 37; Shorter, *supra* note 29, at 186-188. *See also* J. Weeks, *Sex, Politics and Society* 72 (1981) (lead-poisoning "epidemic" because of its use as an abortifacient).

[34] F. Grose, *A Classical Dictionary of the Vulgar Tongue* (1785).

the Arabic medical texts which in Latin translation were standard medical references in the later middle ages described no technique safer or more effective, and later works in English add nothing significant.[35] Given the general lack of inventiveness of pre-scientific societies, the lack of variation in abortion techniques over six centuries is hardly surprising.

Singularly lacking is any mention of "intrusion techniques"—techniques involving intruding an instrument through the cervix into the uterus to induce abortion. With only primitive knowledge of women's reproductive anatomy,[36] intrusive intervention can rarely have been successful. The closest one finds to an intrusion technique are "pessaries"—vaginal suppositories, uually laced with "abortifacient drugs," that did not penetrate the

[35] ARABIC TEXTS: Avicenna, *Libri Canonis Medicine* (Gerard of Cremona trans. 1595); Rhazes, *Liber ad Almansorem* (1497); Himes, *supra* note 32, at 139-151. ENGLISH TEXTS: 1 *Compleat Herbal* 69-71, 94-95 (G. Swindells ed. 1787); M. Etmullerus, *Description of All Diseases Incident to Men, Women and Children* 563 (3d ed. 1712); J. Pechey, *Compleat Herbal of Physical Plants* 13 (1707). The texts also describe "abortifacient" effects in markedly different terms from other pharmacological effects: "Abortifacient" effects are always introduced with phrases such as "it is said," suggesting either uncertainty about the efficacy of the potion or unwillingness to be thought to favor the practice. McLaren, *supra* note 28, at 103-104, 123; Noonan, *supra* note 32, at 201-207, 217.

[36] Not only were potions often given in a belief that a woman had blocked menses rather than pregnancy, but potions were sometimes given to prevent a uterus from rising in a woman's body to her throat to choke her! Shorter, *supra* note 29, at 286-287. Shorter, *supra* at 188-191, conceded that instrumental abortions were not a realistic possibility before the 19th century. *See also* Devereux, *supra* note 28, at 28, 36-37. Gordon, *supra* note 29, at 37-38, believes intrusion techniques are of ancient lineage, but is reduced to asking her readers to disregard part of a long description of an Eskimo intrusion technique when the informant tells us that the purpose was to puncture the uterus.

cervix. Without penetration, however, pessaries were not effective.[37]

Many still believe that medically primitive cultures, including medieval England and colonial America, had mysterious abortion techniques that were safe and effective. If so, why would such folk medicines abruptly disappear in the nineteenth century in favor of highly dangerous intrusion techniques that supposedly made abortion so dangerous as to justify the statutes proscribing abortion? The answer is that before the nineteenth century, traditional forms of abortion had been infanticide and abandonment.[38]

Infanticide was a frequent crime when abortion was still rare.[39] Royal courts actively punished those convicted of infanticide and denied benefit of clergy to one accused of the crime. *R. v. Parker*, 73 Eng. Rep. 410 (1580). The earliest known regulations of midwives (1512) were adopted to prevent the killing of infants.[40] Parliament enacted ever more stringent statutes pro-

[37] Devereux, *supra* note 28, at 37; McLaren, *supra* note 28, at 101-102; Taussig, *supra* note 28, at 355-356.

[38] M. Kenny, *Abortion: the Whole Story* 181 (1986).

[39] One early book (ca. 1300) stated that infanticide within one year of birth was cognizable only by ecclesiastical courts, *Mirror of Justices* 139 (Selden Soc'y 1895). 2 Pollock & Maitland, *supra*, note 16 at 478 n.1, dismissed this book as worthless. Staunford, *supra* at ch. 13; and Lambard, *supra* at 217-18, cited a 1315 conviction as indicating that infanticide was a common law felony (in the same passages where they denied that abortion was a common law felony). Dead babies remained a common sight in London streets into the 19th century. C. H. Rolph, *A Backward Glance at the Age of 'Obscenity'*, 32 Encounter 23 (June 1969). *See also* J. Boswell, *The Kindness of Others: The Abandonment of Children in Western Europe from Late Antiquity to the Renaissance* (1989); Gordon, *supra* note 29, at 32-35; P. Hoffer & N. Hull, *Murdering Mothers: Infanticide in England and New England 1558-1803* (1981); Dellapenna, *supra* note 4, at 395-400; Helmholz, *supra* note 21.

[40] J. Donnison, *Midwives and Medical Men* 18-20 (1988). These regulations were repeatedly strengthened. T. Forbes, *The Midwife and the Witch* 144-147 (1966). Wet-nurses were also seen as a major population control device, J. Guillemeau, *The Nursing of Children* preface (1612). *See also* J. Sharp, *The Midwives Book* 38 (1671).

hibiting infanticide, culminating in "An Act to Prevent the Destroying and Murdering of Bastard Children", 21 James I, ch. 27, § 3 (1624), that conclusively presumed murder from concealment of the death of a child in order to conceal its birth.

Only the emergence of abortion as a real alternative to infanticide reduced the incidence of infanticide, making it a minor legal problem. This intimate relationship between abortion and infanticide was demonstrated by Lord Ellenborough's Act which in the next section after the first English statutory prohibition of abortion reduced the penalty for concealment from death to a term of imprisonment. 43 Geo. III ch. 58, §§ 2-4 (1803).[41]

D. These Laws Were Applied Rigorously in the American Colonies

The English colonists brought the common law here of abortion with them. Inadequately reported colonial court records support this view. In just one colony, no less than three prosecutions for criminal abortion arose before 1660: *Proprietary v. Lambrozo*, 53 Md. Archives 387-391 (1663); *Proprietary v. Brooks*, 10 Md. Archives 464-465, 486-488 (1656); *Proprietary v. Mitchell*, 10 Md. Archives 171-186 (1652) [see App. D, at 34a].[42] Defendants escaped conviction in two of the cases because, before trial, they married (and thereby disqualified) the principal witness against them. Mitchell was convicted of attempted murder, apparently because of a failure to prove the cause of death for the stillborn child.

Prosecutions for abortion arose in other colonies. A Rhode Island woman received 15 lashes for fornication

[41] For the legislative history, *see* Keown, *supra* note 2 at 12-21.

[42] *See also Proprietary v. Robins*, 41 Md. Archives 20 (1658), and *Robins v. Robins*, 41 Md. Archives 85 (1658).

and attempted abortion. *Colony v. Allen*, Newport Cnty. Gen. Ct. Trials: 1671-1724A n.p. (Sept. 4, 1683 sess.).[43] Indictments survive from *In re the Stillbirth of Agnita Hendricks' Bastard Child* (1679), Ct. Rec. of New Castle on Del. 1676-1681, at 274-275 (1904), and *Colony v. Powell* (Va. 1635), 7 Am. L. Rec. 43 (1954). A 1716 New York municipal ordinance forbade midwives to aid or counsel abortion. 3 Min. of the Common Council of N.Y. 122 [see App. D, at 37a].[44]

While abortion and infanticide were not common in colonial America,[45] more colonial legal activity, just as in England, was directed against infanticide than abortion.[46] Still, colonial jurist James Parker, in one of the few secondary sources on the common law as applied in a colony, correctly concluded that the common law of abortion was part of the law applied in New York. J. Parker, *Conductor Generalis: Or, the Office, Duty, and*

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[43] Noted in L. Koehler, *A Search for Power: the "Weaker Sex" in Seventeenth-Century New England* 329, 336 n.132 (1980).

[44] M. Gordon, *Aesculapius Comes to the Colonies: the Story of the Early Days of Medicine in the Thirteen Original Colonies* 174-175 (1949). For a similar ordinance in Virginia *see* S. Massengill, *A Sketch of Medicine and Pharmacy* 294 (2d ed. 1942).

[45] J. D'Emilio & E. Freedman, *Intimate Matters: A History of Sexuality in America* 26, 65 (1988); Gordon, *supra* note 29, at 33, 49-51; C. Scholten, *Childbearing in American Society 1650-1850* 9 (1985).

[46] Hoffer & Hull, *supra* note 39, at 33-113. Concealment statutes were enacted in eight colonies or states before an abortion statute, beginning with Massachusetts in 1696, *Charters & Gen'l L. of the Colony & Prov. of Mass. Bay* 293 (Dane, Prescott, & Story eds. 1814). At least one woman was prosecuted for concealment before a colonial statute was adopted, 2 J. Winthrop, *History of New England 1630-1649* 317-318 (J. Hosmer ed. 1908). Even the Salem Witchcraft Trials have been linked to infanticide, Hoffer & Hull, *supra* at 55-56. The close empirical link of the concealment statutes and abortion was demonstrated by the 11 states that enacted a concealment statute contemporaneously with the state's first abortion statute and by the 20 states that codified the two statutes together. Dellapenna, *supra* note 4, at 399.

Authority of Justices of the Peace 216-17 (1764) [see App. D, at 38a].

E. When Abortion Became More Common than Infanticide with the Development of Technical Means with a Lessened Danger to the Mother's Life, English and American Law Came to Emphasize Abortion as the Primary Evil

Abortion statutes were enacted throughout the nation and the world in the nineteenth century.[47] *Roe's* majority viewed this, and the accompanying increase in prosecutions, as resulting from Victorian sexual attitudes, fears for maternal health, and concern for fetal life. 410 U.S. at 147-152. Means insisted that only fear for maternal health applied.[48] They never explained why these reasons became weighty only in the nineteenth century. Mohr and his associates, while recognizing a "moral prejudice" favoring the life of unborn children,[49] argued that the central reason for the statutes was to assure the dominance of the newly organized allopathic physicians over competitors, especially midwives, and to a lesser degree concern to reverse falling birthrates among the native-born middle classes and to assure paternal dominance in the household.[50] These reasons, they claimed,

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[47] *See generally* Dellapenna, *supra* note 4, 389-407; Quay, *Justifiable Abortion—Medical and Legal Foundations (Pt. II)*, 49 Geo. L.J. 395 (1961); J. Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 St. Mary's L.J. 29 (1985).

[48] Means I, *supra* note 3, at 511-15; Means II, *supra* note 3, at 382-92.

[49] Mohr, *supra* note 5, at 35-36, 87, 104, 110-11, 140, 143-44, 147-59, 164-70, 196-99, 207, 214, 216-17, 261-63; *Casey Brief*, *supra* note 5, at 11, 15, 26-28; *Webster* Brief, *supra* note 5, at 11, 16, 25-28.

[50] Mohr, *supra* note 5, at 32-37, 86-122, 128-31, 134-35, 147-82, 166-70, 187-90, 202, 204, 207-16, 226-29, 237-40, 256-60; *Casey Brief*, *supra* note 5, at 13-21; *Webster* Brief, *supra* note 5, at 13-21. Mohr discounted concern for maternal health because he believed that abortion was safe. Mohr, *supra*, at 25-40.

were sufficient, without concern over fetal life, to overcome strong public support—among men as well as women [51]—for the free availability of abortions.

The actual reasons are quite different. Until *Roe*, voluntary abortion, unlike voluntary surgery generally, was never treated as a private matter between a patient and her physician.[52] The different legislative response is rooted in technological change.

The first report of an intrusion technique in England was in a case in 1732: [53] A woman was sentenced to the pillory and to three years in prison for inserting an iron rod into a second woman's womb, inducing an abortion at less than 14 weeks of gestation (well before quickening).[54] *R. v. Beare*, 2 The Gentleman's Magazine 931 (Aug. 1732) [see App. C, at 27a]. Similar prosecutions arose in 1781 and 1803. *R. v. Anonymous*, 3 J. Chitty, *Criminal Law* 798-801 (1816); *R. v. Tinckler* (1781), 1 E. East, *Pleas of the Crown* 354-356 (1806) [see App. C, at 31a].

Abortion remained highly dangerous; the inserted object served as a highway for ready infection, and often

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[51] *See, e.g.*, Mohr, *supra* note 5, at 108-10, 115-18; *Casey* Brief, *supra* note 5, at 22-23.

[52] Consider the decision of the New York legislature in 1828 to reject a ban on all surgery unless "necessary for the preservation of life," but to accept another part of the same proposal that declared abortion a crime [see App. D, at 39a].

[53] The earliest mention of an intrusion procedure anywhere was in a description in Diderot's *Encyclopedie* [at 452 (1766)] which described an evidently bizarre experiment in Nurnberg in 1714. Shorter, *supra* note 29, at 188-208, places the invention of effective intrusion techniques late in the 19th century.

[54] Another case, four centuries earlier, resulted in the imprisonment of three men for the abortion of an unborn child of one month's gestation. *R. v. Code* (Hampshire Eyre 1281), JUST 1/789, m.1 [see App. C, at 14a].

was sufficiently painful to induce life-threatening shock.[55] Death was not as certain, however, as with injury and ingestion techniques. Intrusion quickly became the technique of choice, setting the stage for the surgical and other intrusion techniques that account for most abortions performed today. Lord Ellenborough himself spoke to the resulting sudden upsurge in abortions in the preamble to his famous Act: It concerned "certain . . . heinous offenses . . . of late also frequently committed . . ." 43 Geo. III, ch. 58. The drafters of the first Pennsylvania abortion statute made a similar observation. *Pa. Daily Legis. Rec.* No. 19, at 151 (1860). The Maryland Court of Appeals made the point even more directly in *Worthington v. State*, 48 A. 355, 356-57 (Md. 1901):

> It is common knowledge that death is not now the usual, nor, indeed, the always probable, consequence of an abortion. The death of the mother, doubtless, more frequently resulted in the days of rude surgery, when the character and properties of powerful drugs were but little known, and the control over their application more limited. But, in these days of advanced surgery and marvelous medical science and skill, operations are performed and powerful drugs administered by skillful and careful men without danger to the life of the patient. Indeed, it is this comparative immunity from danger to the woman which has doubtless led to great increase of the crime, to the establishment of a class of educated professional abortionists, and to the enactment of the severe statutes almost everywhere . . . .

With the introduction of intrusion techniques, fears for the health risks to mothers of abortion first appeared in the legal literature.[56]

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[55] Bates & Zawadski, *supra* note 28, at 85-87. Apparently abortions killed one-third of the women undergoing them early in the 19th century. Dellapenna, *supra* note 4, at 400, 412.

[56] *State v. Murphy*, 27 N.J.L. 112, 114-115 (1858); O.W. Bartley, *A Treatise on Forensic Medicine* 3, 5 (1815); T.R. Beck & J. Beck, *Elements of Medical Jurisprudence* 276-77 (1823); J. Burns, *The Anatomy of the Gravid Uterus* 57-58 (1799); 1 East, *supra*

That abortion statutes almost invariably were adopted in the general codification of common law crimes [57] itself suggests that the statutes were not thought to change the law. Moreover, all nineteenth-century surgery was dangerous for the same reasons as for intrusive abortions (infection and shock), yet only for abortion were social or other pressures likely to induce one to undergo the procedure without prior risk to life or limb. Abortion statutes responded to premature application of new medical technologies,[58] indicating that intrusive abortions were as criminal as injury or ingestion abortions and that abortions were criminal regardless of the stage of pregnancy. The statutes settled the somewhat uncertain law of abortion,[59] uncertainty that suggests that abortion had not

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note 24, at 230; G. Male, *An Epitome of Judicial or Forensic Medicine* 116-117 (1816); A. Taylor, *Manual of Medical Jurisprudence* 595 (1842). *See generally* Keown, *supra* note 2, at 35-38.

[57] Lord Ellenborough's Act, officially the "Offenses Against the Person Act," was the first comprehensive criminal statute in English law. 11 Holdsworth, *supra* note 16, at 537.

[58] *Worthington v. State*, 48 A. 355, 356-57 (Md. 1901); *Moore v. State*, 40 S.W. 287 (Tex. Crim. 1897). *See generally* Keown, *supra* note 2, at 12-48.

[59] Nineteenth-century cases split over whether pre-quickening abortion was a common-law crime. CRIME: *State v. Reed*, 45 Ark. 333 (1885); *Lamb v. State*, 10 A. 208 (Md. 1887); *State v. Slagle*, 83 N.C. 630 (1880); *Mills v. Commonwealth*, 13 Pa. 630, (1850). NO CRIME: *Mitchell v. Commonwealth*, 78 Ky. 204 (1879); *Smith v. State*, 33 Me. 48, 57 (1851); *Commonwealth v. Parker*, 50 Mass. (9 Met.) 263 (1845); *Commonwealth v. Bangs*, 9 Mass. 387 (1812); *State v. Cooper*, 22 N.J.L. 52 (1848). Dicta in other cases also split on the question. The nineteenth-century's two leading treatises on American criminal law both concluded that, notwithstanding the several cases recently decided to the contrary, pre-quickening abortion was a common-law crime. 1 J.P. Bishop, *Criminal Law* § 386 (2d ed. 1858); 1 F. Wharton, *The Criminal Law of the United States* §§ 1220-1230 (5th rev. ed. 1861) [see App. D, at 45a]. The "Historians' Briefs" simply assert, without any discussion of the evidence, that abortion was not a crime at common law. *Casey* Brief, *supra* note 5, at 5; *Webster* Brief, *supra* note 5, at 4.

been a common practice, solemnly reaffirming social policy in the face of changing social behavior.

F. The Shift of Emphasis from Infanticide to Abortion as the Social Evil Represented a Widely-Shared Consensus on the Value of Fetal Life, a Consensus that Included Nineteenth-Century Feminists and Thus Can Hardly Be Characterized as a Conspiracy by Male Physicians and Others to Suppress Women

The nineteenth-century saw a steady broadening of abortion statutes to reach all abortions regardless of technique or stage of pregnancy and to include (in a number of states) punishment for the mother.[60] This broadening suggests, as contemporary courts generally held, that protection of fetal life was the major purpose of the statutes. *Dougherty v. People*, 1 Colo. 514 (1872); *State v. Lee*, 37 A. 75 (Conn. 1897); *State v. Moore*, 52 Iowa 128 (1868) [see App. D, at 48a]; *State v. Watson*, 1 P. 770 (Kan. 1883); *Smith v. State*, 33 Me. 48 (1851); *People v. Sessions*, 26 N.W. 291 (Mich. 1886); *State v. Gedicke*, 43 N.J.L. 86 (1881); *State v. Crook*, 51 P. 1091 (Utah 1898); *State v. Howard*, 32 Vt. 380 (1859).[61] Many religious and social leaders also supported treating abortion as a crime.[62] Only by impugning the integrity

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[60] The broadening is illustrated by the New York abortion statutes [see App. D, at 39a.] In 1845, New York made it a misdemeanor for a woman to seek or procure an abortion, raising it to a felony in 1872. Both "Historians' Briefs" flatly assert that women were never subject to punishment for abortion. *Casey* Brief, *supra* note 5, at 1; *Webster* Brief, *supra* note 5, 1.

[61] The "Historians' Briefs" mentioned only one case, and that to the contrary. *Casey* Brief, *supra* note 5, at 27-28; *Webster* Brief, *supra* note 5, at 26. They omit even mention of a later case from the same court, *State v. Gedicke*, cited in the text.

[62] *See, e.g.*, The Resolution of the Medical Society of the State of New York, 1867 N.Y. Assembly J. 443-44 (Feb. 28, 1867) [see App. D, at 44a]. The *Roe* majority quoted other representative statements, 410 U.S. at 141-142. *See also* Mohr, *supra* note 9, at 35-36, 175-76, 182-196; M. Olasky, *The Press and Abortion, 1838-1988* 17-53 (1988).

of innumerable social and professional leaders can one argue that protection of unborn children from the rising numbers of abortions was not a significant concern.

Historians favoring abortion rights would have us believe that nineteenth-century abortion statutes were adopted in struggles between doctors and midwives for markets, or between husbands and wives for dominance in homes, or of men to use women to prevent "race suicide." [63] If so, why were nineteenth-century feminists, even the most militant, adamantly opposed the legality of abortion? [64] This attitude continued into the twentieth century, with Margaret Sanger advancing abhorrence of abortion as a major reason for founding Planned Parenthood Federation.[65]

The authors of the *Casey* Brief, see feminist opposition to abortion based on Victorian hostility to sexuality or to "male license." [66] The sharp contrast—even among

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[63] *See* the text *supra* at notes 47-51.

[64] D'Emilio & Freedman, *supra* note 45, at 150-67; Gordon, *supra* note 29, at 106-20, Mohr, *supra* note 5, at 109-14. *See, e.g.*, E. Duffy, *The Relations of the Sexes* 274-75 (1876); A. Stockham, *Tokology* 246-50 (1887); (Susan B.) Anthony, *Marriage and Maternity*, 4 The Revolution 4 (July 8, 1869); (Elizabeth Cady) Stanton, *Child Murder*, 1 The Revolution 146-47 (March 12, 1868). *See generally* D'Emilio & Freedman, *supra* at 64; Gordon, *supra* at 129; Mohr, *supra* at 113. Note also that the penalties for abortion were harsher than for contraception. Only professional abortionists defended the social propriety of the procedures. Mohr, *supra* at 62-65, 76-79; Olasky, *supra* note 62, at 3-17.

[65] M. Sanger, *Motherhood in Bondage* 394-96 (1928). Petchesky decried Sanger's stand on abortion as a sell-out to male doctors. Petchesky, *supra* note 29, at 89-95. D'Emilio & Freedman described the politics of Margaret Sanger's work for birth control without mentioning her opposition to abortion. D'Emilio & Freedman, *supra* note 45, at 243-46.

[66] *Casey* Brief, *supra* note 9, at 18-19. Note that they do not mention the virtually unanimous condemnation of abortion by nineteenth-century feminists, seeking to link support for contraception to support for abortion. Mohr, at least, admits the "anomaly." *Mohr, supra* note 9, at 110-14.

women who had had abortions—between the horror feminists expressed for abortion and their accepting attitude to contraception suggests that their attitude was focused on abortion rather than on sex or men.[67] The story of the early feminists suggests again that nineteenth-century legislatures responded to a widely shared consensus that abortion was the taking of human life and far different from contraception.

III. LEGISLATURES ARE THE PROPER FORA TO RESOLVE THE COMPETING CLAIMS OF MOTHERS AND THEIR OFFSPRING

The historical nature of the abortion problem as the intersection of policies protecting mothers and children with changing medical technology suggests that the balancing of the resulting claims is best left to legislative rather than judicial development.[68]

A. Changes in Medical Technology Are Central to Proper Resolution of the Controversies over Abortion

Evolving medical technologies for performing abortions and for recognizing and caring for unborn children have shaped the interests in the controversy over abortion. Until the twentieth century, both sets of interests converged to criminalize abortion. Now those interests have diverged, bringing controversy to an area where once all agreed that only evil could be found.

Technical progress continued. Pain-killing drugs (beginning with morphine in 1806), anesthesia (from the 1840's), antiseptics (after 1867), sulfa drugs and antibiotics (from the 1930's) dramatically reduced the risk of maternal death or injury. Many women thus came to see abortion's prohibition, rather than its possibility, as the threat to their well-being.

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[67] *See, e.g.*, D'Emilio & Freedman, *supra* note 51, at 50-63, 64-65.

[68] A. Bickel, *The Morality of Consent* 28 (1975). *See also Roe v. Wade*, 410 U.S. at 219-223 (Rehnquist & White, JJ., dissenting).

Simultaneously, the perceived interests of society in unborn children changed as new medical information and technologies emerged with a focus on human reproduction. Consider the demise of the ancient distinction of "quickening." Application of cell theory to embryology at the opening of the nineteenth century revolutionized our understanding human reproduction [69] and was promptly followed by abortion statutes removing distinctions based on quickening.[70] An English court promptly interpreted the earlier statutory term "quick with child" to mean conception, rather than the felt movement of the child within the womb, returning to the original understanding of that term. *R. v. Wycherley*, 173 Eng. Rep. 486 (N.P. 1838).[71] The changes underlined that the statutes were crafted to protect human life.

Today, embryologists or fetologists can diagnose and treat an unborn child independently of the mother, including removing the child from its mother's womb for surgery and then returning it to the womb to complete gestation. Facing such developments, one can hardly consider the child a mere extension of its mother.[72] For

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[69] 3 *A History of Science* 456-483 (R. Taton ed. 1965); A. Meyer, *The Rise of Embryology* 28-120, 138-147, 170-194, 302-341 (1939); J. Needham, *A History of Embryology* 115-229 (1959).

[70] Illinois had already removed the quickening distinction, but only for abortions by a "noxious substance.' Ill. Rev. Code § 46 (1827). Maine adopted the first American statute removing all distinctions based on quickening. Me. Rev. Stat., ch. 160, §§ 13, 14 (1840). *See also* The offenses against the Persons Act, 7 Will. IV & 1 Vict., ch. 85 (1837).

[71] Philip Rafferty's research has persuaded the Oxford English Dictionary to change its definition of "quick with child" to conform to the *Wycherley* definition, according to a letter, date 23 Nov. 1990, from J.A. Simpson, co-editor of the Dictionary, to Mr. Rafferty (copy in my possession). The phrase apparently became confused with the phrase "with quick child." *But see State v. Cooper*, 22 N.J.L. 53, 57 (1849).

[72] Consider the odyssey of Dr. Bernard Nathanson from "Abortion King" of New York to anti-abortion activist through his experiences as a fetologist. B. Nathanson, *Aborting America* (1979); B. Nathanson, *The Abortion Papers* (1983).

one who does not accept fetal personhood, the continuing prohibition of abortions that are increasingly safe for mothers can only seem a serious intrusion into the liberty of women because of a "moral prejudice". This view ignores the unbroken common law tradition of protecting unwanted children as far as possible from aggression by their parents.

Reproductive technology remains one of the most rapidly advancing areas of medical research; hoping not to impede this progress, this Court has sought to preserve physicians' autonomy.[73] While professional autonomy promotes continuing medical advances, law cannot be fashioned solely to protect the autonomy of the technicians: Issues relating to abortion transcend mere technical competence. In balancing the interests and values created or reinforced by changing medical technologies, states need the same broad authority to regulate the conduct of physicians performing abortions as for other medical procedures.

B. Legislatures Are Best Placed to Explore Appropriate Regulatory Responses to Changing Reproductive Technologies

To resolve this controversy, we must escape the language of rights and the atomistic vision of society it entails: [74] we must balance concern for the dignity of women and the needs of poor and working mothers with

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[73] In *Doe v. Bolton*, the majority accorded doctors standing as a class, 410 U.S. at 188-189, and repeatedly adverted to the doctors' privacy interest, *id.* at 192-193, 196-201. Although the majority denied standing to a specific doctor in *Roe v. Wade*, 410 U.S. at 125-127, they repeatedly referred to medical opinions, *id.* at 130-132, 141-146, 149-150, 159, 163, and they finally gave the physician decision-making power equal to the mother, *id.* at 153, 162-166. *See also Thornburgh v. American College of Obstetricians*, 476 U.S. 747, 759-765 (1986).

[74] M. Glendon, *Abortion and Divorce in Western Law* 131 (1987); Veltri, *Book Rev.*, 18 Oh. N.U.L. Rev. 257, 272 (1991).

the welfare of unborn children, all in a context continually reshaped by changing medical technologies.[75] To address these concerns adequately, the abortion question must be returned to the political processes, primarily in the states.

Legislatures are better at establishing policies for the future, leaving courts to fashion remedies for past wrongs.[76] A legislature can fund programs to reduce the need for abortion and can accurately reflect the prevailing sentiments of the community on this divisive issue. Courts can only issue injunctions; they are simply not suited to serve as a board of review for issues of medical technology, *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 454-459 (1983) (O'Connor, J., dissenting), as the court in *Roe* recognized when it was unable to decide when an individual human life (a "person") begins, 410 U.S. at 160. Yet such decisions of life and death are simply too important to be left to the technicians, especially when the technicians have an economic stake in deciding against life. Finally, as Justice Brandeis argued in his dissent to *New State Ice Co. v. Liebman*, 285 U.S. 262, 309-311 (1932), for such morally and socially unsettled problems, the states should serve as laboratories for social experiment. *See also Addington v. Texas*, 441 U.S. 418, 431 (1979).

CONCLUSION

Roe v. Wade should be overruled. Failing that, the application of *Roe v. Wade* should be reconsidered and the Pennsylvania statutes should be upheld as consistent with the values and policies expressed in that decision.

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[75] Note the factual changes between the trial and its review by this Court in *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 75-79, 95-99 (White, J., disenting, with Burger, C.J., & Rehnquist, J.), 101-102 (Stevens, J., concurring) (1976). *See generally* Mangel, *Legal Abortion: The Impending Obsolescence of the Trimester Framework*, 14 Am. J.L. & Med. 69 (1988).

[76] *City of Richmond v. J.A. Croson Co.*, 469 U.S. 469, 513-14 (1989) (Stevens, J., concurring).

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APPENDICES

APPENDIX A

THE INTEREST OF THE *AMICUS CURIAE*

This brief is filed under Supreme Court Rule 36, with the consent of the parties, on behalf of the American Academy of Medical Ethics as *amicus curiae* in support of Respondents, Cross-Petitioners. The Academy is an educational and lobbying organization with approximately 20,000 physician members. The Academy was incorporated in 1986 to respond to the challenges to established medical ethics emerging in recent decades. The Academy is co-publisher of the journal *Issues in Law and Medicine* and sponsors national meetings as fora for dialogue on medical and ethical questions. The Academy follows the Hippocratic Oath in opposing abortion except to save the life of the mother. The Academy sees an unborn child as a patient deserving the protection and the full advocacy of an attending physician. The Academy has consistently asked the Court to overrule *Roe v. Wade*, 410 U.S. 113 (1973), or to reconsider its application in light of current medical technology and societal interests.

APPENDIX B [1]

WHAT REALLY HAPPENED IN *REX v. de BOURTON?*

(a.k.a. the Twinslayer's Case)

1327-1328

The Uncorrected, Incomplete Year Book Report of *Rex v. de Bourton*, Y.B. Mich. 1 Edw. 3 f. 23 pl. 18 (1327)[2]

A writ issued to the sheriff of Gloucester to apprehend one D. who, according to the testimony of Sir. G. Scrop, is supposed to have beaten a woman in an advanced state of pregnancy who was carrying twins, whereupon directly afterwards one twin died, and she was delivered of the other, who was baptized John by name, and two days afterwards, through the injury he had sustained, the child died: and the indictment was returned before Sir G. Scrop, and D. came, and pled Not guilty, and for the reason that the Justices were unwilling to adjudge this thing as felony, the accused was released to mainpernors, and then the argument was adjourned since die. Thus the writ issued, as before stated, and Sir G. Scrop rehearsed the entire case, and how he [D.] came and pled.

Herle: to the sheriff: Produce the body, etc. And the sheriff returned the writ to the bailiff of the franchise

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[1] The appendix was adapted from the unpublished research of Mr. Philip Rafferty of the Los Angeles Bar. The translations are by Dr. J.H. Baker of Cambridge University. Dr. Baker's text, *An Introduction to English Legal History* (3d ed. 1990), is a leading text for the study of the topic. All translations are Dr. Baker's. The footnotes are mine.

[2] This is the form of the case as known to the later common law commentators such as Staunford, Coke, Hale, Blackstone, and Hawkins, as well as how it is known to all modern commentators. *See, e.g.*, Means, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right about to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L.F. 335, 337 (1971).

of such place, who said, that the same fellow was taken by the mayor of Bristol, but of the cause of this arrest we are wholly ignorant.

Corrected, Incomplete Year Book Report of *Rex v. de Bourton*[3]

A writ issued to the sheriff of Gloucestershire to take one D., who, by the testimony of Sir Geoffrey Scrop, is supposed to have beaten a woman great with two children, so that immediately afterwards one of the children died, and she was delivered of the other, which was baptised by the name of Joan, but died two days later from the injury which the child had; and the indictment was returned before Sir Geoffrey Scrop; and D. came and pleaded Not guilty; and because the justices were not minded to treat[4] this thing as a felony, the indictee was released on mainprise [bail] and then this matter remained with a day set, and so the writ was issued as above, and it said that *by testimony of* Sir Geoffrey Scrop *etc., and* recited the whole of the case [as above], and how he came and pleaded etc., [and that the sheriff should have caused his body to come etc.][5] And the sheriff returned the writ to the bailiffs of the franchise of such and such a place, who said that the person in ques-

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[3] Dr. Baker uncovered this text by examining the four original manuscripts of the Year Book Report: Lincoln's MS. Hale 72 at fo. 86v; Lincoln's Inn MS. Hale 116 at fo. 3; Lincoln's Inn MS. Hale 137(2) at fo. 11; Bodleian Library Oxford MS. Bodl. 363 at fo. 9v. The four agree with each other and differ from the printed version—some two centuries later than the manuscripts. Matters wholly omitted in the printed text are italicized. Dr. Baker's letter describing his search is on file with Mr. Rafferty.

[4] *d'agarder* ("to award") in all MSS.; *adjudge* only in the printed version.

[5] The passage is garbled in the printed version, coming after the reference to C.J. Herle, who was Chief Justice of Common Pleas and not of the King's Bench. The case was being heard before the King's Bench.

tion had been taken by the mayor of Bristol, but they were wholly unaware of the reason for the taking etc. *Therefore, a writ issued to the major of Bristol to cause the body to come, together with the cause etc.*

The Original Court Records in *Rex v. de Bourton*, K.B. 27/270, Rex m.9 (Mich. term 1327)

Gloucestershire. The lord king has sent his writ to the sheriff of Gloucestershire in these words: Edward by grace of God kind of England, lord of Ireland and duke of Acquitaine, to the sheriff of Gloucestershire, greeting! Because we have learned by the certificate of our beloved and faithful Geoffrey le Scrop, our chief justice, that Richard de Bourton has been indicted for that he entered the house of William Carles, tailor, at Bristol, and assaulted Alice, wife of the same William, being there greatly pregnant with two children,[6] and with his hands beat and ill treated her, and violently knocked her to the ground, and with his feet so trampled upon the ground [*sic*] that he feloniously killed one of the aforesaid children in the belly of the same Alice its mother, and broke the head and arm of the other of the same children so that it was forthwith born and baptised by the name of Joan, and immediately after receiving her baptism died from the injury[7] aforesaid; and that the foregoing matters still remain undetermined before ourself; and that this Richard had a day before us at a certain day now past for hearing the jury of the country on which, for good and ill, he put himself concerning the felony aforesaid, by mainprise of John le Taverner of Bristol and others named in the said certificate, who mainprised to have him before us at the said term; and on behalf of the selfsame Richard we are given to understand that by reason of the foregoing he has been taken, since that mainprise, and detained in our prison of Bristol, on ac-

[6] *grossam doubus pueris pregnantem*

[7] *de malo*

count of which he could not come before us on the aforesaid day to stand to right upon the foregoing according to the law and custom of our realm: We, willing what is just to be done upon the foregoing, command you (as we commanded before) that if the same Richard is detained in the aforesaid prison by reason of the foregoing and not otherwise, and if he finds you sufficient mainpernors who mainprise him before us in a fortnight from Michaelmas day wheresoever we should then be in England, to do and receive what our court should decide in the foregoing, then cause the selfsame Richard to be meanwhile delivered from prison by the mainprise aforesaid. And have you there the names of those mainpernors, and this writ. And if the same Richard is indicted for any other felonies or tresspasses in your county, then without delay send us distinctly and openly under your seal the tenor of the aforesaid indictment at the aforesaid day, that we may do further therein what by the law and custom aforesaid should be done, or else signify unto us the reason why you will not or cannot carry out our command heretofore directed unto you. Witness my self at Northallerton, the 14th day of July in the first year of our reign [1327].

By virtue of which writ, the sheriff (namely, Thomas de Rodbergh) returns that he command Everarrd Fraunceys and Robert Grene, bailiffs of the liberty of the vill of Bristol, who answered him that Richard de Bourten, lately indicted for the death of Joan, daughter of William Carles, tailor, at Bristol, as is contained in the writ, has not been taken by them the said bailiffs nor is for that reason detained in prison, but that he has been taken and detained by Roger Rurtels the mayor of the aforesaid vill for certain reasons which are unknown to them the said bailiffs etc.

And, after inspection of the aforesaid writ and return etc., the mayor and bailiffs of the vill of Bristol are commanded that if the same Richard finds sufficient mainpernors to be before the king in a fortnight from St.

Hilary wheresoever etc. to hear the aforesaid jury and to do further and receive what the king's court should decide for him, then they should cause the selfsame Richard to be meanwhile delivered from the aforesaid prison by the above-mentioned mainprise. And if he is indicted for any other felonies or trespasses before them in the vill aforesaid, then they should distinctly and openly under their seals send that indictment (if any there be) or else the cause for which he was taken, to the king at the day aforesaid upon the incumbent peril, so that the lord king further etc. what is to be done etc.

At which day the mayor and bailiffs of the vill of Bristol return that the aforesaid Richard de Bourton did not find sufficient mainpernors for being before the lord king at this day, namely in the quindene of St. Hilary etc., and to do and receive what is commanded in the writ, as a result of which they did nothing further in executing the writ etc. And because the same mayor and bailiffs have not returned here before the king the names of themselves according to the form of the statute etc., and also have not answered etc. for what reason the aforesaid Richard de Bourton has been taken, as in the lord king's writ directed them therein was commanded, nor whether or not the aforesaid Richard is indicted for any other felonies or trespasses before them in the vill aforesaid, the same mayor and bailiffs (namely, John le Romeseie, mayor, and Hugh de Langebrigge and Stephan Lespcier, bailiffs etc.) are in mercy. And they are assessed by the justices at 40s. And the sheriff is commanded that he should not omit by reason of the liberty of the aforesaid vill to enter the same etc., and if the same Richard should find him sufficient mainpernors to mainprise to have him before the king in a fortnight from Easter day wheresoever etc. to hear the jury aforesaid etc. and further to do etc., then he should cause the selfsame Richard to be meanwhile delivered from the aforesaid prison by mainprise aforesaid etc. The sheriff is also commanded that he should not omit on account of the

liberty to cause the aforesaid mayor and bailiffs to come before the king at the said term to answer the king for the return etc. Also the mayor and bailiffs are commanded that if the aforesaid Richard is indicted for any felonies and trespasses before them in the aforesaid vill, then they should distinctly and openly under their seals send that indictment (if any there be) or else the cause for which he was taken, to the king at the day aforesaid etc. so that further etc.

Original Court Records of Further Proceedings in *Rex v. de Bourton*, K.B. 27/242, Rex m.9 (Easter term 1328)

Gloucestershire. The jury at the suit of the lord king to make recognition etc. whether Richard de Bourton of Bristol is guilty of the death of Joan, daughter of William Carles, tailor of Bristol, feloniously slain in the suburbs of Bristol, whereof he has been indicted (as appears to the king by a certain indictment lately made thereof before the coroners of the vill of Bristol, and which the king caused to come before him), is put in respite until the octaves of St. John the Baptist wheresoever etc., for want of jurors, because none [came] etc. Therefore, let the sheriff have the bodies of all jurors before the king at the said term, etc. And let the aforesaid Richard meanwhile be released by the mainprise which heretofore found, from day to day until etc. And the sheriff is commanded that except for them etc. he should put in as many and such etc. and have them before the king at the said term etc.

Original Court Records Concluding Procedings in *R. v. de Bourton*, K.B. 27/273, Rex m.12d (Octave of St. John, 2 Edw. III, 1328)

Gloucestershire. The jury at the suit of the lord king to make recognition of whether or not Richard de Bourton of Bristol is guilty of the death of Joan, daughter of William Carles, tailor of Bristol, feloniously slain in the suburbs of Bristol, whereof he is indicted—as appears to

the king by a certain indictment lately made thereof before the coroners of the vill of Bristol, and which the king has cause to come before [himself] etc.—is put in respite until one month from Michaelmas day, wheresoever etc., for want of jurors, because none [came] etc. Therefore let the sheriff have the bodies of all the jurors before the king at the said date etc. And let the aforesaid Richard meanwhile be released by the mainprise which he previously found, from day to day etc. Afterwards, the same term, the aforesaid Richard came and proffered a charter of the present lord king for pardon of the aforesaid felony, which is enrolled in Hilary term in the first year of the reign of our present king. Therefore he [is to go] thereof *sine die* etc.

Dr. Baker's Comments on the Problem of Deciding the True Course of Events in *Rex v. de Bourton* in two letters sent to Mr. Rafferty in 1985

From the letter of Nov. 6, 1985:

"Richard de Bourton was indicted before the coroners of Bristol (1) for feloniously killing a child which died in the womb, (2) for causing the death of the other (Christened Joan). We do not . . . have the indictment, though as summarized [in the year book report] . . . it does seem that the words of the felony applied to both children. In the later entries, the offense is described only as the killing of Joan, but that may have been clerical shorthand.

"The indictment was removed into the King's Bench some time in the reign of Edward II. The indictment files do not survive. I discovered that the King's Bench held two gaol deliveries in Gloucestershire in the 1320's, but the indictment is not recorded there (K.B. 27/247, Rex m.1d; K.B. 27/255, Rex m.24).

"Bourton pleaded not guilty, and was released on mainprise to appear at some time before Michelmas term

1327, but before his appearance he was arrested by the mayor and bailiffs of Bristol for some undisclosed cause. . . . [That] the judges were not minded to treat it as a felony . . . seems to me . . . not a final determination of that question—indeed the record says that the issue of felony was still pending in 1328—but related only the bail application."

From the letter of Dec. 12, 1985:

"As I now see the case, the record shows that Bourton was indicted for feloniously killing a child which died in the womb of the mother and another (Joan) which died after birth and baptism; that he pleaded not guilty, but was never tried; and that in Trinity term 1328 he was discharged on the strength of a pardon granted a year earlier. There is therefore nothing of record to show whether the court considered the facts alleged to amount to a felony or not, except insofar as the case was continued through several terms on the basis that it *was* a felony. (It could be, however, that only the killing of Joan was so regarded.) It is therefore the yearbook report that remains crucial, and this appears to say (in the middle) that Bourton was granted bail because the judges were not minded to treat it as a felony. The status and meaning of this pronouncement still seem[s] to me less than clear. For one thing, it seems contrary to the record, which shows that the case was continued on the basis that a jury had been summoned to try whether Bourton was guilty of feloniously killing (what we should call manslaughter). That issue arose from Bourton's plea of not guilty, which the court had recorded. [T]here is therefore no question of the indictment having been quashed on the ground that it did not disclose a felony. Secondly, although it is probable that bail was not thought to be grantable for murder in medieval times (Y.B. 25 Edw. III, fo. 85; Coke, *Treatise on Bail & Mainprise;* Staunford P.C. 72a), it seems to have been allowable for

felony.[3] It could hardly be argued that the release of Bourton on bail shows that if the facts were true he would not have been guilty of felony, because that again would be contrary to the record. I therefore do not really understand the year book in this respect, and suspect it may be a defective report.

"A pardon does not necessarily imply a legal doubt, at this date. Pardons were sometimes granted for favour. This case does look unusual however, because it appears from the patent roll (*Calendar Patent Rolls 1327-1330*, p. 113: Pat. 1 Edw. III, pt. 2, m.17) that Bourton was included in the general pardon of 29 May 1327 but with the special proviso that, unlike the other persons pardoned with him, he was to be excused from serving against the Scots. (The others were apparently ordinary felons conscripted into the army.)

"The pardon is not to be found in the roll for Hil. 1 Edw. III, which is defective."

Mr. Rafferty's comments on *Rex v. de Bourton* in an unpublished manuscript made available to me in 1989 and 1991

"[A] person, who would continue to maintain that *Bourton's case* stands for the proposition that the fetal victims described in the *Bourton* indictment are not potential victims of common law criminal homicide, must implicitly adopt each of the following three premises: 1) the three foregoing *Bourton* 'felonly' plea roll entries represent defective entries. 2) The *Bourton* justices did not understand then existing English laws and customs on bail in felony cases. 3) The *Bourton* justices did not then understand the then existing common law on criminal homicide. . . . What is more, such a person would

[3] The Statute of Westminster I (3 Edw. I, c. 15, 1275) provides that one indicted for homicide is not mainpernable or replevisable except when he is indicted on "light suspicion". Although Dr. Baker does not advert to "light suspicion", this might explain the apparent confusion in the Year Book reports of the case.

also have to 'invent' a 14th century common law legal procedure through which a defendant at a 'post-arraignment,' pretrial hearing could bring a facial challenge to a felony indictment. This is so, because so far as is known, no such procedural tool existed at the 14th century common law. It simply cannot be overlooked that Bourton did not demur to the felony indictment. He pled not guilty to it."

APPENDIX C[1]

OTHER REPRESENTATIVE ENGLISH LEGAL MATERIALS RELATING TO ABORTION

Agnes's Appeal

1200, 1 Selden Soc'y 39 (no. 82, 1887)

Lincolnshire. Agnes, the daughter of Saxi, appeals John of Paris that whereas she was in labor, he came to her house and dragged her out by the feet and struck her with a certain pole in such a way that she lost her child. And the citizens of Lincoln came and showed a charter of the lord king which witnesses that they should not be impleaded outside the walls of Lincoln (except for their moneyers and officials), and that they ought not to make battle concerning any appeal but to deraign themselves[2] according to the liberties and laws of the city of London;[3] and they prayed this liberty. A day is given to them before the lord king wheresoever he should then be in England on the morrow of St. Edmund to hear their judgment.[4]

Amice's Appeal

JUST 1/274, m.14d (1247)

Amice, who was the wife of Ralph Gundwine, appeals Adam Warner, William Warner and Henry Warner that

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[1] For the cases before 1600, I have used original translations by Dr. J.H. Baker (*see* Appendix B n.1) in order to achieve a consistent usage and reliable English texts. Dr. Baker provided his translations to Philip Rafferty of Los Angeles. I have preserved original spellings and grammer in the sources originally in English. All footnotes are mine.

[2] *I.e.*, to vindicate themselves or to prove their innocence.

[3] *I.e.*, trial by wager or law—through oath-helpers.

[4] The outcome has not been found.

they came to the house of her the said Amice and broke her house, and took her the said Amice and beat her severely so that, by reason of that beating, she the said Amice lost her child which was in her belly. And that they did this to her wickedly and feloniously against the peace etc., she offers etc.

And the aforesaid Adam and others come and deny the [breach of the peace], the beating, and the whole etc. and put themselves upon a jury of the township. And they offer the lord king 50 pounds for having the jury therein, by pledge of [12 names].

And the jurors say upon their oath that in truth the aforesaid Adam and others beat the aforesaid Amice; but they say that she immediately went off, and walked about hither and thither, and afterwards when eight days had elapsed she aborted a certain child having the form of a male five inches long; but they believe that this was rather due to the labor and foolish behavior[5] of the selfsame Amice than to the aforesaid beating.

Juliana's Appeal

1256?, Somerset Pleas (Civ. & Crim.) from the Rolls of the Itinerant Justices 321 (no. 1243) (C. Chadwyck-Healy ed. 1897)

John de Rechich beat one Juliana, daughter of Maynard, so that he killed her boy in her womb, and fled. Therefore let him be exacted and outlawed. He was received at Stoke Curcy. Therefore [that township] is in mercy.[6] The jurors concealed that matter; therefore they are in mercy. He had no chattels.

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[5] *stultum gestum*

[6] *I.e.*, to be amerced: to pay a fine in lieu of more serious punishment.

Rex v. Code

Eyre of Hampshire, 1281, JUST 1/789, m.1 [7]

. . . Alice, the wife of Adam Prest, coming from the city of Winchester out of the vill of Upham, met *Walter* Code, Richard the Potter, and Stephen his brother, and Herbert the Carpenter, who knocked her over and *beat* her and would have lain with her by force, so that by the violence which they committed against her she gave birth to a certain abortive *child* as if [8] of the age of one month. William de Stratton, the coroner, did not *come*; therefore to judgment of him. Afterwards the aforesaid Walter and the others come and deny the death, the felony, and all . . . *and thereof* they put themselves upon the country. And twelve jurors say upon their oath that the aforesaid Walter, Richard, and Stephen with force knocked over and beat the aforesaid Alice, as a result of which she gave birth to a certain abortive child of such an age that it was unknown whether it was male or female; which child was eight inches long. And they say that the aforesaid Herbert is not guilty thereof. Therefore *let him be* quit thereof. And the aforesaid Walter, Richard, and Stephen are committed to prison.

Rex v. Mercer

Eyre of Oxford, 1285, JUST 1/710, m.45

Emma, the wife of Reynold the Mercer, and Alice, the daughter of Thomas of Northleigh, being pregnant, were fighting together in the field of Northleigh in such a way that the aforesaid Emma struck with a certain stone on the side, by which blow the same Alice on the second day following gave birth to a certain living male child having

[7] The manuscript is badly worn; the italicized words have been suplied by inferences from the parts of the manuscript which survive.

[8] *quasi*

on its head a wound from the blow of the same stone; which child died immediately after it was baptized. And the jurors say upon their oath that the aforesaid Alice gave birth one month before the time of birth,[9] and that the child died from the aforesaid blow, in respect of which they suspect her of wrong. Therefore, let her be outlawed and waived.

Rex v. Haule

Eyre of London, 1321, JUST 1/547A, m.20d

In the twelfth year of the aforesaid reign of King Edward, John of Gisors being coroner, Stephen of Cornhill and Robert de Rokesle then being sheriffs, a certain Maud de Haule [10] and Agnes the Convert [11] were fighting together in this ward, and a certain Joan of Hallynghurst came along and separated them from each other, by reason of which the aforesaid Maud threw the aforesaid Joan out of the house where she dwelt and she fell on the step of a solar of the same house so that on the fourth day following she gave birth to a certain child of the female sex ten weeks before the due time,[12] which the same child died immediately after birth. And the aforesaid Maud was taken immediately after the deed and led to Newgate prison in the time of the aforesaid sheriffs. Therefore [let them answer for what happened].[13] And Robert Gobba, John Braaz, and Richard atte Vyngne, three neighbors, did not come; but they are not suspected of wrong. The aforesaid Robert was attached by Walter le Ken; therefore [he is] in mercy. The other mainpernor has died. The aforesaid John was attached by Hugh Trigge and John de Haleford; therefore [they are] in mercy. The aforesaid Richard was attached by John

[9] *tempus pariendi*

[10] The name could also be read as "Hanle".

[11] *Agnes le Converse*

[12] *per decem septimasna ante tempus pariendi*

[13] Translation uncertain.

Bardewyne and John le Kent; therefore [they are] in mercy. Afterwards William le Leyre and Henry atte More, tenants of part of the lands which were held of the aforesaid sheriffs, come and fully admit that the aforesaid Maud de Haule was in the aforesaid prison in the time of the aforesaid sheriffs, and they say that the aforesaid Maud was hanged before Hamon Hauteyn and his fellows, justices assigned to deliver the gaol aforesaid etc. And that appears from the rolls of the same Hamon etc. She had no chattels etc.

Rex v. Anonymous (a.k.a. the Abortionist's Case)

K.B., 1348, Fitzherbert, Graunde Abridgement, tit. Corone, f. 268, pl. 263 (1st ed. 1516)[14]

One was indicted for that he killed a child in its mother's belly, and the opinion [was] that he shall not be arraigned on this since no name of baptism was in the indictment, and also it is hard to know whether he killed it or not etc.

Selected Readings on the Law of Murder [15]

Excerpts from John Baldwin's Reading, Grays Inn, c. 1455/60

[Statute of Marlborough, c.25] Before the making of this statute, the word *murdrum* implied felony, namely man-slaying, which was so henious that the penalty was death, in whatever manner the slaying was done. Thus, even if the intention of the person who killed the man was not to slay him, but it was by misfortune, nevertheless it would have been adjudged murder, which was a felony for which he would have been put to death . . . because

[14] Dr. Boaker, in a letter to Philip Rafferty (Dec. 12, 1985), indicated that the case does not appear in the various Year Books for 1348, and cannot be traced back before Statham's *Abridgment* (c. 1490, f. 58, pl. 91), which is reproduced in Fitzherbert's *Abridgement*.

[15] Unpublished; found and translated from Law French by J.H. Baker.

it tended to the improverishment of the realm. Now, however, by this statute it is laid down that it shall not be deemed murder where it may be adjudged to be by misfortune . . . There may be murder and yet no felony—as where a piece of timber falls on a man, or a horse kills a man—but the cause of his death shall be forfeited to the king as deodand. . . . There may be murder even where a man does not lay his hands upon or strike anyone, and it is felony: for instance, if a man poisons another, or makes a trap whereby the other dies. And it is a good indictment to say "that he feloniously slew" even though he did not lay his hands [on the deceased] . . . It is a good indictment before the coroner, if the person killed is unknown, to say "that he slew (or feloniously murdered) someone unknown"; that is adjudged. Also "feloniously slew a certain unbaptised person"; for that he shall be put to death. It is otherwise if a man strikes a pregnant woman, and she is delivered of one who is dead; there is not felony, because it cannot be known whether it was by the striking or some other cause, because it was not that time in being, and therefore it cannot be tried.

Excerpts from Thomas Pygot's Reading, Grays Inn, 1510

[Statute of Marlborough, c.25.] . . . There is a distinction between murder and manslaughter; for murder is where a man kills another upon malice aforethought (as, by lying in wait for him), and manslaughter is where people who are not friends meet suddenly, or a sudden dispute arises between friends, and one kills the other: that is manslaughter. But for either of them [the offender] shall die. Therefore it is now to be seen for what murder and manslaughter a man shall die, at common law and at the present day. The statute says, "where it is *solely* by misfortune", and therefore if murder is mixed with malice or negligence he shall die. . . . [If] a physician or surgeon gives contrary medicine, so that the sick person dies, it is felony, just as if it had

been poison. (But this must be understood where it is done *animo felonico*; otherwise not. So the circumstances in which he is killed by negligence may be enquired into.) . . . Killing an enemy alien who does not have a safe-conduct shall not be felony. . . . Also I may be indicted for killing someone unknown, because he might have been disfigured by me or have come from a distant region. . . .

Rex v. Lichefeld

K.B. 27/974, Rex. m.4 (1505)

Nottinghamshire. Heretofore, namely on the vigil of the Epiphany of [our] Lord in the nineteenth year of the reign of the present lord king [Jan. 5, 1504], at Basford in the aforesaid county, before Richard Parker one of the said lord king's coroners in the aforesaid county upon the view of the body of Jane Wynspere of Basford aforesaid, it was presented by the oath of twelve jurors that the said Jane Wynspere of Basford in the county of Nottingham, single woman, being pregnant,[16] on the twelfth day of December in the year above mentioned [1503] at Basford aforesaid, being inspired by the devil drank various bad [17] and [pure] [18] potions in order to kill and destroy the child in her body,[19] and took them into her body, as result of which the said Jane then and there died, and thus the same Jane in manner and form aforesaid feloniously and as a *felo de se* slew and poisoned herself and the child in her body; and that Thomas Lichefeld of Basford in the county aforesaid, cleric, knowing that the said Jane had committed said

[16] *puerpera*: perhaps "in labor".

[17] *corupta*

[18] *immaculata*, which Dr. Baker suggests here should be translated as "polluted" although it means the opposite; perhaps, the *in-* refers here refers to putting something in the potion rather than to negative *-maculata*.

[19] *infantem in corpore suo*

felony in form aforesaid, then and there feloniously harbored *the* said Jane . . . .

On the Thursday after the quindent of Hilary [Jan. 30, 1505], Lichefeld comes in custody and demurs to the indictment on the ground that the principal is dead and that he cannot answer without her. The court adjudges that he is discharged *sine die*.[20]

Rex v. Wodlake

Indictment, K.B. 9/513/m.23 (1530)

Middlesex. The jurors present that William Wodlake of the parish of St. Clement Danes in the county of Middlesex, net-maker, on the twentieth day of May in the seventh year of the reign of Henry VIII [1525], with force and arms (namely knives etc.) at the aforesaid parish of St. Clement, assaulted Katherine Alaund, then a girl of fourteen years of age, and then and there violently and against her will feloniously raped her and carnally knew her, against the peace of the lord king etc.

Middlesex. The jurors present that William Wodlake of the parish of St. Clement Danes in the count of Middlesex, net-maker, on the tenth day of November in the eighteenth year of the reign of King Henry VIII [1526], by the instigation of the devil, knowing that a certain Katherine Alaund was pregnant with a child,[21] with dissembling words gave the same Katherine to drink a certain drink in order to destroy the child then being in the said Katherine's body,[22] and desired and caused her the said Katherine to drink the selfsame drink, by reason of which drink the same Katherine was afterwards delivered of that child dead: so that the same William

[20] Note that the lack of the allegation "*contra pacem*" in the indictment would also have been sufficient grounds for a demurer.

[21] *cum puero esse pregnatum* [*sic*]

[22] *dictum puerum in corpors dicte Katerine existentum*

Wodlake feloniously killed and murdered the child with the drink in manner and form aforesaid, against the peace of the lord king etc.

The Endorsement of the Indictments after Mandamus for Removal to the King's Bench, K.B. 9/513/m.23d (1530)

TRUE BILL taken at St. John's Street in the county of Middlesex before Sir John More, knight, Robert Wroth, Robert Cheseman, John Brown, Richard Hawkes, and John Palmer, keepers of the peace of the lord king and the same king's justices assigned to hear and determine various felonies, tresspasses, and misdeeds in the county of Middlesex, on the Thursday next after the feast of the Conception of the Blessed Virgin Mary in the twenty-first year of the reign of King Henry VIII [Dec. 9, 1529], by the oath etc. of . . . jurors [23] delivered before the lord king on the Saturday next after the quindene of St. John this same term [July 9, 1530], by the hand of the aforesaid John More, one of the aforesaid justices, in order to be determined.

[Sewn to the bill, in the King's Bench file, is a writ dated April 29, 1530, ordering the justices of the peace for Middlesex to send all indictments concerning William Wodlake for appearance "before the king", i.e., before the King's Bench. The writ, tested by Chief Justice Fitz-James, is endorsed by Sir John More that all indictments concerning Wodlake have been sent according to the tenor of the writ.]

In the Controllment Roll of the Clerk of the Court, K.B. 29/162/m.11d (1531)

Middlesex. William Wodlake (dead) of the parish of St. Clement Danes in the county aforesame, net-maker, is to be taken [and brought here] in the octave of Michaelmas [to answer] for various felonies, murders, and misdemeanors of which he is indicted . . . . Afterwards, in

[23] Refers to the grand jury.

Hilary term 22 Henry VIII [1531] he is to be taken [and brought here] in the quindene of Easter: at which day he is dead. Therefore let the process against him here totally cease.

Cockaine v. Witnam

Hil., 19 Eliz. 1 (1577) Action for Slander

Version 1: Brit. Lib., Ms. Landsdowne 1067, fo. 97

"The Lady Cockeyn [*sic*] offered A.B. her maid a drink in order to murder her child, because her butler had gotten it." And although this was not murder, for the infant was *en ventre sa mere*, the action nevertheless lay.

Version 2: Cro. Eliz. 49, pl.4 (1586)

Action for words. At the Nisi Prius the defendant pleaded *concord pius le darraine* continuance, judgment *si al enquest*, etc. And by all the justices it was no plea, but he ought to conclude, judgment *si actio*, etc., and so in all pleas pleaded since the last continuance.

Then it was moved, if judgment shall be given upon this, or a new Nisi Prius be granted; and upon good advice judgment was given for the plaintiff, for it was a confession of the matter in issue.

The words were "My Lady Cockaine did offer two shillings to a woman with child, to get her a drink to kill her child, because it was gotten by J.S., Sir Thomas Cockaine's butler." And it was moved the action did not lie for these words; but it was adjudged for the plaintiff, for by them the lady's credit is impaired; and, if true, there was cause to bind her to good behaviour, although it was not said she did give money, or any hurt was done, but that she offered etc. This case was adjudged Hill. 19 Eliz. Intratur, Mich. 17 & 17 Eliz. Rot. 183. *Ex relatione* Chamberlaine. *Vide* 4 Co. 16.b.

Version 3: Harv. L.S. Lib. Ms. 1180(1), fo. 387

For this he vouched a case in Michaelmas 17 & 18 Eliz., roll 483, between Sir John Cockin [*sic*] and his wife and one Wyman [*sic*], because Wyman spoke these words, "My Lady Cockin did offer one Bash 10 pounds to get her a drink to destroy the child she went withall, because Mr. Cockin's butler had begotten it"; and it was ruled that an action lay, and yet he did not say that a drink was got, but only an offer to get . . . .

Regina v. Turnour

Assize 35/23/29 (Essex 1581)[24]

Essex: The jurors for [our] lady the queen present that Jane Turnour of Stisted in the aforesaid county, spinster, being a common witch and enchantress, not having God before her eyes, but being seduced by the instigation of the devil, on the eight day of January in the twenty-second year of the reign of the Lady Elizabeth [1580], Queen of England, France and Ireland, defender of the faith, devilishly and maliciously at Sisted aforesaid, on various days and occasions both before and since, maliciously and devilishly bewitched and enchanted a certain Helen Sparrowe, wife of John Sparrowe, in the body of the same Helen, being then great with a certain living child,[25] by reason whereof not only was the same Helen then and there on various occasions gravely vexed in her body horribly troubled, to the greatest danger of her life, but also the aforesaid child (of which the same Helen was then and there great) then and there came to death. And thus the aforesaid jurors say upon their oath that the aforesaid Jane Turnour, in manner and form aforesaid, on the day and in the year aforesaid, at

[24] Two accompanying indictments charged Turnour with having used witchcraft to endanger the lives of an adult woman and a child of seven years.

[25] *infantum vivo*

Stisted aforesaid, maliciously and devilishly bewitched and enchanted the aforesaid Helen Sparrowe, and deprived the living child (of which the aforesaid Helen was then pregnant) of his life by reason of these enchantments and bewitchings, contrary to the form of the statute made and provided for such cases, and to the bad and pernicious example of all other offending in such cases, and against the peace of the said present lady the queen. [Note by the clerk:] Puts herself on the country;[26] guilty judgment.

Entry in the Gaol Delivery Roll of the Essex Summer Sessions and General Gaol Delivery Held at Braintree, July 17, 1581, from C. Ewen, *Witch Hunting and Witch Trials: The Indictments for Witchcraft from the Records of 1373 Assizes Held for the Home Circuit A.D. 1559-1736* 143 (London, 1929)

Joan[27] Turnour: Convicted at the last assizes for witchcraft and reprieved[28] for one year.

Entry in the Essex Lenten Sessions and General Gaol Delivery Held at Chelmsford, March 22, 1582, from C. Ewen, *supra*, at 146

Joan Turnour: Sentenced for witchcraft and reprieved[29] for one year.

Regina v. Sims

75 Eng. Rep. 1075 (Q.B. 1601)

Trespasse and assault was brought against one Sims by the Husband and the Wife for beating of the woman.

Coke [Attorney-General]: The case is such, as appears by examination. A man beats a woman which is great

[26] *I.e.*, accepts trial by jury.

[27] *Johana*, meaning Jane or Joan.

[28] *rep'p*, possibly meaning remanded.

[29] *rep. p.*, possibly meaning remanded.

with child, and after the child is born living, but hath signes, bruises in his body, received by said batterie, and after dyed thereof, I say that this is murder.

Fenner & Popham (J.J.), *absentibus caeteris*, clearly of the same opinion, and the difference is where the child is born dead, and where it is born living, for it be dead born it is no murder, for *non constat*[30] whether the child were living at the time of the batterie or not, or if the batterie was the cause of the death, but when it is born living, and the wounds appear in his body, and then he dye, the Batteror shall be arraigned of murder, for now it may be proved whether these wounds were the cause of the death or not, and for that if it be found, he shall be condemned.

Regina v. Webb

Queen's Bench, 1602, Calendar of Assize Rec., Surrey Indictments, Eliz. 1 at 512 (no. 3146) (J. Cockburn ed. 1980)

Surrey. The jurors for our Lady of the Queen present, that Margaret Webb, lately of Godalmyn, spinster, on the tenth day of August, in the forty-first year of the reign of our Lady Elizabeth [1599] by the grace of God Queen of England, France and Ireland, and defender of the faith, with force and arms, and at the aforesaid Godalmyn in the aforesaid county, not having the fear of God before her eyes, but moved and seduced by the instigation of the devil, once ate the poison called "ratsbane" with the intention of spoiling and destroying the infant in the womb of Margaret herself and thus the aforesaid Margaret, by reason of eating the aforesaid poison, spoiled and destroyed then and there the infant in her womb, as a pernicious example to all malefactors offending in like manner, against the peace of our Lady Queen, her crown and dignity.

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[30] It cannot be proved.

Sir Edward Coke, *Third Institute* 50-51 (1644)

If a woman be quick with childe, and by a Potion or otherwise killeth it in her wombe; or if a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe, this is a great misprision, and no murder; but if the childe be born alive, and dieth of the Potion, battery, or other cause, this is murder: for in law it is accounted a reasonable creature, in rerum natura, when it was born alive. And the Book in 1 E. 3 was never holden for law. And 3 Ass. p.2 is but a repitition of that case. And so horrible an offence should not go unpunished. And so was the law holden in Bractons time, Si aliquis qui mulierem praegnanem percusserit, vel ei venenum dederit, per quod fecerit abortivum, si puerperium jam formatum fuerit; & maxime si fuerit animatum, facit homicidium. And herewith agreeth Fleta: and herein the law is grounded upon the law of God, which saith, Quicumque effuderit humanum sanguinem, fundetur sanguis illius, ad imaginem quippe Dei creatus est homo. If a man counsell a woman to kill the childe within her wombe, when it shall be born, and after she is delivered of the childe, she killeth it; the counsellor is an accessory to the murder, and yet at the time of the commandement, or counsell, no murder could be committed of the childe in utero matris: the reason of which case proveth well the other case.

Rex v. Anonymous

Bury Assizes, 1670, 1 M. Hale, *History of the Pleas of the Crown* 429-30 (London 1736)

But if a woman be with child, and any gives her a potion to destroy the child within her, and she takes it, and it works so strongly, that it kills her, this is murder, for it was not given to cure her of a disease, but unlawfully to destroy the child within her, and therefore he, that gives a potion to this end, must take the hazard, and if it kills the mother, it is murder, and so ruled before me at the assizes at Bury in the year 1670.

Sir Matthew Hale, *History of the Pleas of the Crown* 428-30, 433 (London 1736)

These opinions therefore may serve to caution ignorant people not to be too busy in this kind of tampering with physic, but are no safe rule for a judge or jury to go by: we see the statute of 34 & 35 *H. 8 cap. 8* dispenseth with the penalty of those former statutes, as to outward applications and medicines for agues, stoen, strangury, which may be administered by any person, and the preamble of the statute tells us, that if none but licensed chirurgeons should be used in many cases, many of the king's subjects were like to perish for want of help.

[Here, Hale reported his *Rex v. Anonymous, supra* at B-22.]

And certainly if that opinion should obtain, that if one not licensed a physician should be guilty of felony, if his patient miscarry, we should have many of the poorer sort of people, especially remote from *London*, die for want of help, lest their intended helpers might miscarry.

This doctrine, therefore, that if any dies under the hand of an unlicensed physician, it is a felony, is apochyphal, and fitted, I fear, to gratify and flatter doctors and licentiates in physic, tho it may, as I said, have its use to make people cautious and wary, how they take upon themselves two much in this dangerous employment.

. . .

If a woman be quick or great with child, if she takes, or another gives her any potion to make an abortion, or if a man strike her, whereby the child within her is *kild*, it is not murder nor manslaughter by the law of *England*, because it is not yet *in rerum natura*, tho it be a great crime, and by the judicial law of *Moses* was punishable with death, nor can it legally be made known whether it were kild or not, *22 E. 3 Coron. 263.* so it is, if after such child were born alive, and baptized, and after die

of the stroke given to the mother this is homicide. *1 E. 3. 23. b. Coron. 146.*

But if a man procure a woman with child to destroy her infant, when born, and the child is born, and the woman in pursuance of that procurement kill the infant, this is murder in the mother, and the procurer is accessary to murder, if absent, and this, whether the child were baptized or not. *7 Co. Rep. 9 Dyer 186.*

Rex v. Beare

(Derby, England, Aug. 15, 1732)

2 The Gentleman's Magazine 931 (Aug. 1732)

ELEANOR MERRIMAN, now the Wife of *Ebenezer Beare*, indicted for a Misdemeanor, in endeavouring to persuade Nich. Wilson to poison his Wife, and for giving him Poison to that End.

Indicted a second time by the Name of *Eleanor Beare, for a Misdemeanor*, in destroying the Foetus in the Womb of *Grace Belfort*, by putting an iron Instrument up into her Body, and thereby causing her to miscarry.

Indicted a third time, for destroying the Foetus in the Womb of a certain Woman, to the jury unknown, by putting an Iron Instrument up her Body, or by giving her something to make her miscarry. Pleaded Not Guilty.

. . .

To the Second Indictment

COUNSEL [FOR THE KING]: Gentlemen, you have heard the Indictment read, and may observe, that the Misdemeanor for which the Prisoner stands indicted, is of a most shocking Nature; to destroy the Fruit in the Womb carries something in it so contrary to the natural Tenderness of the Female Sex, that I am amazed how ever any Woman should arrive at such a degree of Impiety and Cruelty, as to attempt it in such a manner as the prisoner

has done, it has really something so shocking in it, that I cannot well display the Nature of the Crime to you, but must leave it to the Evidence: It is cruel and barbarous to the last degree.

Call *Grace Belfort.*

GRACE BELFORD [sic]: I lived with the Prisoner as a Servant about ten Days, but was not hired, and I was off and on with her about fourteen Weeks: When I had been with her a few Days there came Company into the House, and made me drink Ale and Brandy (which I was not used to drink) and it overcame me; my Mistress sent me unto the Stable to give Hay to some Horses, but I was not capable of doing it, so [I] laid me down in the Stable; and there came to me one Ch——r, a young Man that was drinking in the House, and after some Time I feared I was with Child by Ch——r; upon that, my Mistress asked me if I was with Child, I told her I thought I was; Then she said if I could get 30 shilling from Ch——r, she would clear me from the Child, without giving me Physik. A little Time after, some Company gave me Cyder and Brandy, my Mistress and I were both full of Liquor, and when the Company was gone, we could scarce get up the Stairs, but we did get up; then I laid me on the Bed, and my Mistress brought a kind of an Instrument, I took it to be like an Iron Skewer, and she put it up into my Body a great Way, and hurt me.

COURT: What followed upon that?

EVIDENCE: Some Blood came from me.

COURT: Did you miscarry after that?

EVIDENCE: The next day after I went to *Allesiree*, where I had a Miscarriage.

COURT: What did the Prisoner do after that?

EVIDENCE: She told me the Job was done. I then lodged two or three Nights with one *Ann Moseley* (now *Ann Oldknowles*) and coming one Morning to see the Prisoner, I called for a Mug of Ale and drank it, and told her I was going home; then came in *John Clark*,

and on the Prisoner's saying I was going home, he said he would give me a Glass of Wine to help me forward, which accordingly he did, out of a Bottle he had in his Pocket, then I took my leave of him; and when I was a little Way out of Town, I fell down at a Style, and was not well, I lay a little while, then go up, and went to *Nottingham* that night.

Call *Ann Oldknowles.*

COURT: Do you know any Thing of *Grace Belford* having a Miscarriage?

EVIDENCE: I know nothing, but that when she lay with me, I saw all the Symptoms of Miscarriage on the Bed where she lay.

Call *John Clark.*

COURT: Do you know the Prisoner?

EVIDENCE: Yes, I have frequented her House.

COURT: Did you ever hear her say anything that she had used Means to make a Woman with Child miscarry, by putting any kind of Instrument up their Bodies, or by giving them any Thing to take inwardly?

EVIDENCE: Yes, I have.—

COURT: Have you seen her Instrument for that Purpose, or have you seen her use any Means to make any Woman with Child miscarry?

CLARK: No, but I have heard her say she had done it, and that she then had under her one *Hannah* ————, whose other Name I know not.

COURT: Have you heard her say she had been sent for for these wicked Practices, or had any Reward for causing any one to miscarry?

CLARK: I heard her say she had been once sent for to *Nottingham*, and, as I remember, she said she had five Pounds for the Journey.

PRISONER: Did you not say you never heard me say any thing of using any Means to cause Miscarriage in any Person, or saw me use any Means for that End?

CLARK: No, I said I never saw you do any thing that Way, but had heard you say you had done it. Would you have me forswear myself?

PRISONER: No, but I would have you speak the Truth.

CLARK: I do.

Then the Prisoner called several Persons to speak in her Behalf, but only two appeared, and they only gave her Friends a reputable Character, and said the prisoner had a good Education, but they knew nothing of the latter Part of her Life.

MR. MAYOR: The Prisoner at the Bar has a very bad Character, and I have had frequent Complaints against her for keeping a disorderly House.

Many evidences were ready in Court to have proved the Facts she stood charged with in the third Indictment; but his Lordship observing that the second Indictment was proved so plainly, he thought there was no Necessity for going upon the third.

His Lordship summed up the Evidence in a very moving Speech to the jury, wherein he said, he never met with a Case so barbarous and unnatural. The Jury, after a short Consultation, brought the Prisoner in Guilty of both Indictments, and she received sentence to stand in the Pillory, the two next Market-Days, and to suffer close Imprisonment for Three Years.

Derby, August 18, 1732. This day *Eleanor Beare*, pursuant to her Sentence, stood for the first Time in the Pillory in the Market place; to which Place she was attended by several of the Sheriff's Officers; notwithstanding which, the Populace, to show their Resentment of the horrible Crimes wherewith she had been charged, and the little Remorse she has shown since her Commitments, gave her no Quarter, but threw such quantities of Eggs, Turnips, etc. that it was thought she would hardly have escaped with her Life: she disengaged herself from the Pillory before the Time of her standing was expired, jumped among the Crowd, whence she was with Difficulty carried back to Prison.

Rex v. Tinkler

King's Bench, 1781

Report in the Newcastle Chronicle, Nov. 24, 1781, at 2

Tuesday last Margaret Tinkler, midwife, was executed near Durham, for a crime in acting or recommending certain means to destroy an infant, which was effected; and finally with the death of the mother. Before she left the jail for execution, she confessed to a worthy clergyman, and Mr. Smith, surgeon in Newcastle, then present, that she only recommended the means, but that the act itself was done by the deceased woman . . . [Her plea of pregnancy failed.]

The Published Report, 1 E. East, A Treatise of the Pleas of the Crown 354-356 (1803)[31]

Margaret Tinkler was indicted for the murder of Jane Parkinson, by inserting pieces of wood into her womb. A second count charged her as accessary before the fact. It was proved by several witnesses, that from the first time of the deceased taking to her bed, which was on the 12th of July, she thought that she must die, making use of different expresses, as, *that she was going; that she was working out her last*; and exclaiming, *Oh! that Peggy Tinkler has killed me*. She lingered till the 23d, when she died. She never was up but once during that time, when on telling a friend who attended her that she thought herself better, she advised her to get up, which the deceased did, and walked as far as the passage going out of the room, but was forced to return and go to bed again. It appeared by the testimony of several witnesses, that from the moment of her taking to her bed till the time of her death she had declared, *that Tinkler had killed her and dear child*, (stating the particular means used, which agreed with the charge in the indictment.) And

[31] This report, which is the one by which the case is generally known, has been verified by Dr. Baker against the original records of the case.

during the same period she had declared more particularly, "that she was with child by one P. a married man, who, being fearful lest his wife should hear of it if she were brought to bed, advised her to go to the prisoner, a midwife, to take her advice how she should get rid of the child, being then five or six months gone." "That the prisoner gave her the advice" in question, which she followed accordingly. It was proved by the testimony of a witness, that three days before the delivery, which was on the 10th of July, she saw the deceased in the prisoner's bed-chamber, when the prisoner took her round the waist and shock her in a very violent manner six different times, and tossed her up and down: and that she afterwards delivered at the prisoner's house. The deceased also declared during her illness, that after her delivery the prisoner gave her the child to take home; and bid her to go to bed that night and sleep, and get up in the morning and go about her business, and nobody would know anything of the matter; but that appearing very ill the next day at a relation's house, they had ordered her to go home and go to bed, which she did. The child was born alive, but died instantly; and the surgeons, who were examined, proved that it was perfect. There was no doubt but that the deceased had died by the acceleration of the birth of the child: and upon opening her womb it appeared that there were two holes caused by the skewers, one of which was mortified, and the other only enflamed; and other symptoms of injury appeared. A short time before her death she was asked whether the account she had from time to time given of the occasion of her death, and the prisoner's treatment of her were true; and she declared it was. It was objected that the above evidence of the deceased's declarations ought not to be admitted, as she herself was *particeps criminis*, and likewise as it appeared at the time of her declarations she was better, or thought herself so. But Nares J. was of opinion, that however this objection might hold with respect to the second count, in which the prisoner was charged as an accessory to the deceased, yet the deceased

was not willingly or knowingly an accessory to her own death; and therefore it was like the common case of any other murder. And as to the objection that she once thought herself better, and tried to get up, yet the same declarations she then made had been made repeatedly before to persons whom in confidence she told that she never should survive, when she first took to her bed; and she had repeated the same declarations the day before she died, and within a few hours of her death. And as to the fact itself, he was clearly of opinion it was murder on the authority of Lord Hale. The jury found the prisoner guilty on the first count, charging her as a principal in the murder, and execution being respited to take the opinion of the judges on the whole case, they all met to consider of it: and were unanimously of opinion that these declarations of the deceased were legal evidence: for though at one time the deceasd thought herself better, yet the declarations before and after and home to her death were uniform and to the same effect. And as to her being *particeps criminis*, they answered, that if two persons be guilty of murder, and one be indicted and the other not, the party not indicted is a witness for the crown. And though the practice be not to convict on such proof uncorroborated, yet the evidence is admissible; and here it was supported by the proof of the prisoner tossing the deceased in her arms in the manner stated. Most of the judges indeed held that the declarations of the deceased were alone sufficient evidence to convict the prisoner; for they were not to be considered in the light of evidence coming from a *particeps criminis*; as she considered herself to be dying at the times, and had no view or intent to serve in excusing herself, or fixing the charge unjustly on others. But others of the judges thought that her declarations were to be so considered; and therefore required the aid of confirmatory evidence.

APPENDIX D

REPRESENTATIVE EARLY AMERICAN LEGAL MATERIALS RELATING TO ABORTION

Proprietary v. Mitchell

10 Md. Arch. 171-186 (1652)

[The following record of the trial is found at 10 Md. Arch. 182-185; the first part of the report includes extensive depositions as evidence against Captain Mitchell used to prepare the charges, including statements that he had administered a "Phisick" to Susan Warren to induce the abortion of their child.]

The Court this day took into Consideration a Peticon exhibited by Capt. William Mitchell who intended (as it Seems) to have preferred the Same to the Assembly had it gone on; The Peticon being as followeth vizt.:

To the Honble the Assembly for regulateing the affairs of the Province of Maryland:

The humble Peticon of Capt. Wm. Mitchell Humbling Shewing That your Peticoner was on Saturday last comitted prisoner to the Common Gaol upon a Warrant Signed by Robert Brooke Esq., In which your Peticoner Stands charged in general words with Murther, Atheisme, and Blasphemy, Crimes never in the least acted or within the Intention of your Peticoner. Your Peticoner therefore humbly prays he may be Speedily called to his Answer, and have his liberty restored in Case noe crime in Law be proved against him that warrants his Imprisonment upon the warrant before menconed, And that his Natural filing for which God hath pleased to affiict and humble Peticoner, may not be pressed against your Peticoner in Cases wherein the Laws of England are Silent, And your Peticoner Shall ever pray.

[Signed] Wm. Mitchell

Upon reading of which Peticon the Court gave direction for a Speedy tryall whereupon his Lordships Attorney, Mr. Hatton, brought in his charge as followeth, viz.:

May it please this Honble Court: It is fallen to my Lott upon the alteracon in the Government [1] as Attorney to the Lord-Proprietary to be prosecutor against Capt. William Mitchell now prisoner here upon Mr. Brookes Warrant, I could have wished there been no Such occasion, The Crimes for which I am to charge him being Soe many and Soe heynous, that I have not known or heard of the like, It troubles me the rather in regard the Lord Baltemore hath been formerly Soe deceived in him as to place him here in the Seat of Judicature, which by his Scandolous course of life and gross haynous offences, he hath extreamly abused, Whereas he ought (especially Soe placed) to have given good example to others an to imploy that Talent and those abilities of witt and understanding (which almighty God hath indeed in a large measure bestowed on him) to his glory and the publick good, But by Common experience it is apparent, that the chiefest use he hath made thereof hath been to colour over his Villanous Courses, and to mock and deride all Religion and Civil Government, As the Court (in part) take notice by the particulars of his Charge being as followeth Vizt.:

The charge of the Lord Proprietary's Attorney by way of Indictment against Capt. William Mitchell in the name of the Keepers of the Liberties of England by Authority of Parliamt. ffirst: That by his expressions as well as practice (as will as I conceive appear by proofe) he hath not only professed himself to be an Atheist, but hath also endeavoured to draw others to believe there is noe God, Makeing a Common practice by blasphemous expressions

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[1] [Editor's note] Probably a reference to the displacement of the colony's Catholic government by its first Protestant government in 1652. *Worldmark Encyclopedia of the States* 242 (1981).

and otherwise to mock and deride God's Ordinances, and all Religion, thereby to open a way to all wicked lustfull licentious and prophane Courses. Secondly: That he hath Comitted Adultery with one Susan Warren. Thirdly: That he hath Murtherously endeavoured to destroy or Murther the Child by him begotten in the Womb of the Said Susan Warren. And is much Suspected (if not known) to have brought his late wife to an untimely end in her late Voyage hitherward by Sea. Ffourthly: That (as I conceive will appear by proofe) he hath Since his late wife's death lived in fornication with his now pretended wife Joane.

And for these and other grosse Crimes and Misdemeanors (sufficiently I conceive) appearing by proofe, My humble request is that the prisoner may be brought to his Answer, and upon a Speedy tryall may receive punishment according to Justice to God's glory and discharge of the Government in that particular.

To which charge the Said Capt. Mitchell the prisoner by his Answer pleading not Guilty, made Choice to be tryed by a Jury Whereupon these persons following were warned to be of the Grand Jury for the tryall vizt: . . . ., who being all particularly called by name and attending the Court, The prisoner being demanded whether he could take any personal excepcon against any of them, expressed that he could not but was well Satisfied therein. Whereupon the Jurors were Sworn and their charge given them to bring in a Just and true verdict upon every branch of the Attorneys Charge aforesaid according to evidence to the best of their Skill who after much time Spend therein brought in their Joynt verdict in the words following vizt.:

Vera[2] to the first Soe far as one Deposition with Sundry Circumstances thereunto agreeing Shall be

[2] [Editor's note] "True bill"—a good indictment.

thought valid in Law. To the Second, third, and fourth: *Billa Vera.*

After the bringing of which verdict the Court discharged the Jurors and the day being far Spent and by reason of other Occasions, the Governor adjourned the Court till the day following.

. . .

Capt. William Mitchell this day referred himself wholly to the determination and Judgement of the Court for all matters charged against him upon which the Grand Jury had given in their verdict the day before not desiring that the Court Should be troubled with impannelling another Jury for the further tryall thereof.

This Court therefore takeing the matter into Serious Consideracon upon the perusal of the proofs and in pursuance of the verdict of the Grand Jury for his Several Offenses of Adultry, fornication and Murtherous intention, and in respect of his lewd and Scandalous Course of life Sufficiently appearing upon the proofs doth Order that the Said Capt. Mitchell Shall forthwith pay ffive thousand pounds of Tobacco and Cask or the value thereof as a ffine to the Lord Proprietary, And to enter into bond for his good behavior. And that he and his now pretended wife Joane be Seperated till they be Joyned together in Matrimony in the usual allowed Manner, And that paying the Court Charges and other ffees and Charges of imprisonment he is to be discharged of his Imprisonment in this particular.

The Midwives' Ordinance

3 Min. of the Common Council of N.Y. 122 (1716)

You [midwives] Shall not Give any Counsel or Administer any Herb Medicine or Potion, or any other thing to any Woman being with Child whereby She Should Destroy or Miscarry of that she goeth withall before her time.

James Parker, *Conductor Generalis: Or, the Office, Duty, and Authority of Justices of the Peace* 216-17 (1764)

If a physician or surgeon gives a person a potion, without any intent of doing him any bodily harm, but with intent to cure or prevent a disease, and contrary to the physician or surgeon's expectation it kills him, this is no homicide. And lord Hale says, he holds their opinion to be erroneous, who think that if he be no licensed surgeon or physician, that occasioneth this mischance, that then it is a felony. These opinions (he says) may caution ignorant people not to be too busy in this kind of tampering with physick, but are no safe rule for a judge or jury to go by. *1 H.H. 429.*

But if a woman be with child and any gives her a potion to destroy the child within her, and she takes it, and it works so strongly that it kills her, this is murder; for it was not given to cure her of a disease, but unlawfully to destroy the child, within her; and therefore he that gives her a potion to this end, must take the hazard, and if it kills the mother it is murder, [sic]. *1 H.H. 430.*

Also if a woman be quick with child, and by a potion or otherwise, killeth it in her womb; or if a man beat her, whereby the child dieth in her body, and she is delivered of a dead child, this is a great misprision, but no murder: but if the child be born alive, and dieth of the potion, battery, or other cause, this is murder. *3 Inst. 50.*

Lord Hale says, that in this case it cannot be legally known, whether the child were killed or not; and that if the child die, after it is born and baptized, of the stroke given to the mother, yet it is not homicide. *1 H.H. 433.* And Mr. Dalton says, whether it die within her body, or shortly after her delivery, it maketh no difference. *Dalt. 332.* But Mr. Hawkins says, that (in this latter case) it seems clearly to be murder, notwithstanding some opinions to the contrary. *1. Haw. 80.*

Also it seems agreed, that where one counsels a woman to kill her child when it shall be born, who afterwards doth kill in pursuance of such advice, he is an accessary to the murder. *1 Haw. 80.*

By the *21 J. c. 27.* If a woman be delivered of a bastard child, and she endeavor privately, either by drowning or secret burying thereof, or any other way, either by herself, or the procuring of others, so to conceal the death thereof, as that it may not come to light, whether it were born alive or not, but be concealed; she shall suffer death as in the case of murder, except she can prove by one witness that it was born dead.

The Evolution of New York's Abortion Statutes

Rev. Stat. 1829, Pt. IV, ch. 1, tit. 2, at 550 (New York's first abortion statute)

§ 8: The wilful killing of an unborn child, by any injury to the mother of such child, and which would be murder if it resulted in the death of such mother, shall be deemed manslaughter in the first degree.

§ 9: Every person who shall administer to any pregnant woman with a quick child, any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case of death of such child or of such mother be thereby produced, be deemed guilty of manslaughter in the second degree.

Rev. Stat. 1829, Pt. IV, ch. 1, tit. 6, at 578 (also part of New York's first abortion statute)

§ 21: Every person who shall willfully administer to any pregnant woman, any medicine, drug, substance or thing whatever or shall use or employ any instrument or other

means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose; shall, upon conviction, be punished by imprisonment in a county jail not more than one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.

Note to Rev. Stat. 1829, Pt. IV, ch. 1, tit. 2, § 8, 6 Revisers' Notes 12 (1828)

The killing of an unborn quick child, by striking the mother is now only a misdemeanor . . . . see note to section 10.

Proposed Additional Section for Rev. Stat. 1829, Pt. IV, ch. 1, tit. 2, and Note thereto, 6 Revisers' Notes 13 (1828)

§ 10: The involuntary killing of an unborn quick child, by an injury to the mother pregnant with such child, shall be manslaughter in the same cases, and in the same degree, as if such mother had been killed by such injury.

[Revisers' Note] A child not born, is considered as not being in *rerum natura*, and therefore not subject of murder, so that the killing [of] such a child is not murder or manslaughter.

Note to Rev. Stat. 1829, Pt. IV, ch. 1, tit. 6, § 24 [enacted as § 21], 6 Revisers' Notes 74 (1828)

The last section is founded upon an English statute . . . but with the qualification which is deemed just and necessary. See a note on this subject to § 9, in Title 3, of this Chapter. [Apparently this is a reference to tit. 2, § 9, quoted above, but there is no known Revisers' Note for that section.]

Proposed Additional Section for Rev. Stat. 1829, Pt. IV, ch. 1, tit. 6, and Note thereto, 6 Revisers' Notes 75 (1828)

§ 28: Every person who shall perform any surgical operation, by which human life shall be destroyed or endangered, such as the amputation of a limb, or of the breast, trepanning, cutting for the stone, or for hernia, unless it appear that the same was necessary for the preservation of life, or was advised, by at least two physicians, shall be adjudged guilty of a misdemeanor.

[Revisers' Note] The rashness of many young practitioners in performing the most important surgical operations for the mere purpose of distinguishing themselves, has been a subject of much complaint, and we are advised by old and experienced surgeons, that the loss of life occasioned by the practice is alarming. The above section furnishes the means indemnity (*sic*), by a consultation, or leaves the propriety of the operation to be determined by the testimony of competent men. This offense is not included among the mal-practices in manslaughter, because, there may be cases in which the severest punishments ought not to be inflicted. By making it a misdemeanor, and leaving the punishment discretionary, a just medium seems to be preserved.

1845 N.Y. Laws, ch. 260, at 285 (New York's second abortion statute)

§ 1: Every person who shall administer to any person pregnant with a quick child, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, shall [in case the death of such child, or of such mother thereby produced] [a] be deemed guilty of manslaughter in the second degree.

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[a] Added by a corrective amendment the next year. 1846 N.Y. Laws, ch. 22, § 1, at 19.

§ 2: Every person who shall administer to any pregnant woman, or prescribe for any such woman to take any medicine, drug, substance or thing whatever, with intent thereby to procure the miscarriage of any such woman, shall, upon conviction, be punished by imprisonment in a county jail, not less than three months nor more than one year.

§ 3: Every woman who shall solicit of any person any medicine, drug, substance, or thing whatever, and shall take the same, or shall submit to any operation, or other means whatever, with intent thereby to procure a miscarriage, shall be deemed guilty of a misdemeanor, and shall, upon conviction, be punished by imprisonment in the county jail, not less than three months nor more than one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment.

§ 4: Any woman who shall endeavor privately, either by herself or the procurement of others, to conceal the death of any issue of her body, which if born alive would by law be a bastard, whether it was murdered or not, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof be punished by imprisonment in a county jail, not exceeding one year.

§ 5: Any woman who shall be convicted a second time of the offence specified in the fourth section of this act, shall be imprisoned in a state prison for a term not less than two or more than five years.

§ 6: Section nine, article first, title second of chapter one, of the fourth part of the Revised Statutes, and section twenty-one, title six, chapter one of the fourth part of the Revised Statutes are hereby repealed.

1872 N.Y. Laws, ch. 181, at 71 (New York's fifth abortion statute)

§ 1: Any person who shall hereafter wilfully administer to any woman with child or prescribe for any such

woman with child or prescribe for any such woman, or advise or procure her to take any medicine, drug, substance, or thing whatever, or shall use or employ, or advise or procure her to submit to the use or employment of any instrument or other means whatever, with intent thereby to produce the miscarriage of any such woman, unless the same shall have been necessary to preserve her life, or that of such child, shall, in the case the death of such child or such woman be thereby produced, be deemed guilty of a felony, and upon conviction shall be punished by imprisonment in a State prison for a term not less than four or more than twenty years.

§ 2: Any woman pregnant with child who shall take any medicine, drug, substance or thing whatever, or shall use or employ, or suffer any other person to use or employ, or submit to the use of employment of any instrument or other means whatever, with the intent thereby to produce the miscarriage of the child of which she is so pregnant, unless the same shall have been necessary to preserve her life or that of such child, shall in case the death of such child be thereby produced, be deemed guilty of a felony, and upon conviction shall be punished by imprisonment in the State prison for a term not less than four years or more than ten years.

§ 3: Every person who shall administer to any pregnant woman, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug, substance or thing whatever, or manufacture, advertise or sell any such medicine, drug, substance or thing whatever, or shall use or employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, shall upon conviction be punished by imprisonment in a county jail, or in a State prison, not less than one nor more than three years, in the discretion of the court.

§ 4: Whoever shall unlawfully supply or procure any advice, medicine, drug, substance or thing whatever, know-

ing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not pregnant, shall be deemed guilty of a misdemeanor, and shall upon conviction, be punished by imprisonment in the county jail not less than three months nor more than one year, or by a fine, not exceeding one thousand dollars, or by both such fine and imprisonment.

Resolution of the Medical Society of the State of New York,

Feb. 5, 1867

1867 N.Y. Assembly J. 443-44 (Feb. 28, 1867)

Whereas, from the first moment of conception, there is a living creature in process of development to full maturity; and whereas, any sufficient interruption to this living process always results in the destruction of life; and whereas, the intentional arrest of this living process, eventuating in the destruction of life (being an act with intention to kill), is consequently murder; therefore,

Resolved, That this society do express their abhorrence, and deprecate, in a most emphatic manner, the growing increase of that demoralizing aid given and practice rendered in procuring criminal or unnecessary abortion.

Resolved, That this society will hail with gratitude and pleasure, the adoption of any measures or influences that will, in part or entirely, arrest this flagrant corruption or morality among women, who ought to be and unquestionably are the conservators of morals and virtue.

Resolved, That the publication in newspapers, and of secret circulars, of ostensible remedies for female diseases, that suggest abortion, are highly detrimental to public health and morals; and that the Legislature ought, by enactment of a suitable law, to forbid such publications.

Resolved, That a copy of this preamble and resolutions be transmitted to both branches of the Legislature now in session.

Nineteenth-Century Treatises on American Criminal Law

1 Joel Prentiss Bishop, *Commentaries on the Criminal Law* 424-25 (2d ed. 1858)

§ 386. Whether, before the foetus has quickened, an abortion procured with the mother's consent is an offence at the common law, the English books do not distinctly inform us; and the question for England has long been settled by statute in the affirmative. In this country, the tribunals of some of the States have decided in the negative; holding, that, until the woman is quick with child, if she consents, no indictment lies at the common law,—though, if she does not consent, the act is an aggravated assault.[1] The Pennsylvania court, however, discarded this doctrine of the necessity of a quickening; and the learned judge who delivered the opinion remarked with great force: "It is not the murder of a living child which constitutes the offense, but the destruction of gestation by wicked means against nature. The moment the womb is instinct with embryo life, and gestation has begun, the crime may be perpetrated."[2] If we look at the reason of the law, we shall prefer the Pennsylvania doctrine; because the public and private mischiefs are the same, whether the abortion takes place just before or just after the first movings of the coming human existence are perceptible to the expectant mother. The phrase, "quick with child," has been defined to mean, that the woman has felt the child move within her;[3] and a distinction between this expression and "with quick child," once taken by a learned judge,[4] has been discarded.[5]

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[1] Commonwealth *v.* Parker, 9 Metc. 263; Commonwealth *v.* Bangs, 9 Mass. 387; The State *v.* Cooper, 2 Zab. 52.

[2] Mills *v.* Commonwealth, 1 Harris, Pa. 631, 633, opinion by Coulter, J.

[3] Goldsmith's Case, 3 Camp. 76; Reg. *v.* Phillips, 3 Camp. 76.

[4] Reg. *v.* Wycherley, 8 Car. & P. 262; and see this case for an interesting note by the reporter, showing, on medical authority,

1 Francis Wharton, *A Treatise on the Criminal Law of the United States* 653-658 (5th rev. ed. 1861)

§ 1220. There is no doubt that at common law the destruction of an infant unborn is a high misdemeanor, and at an early period it seems to have been deemed murder.[e] If the child dies subsequently to birth from wounds received in the womb, it is clearly homicide,[f] even though the child is still attached to the mother by the umbilical cord.[g] It has been said that it is not an indictable offence to administer a drug to a woman, and thereby to procure an abortion, unless the mother is quick with child,[h] though such a distinction, it is submitted, is neither in accordance with the result of medical experience nor with the principles of the common law.[j] The civil rights of an infant in *ventre sa mere* are equally respected at every period of gestation; and it is clear that no matter how early a stage he may be appointed executor,[k] is capable of taking as a legatee,[l] or under a marriage settlement,[m] may take

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that "the popular idea of quick or not quick with child is founded in error."

[5] The State *v.* Cooper, 2 Zab. 52, 57; and see the authorities there cited; also Rex *v.* Russell, 1 Moody, 356, 360. See The State *v.* Smith, 32 Maine, 369.

[e] 1 Russ. on Cr. 671; 1 Vesey, 86; 3 Coke's Inst. 50; 1 Hawk. c. 13, s. 16; 1 Hale, 434; 1 East, P.C. 90; 3 Chitty C.L. 798.

[f] R. *v.* Senior, 1 Mood. C.C. 36; 3 Inst. 50; see ante, § 942.

[g] R. *v.* Trilloe, 2 Moody, C.C. 13.

[h] Com. *v.* Banks, 9 Mass. 387.

[i] W. & S. Med. Jur. § 344-5. Guy's Med. Juris. tit Abortion; 1 Beck. 172, 192; Lewis, C.L. 10.

[j] 1 Russ. on Crim. 661; 1 Vesey, 86; 3 Coke's Inst. 50; 1 Hawk. c. 13, s. 16; Bracton, 1.3, c. 21.

[k] Bac. Ab. tit. Infants.

[l] 2 Vernon, 710.

[m] Swift *v.* Duffield, 6 Seg. & Rawle, 38; Doe *v.* Clark, 2 H. Bl. 399; 2 Ves. jr. 673; Thelluson *v.* Woodford, 4 Vesey, 340.

specifically under a general devise as a child;"[n] and may obtain an injunction to stay waste.[o] Such also was the effect of a decision on the direct point in Pennsylvania in 1845.[p]

§ 1221. Since the publication of the first edition of this work, the position taken in the text has been the subject of much discussion. [Here follows an extended discussion of *Commonwealth v. Parker*, 50 Mass. (9 Met.) 263 (1845), *State v. Cooper*, 22 N.J.L. 53 (1849), and *Smith v. State*, 33 Me. 48, 57 (1851), all of which disagreed with Wharton's conclusion that pre-quickening abortion was a crime at common law, of the medical authorities on human gestation, and of a French treatise on *Médecine Légale* relative to the crime of abortion.]

§ 1226. It appears, then, that quickening is a mere circumstance in the physiological history of the foetus, which indicates neither the commencement of a new stage of existence, nor an advance from one stage to another—that it is uncertain in its periods, sometimes coming at three months, sometimes at five, sometimes not at all—and that it is dependent so entirely upon foreign influences as to make it a very incorrect index, and one on which no practitioner can depend, of the progress of pregnancy. There is as much vitality, in a physical point of view, on one side of quickening as on the other, and in a social and moral point of view, the infant is as much entitled to protection, and society is as likely to be injured by its destruction, a week before it quickens as a week afterwards. But if the common law in making foeticide penal, had in view the great mischief which would result from its qualified toleration, *e.g.*, the removal of the chief restraint upon illicit intercourse, and the shock which would thereby be sustained by the institution of marriage

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[n] Fearne, 429.

[o] 2 Vernon, 710.

[p] Com. *v.* Demain, & c., 6 Penn. Law Jour. 29; Brightly, 441.

and its incidents—we can have no authority now for withdrawing any epoch in gestation from the operation of the principle. Certainly the restraints upon illicit intercourse are equally removed—the inducements to marriage are equally diminished—the delicacy as the woman is as effectually destroyed—no matter what may be the period chosen for the operation. Acting under these views, the legislatures of Massachusetts and New Jersey, in order to fill up the supposed gap, passed acts making ante-quickening-foeticide individually penal. If, however, as has been argued, no such gap exists, it will be worth while for the courts of those States which have not legislated on the subject, to consider how far an exploded notion in physics is to be allowed to suspend the operation of a settled doctrine of the common law.

§ 1227. It is remarkable that both in Massachusetts and New Jersey, a leading English case on this point was not referred to, where in an investigation before a jury of matrons, Gurney, B., said, after taking medical counsel, "Quick with child, is having conceived; with *quick* child is when the child is quickened." [c] This view disposes of all the common law authorities against the indictability of the offence.

[Wharton concludued his discussion with a brief comment on certain points about framing an indictment and proving the elements of the crime.]

State v. Moore

25 Iowa 128 (1868)

[The defendant, a practicing physician, was convicted and sentenced to ten years in prison for murder in the second degree by means of medicines administered and instruments used with intent to produce an abortion from which the mother died. The mother was quick with child, but the court did not mention this in its opinion—a point

[c] R. *v.* Wycherley, 8 C. & P. 265.

emphasized some years later in *State v. Harris*, 136 P. 264, 266 (Kan. 1913).]

DILLON, Ch.J.—I. That leading question made by the defendant's counsel is, that, conceding the defendant gave Mrs. Grant medicines and used instruments purposely to produce an abortion, yet, if her death happened therefrom when not intended or contemplated by him, this is not murder, unless it was done by assault or against her will. Substantially this question is presented by the demurrer to the indictment, by the instructions given and refused, and by the motion for a new trial.

Refusing to charge in conformity with the defendant's proposition as above stated, the court on its own motion instructed the jury as follows: "To attempt to produce a miscarriage, except when in proper professional judgment it is necessary to preserve the life of the woman, is an unlawful act. It is known to be a dangerous act, generally producing one and sometimes two deaths,—I mean the death of the unborn infant and the death of the mother. Now, the person who does this is guilty of doing an unlawful act. If the death of the woman does not ensue from it, he is liable to fine and imprisonment in the county jail (act March 15, 1858 (Rev. § 4221); and, if the death of the woman does ensue from it, though there be no specific intention to take her life, he becomes guilty of the crime of murder in the second degree. The guilt has its origin in such cases in the unlawful act which the party designs to commit, and if the loss of life attend it as incident or consequence, the crime and guilt of murder will attach to the party committing such an unlawful act."

We have quoted the court's language in order to say that has our approval as being a correct statement of the law of the land. But it is due to the defendant's counsel —whose argument against the correctness of the propositions stated by the court was so distinguished for its fairness, acumen and ability—to notice, and briefly to answer, his objections to this view.

The defendant's counsel concedes, that, tested by the common law rules, the doctrine of the court's charge is correct. In his written brief he says: "It is conceded that at common law the act of procuring an abortion resulting in the death of the mother is murder." But he contends that under the statutes of the State the doctrine does not apply.

In the outset, he calls attention to the fact that the criminal code of the common law has no existence in Iowa, that is, that in Iowa no act, though indictable at common law, can be punished as a crime unless the criminality of such act has been declared or recognized by the statute. *Estes v. Carter*, 10 Iowa, 400. This is followed by the proposition that the act of procuring an abortion was not a criminal offense until made so by the statute of March 15, 1858, reprinted as section 4221 of the Revision. See *Abrams v. Forshee*, 3 Iowa, 278; Hatfield v. Gano, 15 id. 177.

The deduction drawn by him from the above is, that, until the statute of 1858, the act of procuring an abortion was not unlawful, because not specifically made criminal by statute, and, not "being *unlawful*, if death ensues therefrom, it is neither murder nor manslaughter."

He then admits that if the law of murder, as contained in the Revision (§§ 4191, 4192, 4193. 4194), had been enacted at the same time as the law of March 15, 1858 (Rev. § 4221), was passed, or if the statute on the subject or murder had been passed after the act of 1858 (which made criminal the willful procuring of an abortio), that the doctrine of the court's charge would have been correct.

But the statute defining and punishing murder was passed in 1851, and does not, it is argued, *blend* with the subsequent statute of 1858.

. . .

Our view is this: Our statute defines murder in the language of the common law definition of that offense. Compare Rev. § 4191 and 4 Black. Com. 195.

As at common law, *malice*, express or implied, is the essential and distinguishing element of murder. Taking sections 4191 and 4193 together, the proper construction is, that would be regarded as murder under our statute. Section 4192 does not extend or abridge the field of murder, but declares certain specified kinds of homicide to be murder in the first degree, and the next section declares all other kinds of murder (that is, all murder as defined by section 4191) to be of the second degree.

It will be observed that manslaughter is not defined at all, but simply made punishable and the limits of the punishment fixed. Rev. § 4199. It follows that we are remitted to the common law to ascertain what manslaughter is, and it seems also necessarily to follow, that what would be regarded in a common law tribunal as manslaughter would be manslaughter in this State, under our statute.

Inasmuch, therefore, as it is conceded that, at common law, the act charged upon the defendant is murder, the same act is murder in Iowa, and would have been prior to the passage of the act of 1858.

We grant that the present is not a case of express, but of *implied*, malice. In cases of homicide, the settled doctrine of the common law is, that malice may be implied from *unlawful* acts *dangerous* to life, committed without justification. I Bish. Com. Law, § 263; Foster on Hom. 261; *Ann v. The State*, 11 Humph. 159; *Rex v. Martin*, 3 Car. & P. 211; *Commonwealth v. Parker*, 9 Metc. 263-5, per SHAW, Ch.J.

The fundamental proposition of the defendant's argument is, that in Iowa malice cannot be implied from the doing of any act whatever, not what is tendency, unless such act is expressly made a crime by statute.

It would result from this, that if there was not statute in Iowa forbidding persons from putting an obstruction on a railroad track, and one were willfully and purposely put there, causing death, the party doing this act (if he did not intend to produce death) could not be convicted of murder, for the reason that malice (in Iowa) cannot be implied from an act not made unlawful by statute.

In this State, we have no statute specifically forbidding a person in a crowded city from throwing a heavy and dangerous beam from a high buliding, likely to injure and kill passers-by.

At common law, if this be done and death happens, the law would imply malice. But in Iowa, under the doctrine contended for, the party doing an act evincing such an utter and wanton disregard of moral and social duty would not be guilty, even though death be caused thereby, or murder or even manslaughter. These are put by way of illustrations of the consequences of the doctrine maintained by the counsel.

The common law is distinguished, and is to be commended, for its all-embracing and salutary solicitude for the sacredness of human life and the personal safety of every human being. This protecting, paternal care, enveloping every individual like the air he breathes, not only extends to persons actually born, but, for some purposes, in infants *in ventre sa mere*. 1 Black Com. 129.

The right to life and to personal safety is not only sacred in the estimation of the common law, but it is inalienable. It is no defense to the defendant that the abortion was procured with the consent of the deceased.

The common law stands as a general guardian holding its aegis to protect the life of all. Any theory which robs the law of this salutary power is not likely to meet with favor. Certain it is, that a doctrine leading to such results as these above instanced cannot be sound, and is not defensible.

We hold, therefore, that, in cases of homicide, malice may, as at common law, be *implied* from any act unlawful and dangerous in its nature, unjustifiably committed.

The willful and unnecessary procurement of an abortion is an act highly dangerous to the mother, and generally fatal, and frequently designed to be fatal, to the child. It is abhorrent to all our notions of sound morality and to all the precepts of our holy religion.

Nearly two hundred years ago Lord HALE laid down the law as follows: "If a woman be with child, and any gives her a potion to destroy the child within her, and she takes it and it works so strongly that it kills her, this is murder; for it was not to cure her of a disease, but unlawfully to destroy the child within her; and therefore, he that gives a potion to this end, must take the hazard, and if it kills the mother it is murder." 1 Hale P.C. 429, 430.

See also *Tinckler's Case*, 1 East P.C. ch. 5, § 16, p. 264, and *Commonwealth v. Keeper, etc.*, 2 Ashm. (Pa.) 227, directly in point; Fost on Hom. 261; *Ann v. The State*, 11 Humph. (Tenn.) 159; *Commonwealth v. Parker*, 9 Metc. 263-5, per SHAW, Ch.J.

And such is the law today and in Iowa. Thus to hold the law to be is not laying a snare for the physician, since his conscience and the sages of that useful and learned profession concur in condemning the practice. By none has the guilt of the offense been more earnestly and persuasively portrayed, and its too great prevalence lamented than by eminent medical writers and teachers.

Under the foregoing view, the willful and unnecessary procurement of an abortion resulting in the unintended death of the woman would have been punishable as murder in the second degree prior to the act of 1858. Of the correctness of his view I entertain no doubt. But instead of resting the decision of the present question upon this

ground, or upon it alone, the court think all possible doubt removed by the act of 1858. The act of 1851, being unrepealed, continued to speak in 1858, and still continue to speak; and has the same force and effect as if it had been passed concurrently with or subsequent to the act of 1858. So that if it were true that malice can only be implied from acts legislatively made criminal, we have even under this view all of the conditions of the offense of murder.

[The court went on to decide adversely to the defendant five technical questions relating to evidence and the charge to the jury.]

. . .

Affirmed.

(32) (31)

Nos. 91-744 and 91-902

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *et al.*,
Petitioners and Cross-Respondents,

v.

ROBERT P. CASEY, *et al.*,
Respondents and Cross-Petitioners.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE KNIGHTS OF COLUMBUS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS AND CROSS-PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. ACTS TRADITIONALLY CLASSIFIED AS *MALA IN SE* CANNOT BE PROTECTED AS "LIBERTIES" UNDER THE DUE PROCESS CLAUSE	4
II. THERE IS, BY DEFINITION, A RATIONAL BASIS FOR RESTRICTING ACTS *MALA IN SE*	9
III. ABORTION HAS ALWAYS BEEN REGARDED AS *MALUM IN SE*	11
CONCLUSION	15

TABLE OF AUTHORITIES

CASES

	Page
Ballurio v. *Castellini*, 29 N.J. Super. 383, 102 A.2d 662 (1954)	12
Barnes v. *Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991)	2, 3, 4, 9, 10
Blanton v. *North Las Vegas*, 489 U.S. 538 (1989)	8
Bowers v. *Hardwick*, 478 U.S. 186 (1986)	2, 3, 4, 5, 9
Boyd v. *United States*, 116 U.S. 616 (1886)	8
Burnham v. *Superior Court*, 495 U.S. 604 (1990)	5
Cruzan v. *Director, Missouri Dep't of Health*, 110 S. Ct. 2841 (1990)	6
District of Columbia v. *Colts*, 282 U.S. 63 (1930)	8
Eisenstadt v. *Baird*, 405 U.S. 438 (1972)	8
Griswold v. *Connecticut*, 381 U.S. 479 (1965)	8
Hutch v. *Mutual Life Ins. Co.*, 120 Mass. 550 (1895)	13
In re Ruffalo, 390 U.S. 544 (1968)	8
Karger v. *Com'r*, T.Ct. Mem. 1954-98, 13 T.C.M. (CCH) 661 (1954)	12
Meyer v. *Nebraska*, 262 U.S. 390 (1923)	3, 7
Michael H. v. *Gerald D.*, 491 U.S. 110 (1989)	2, 3, 4, 5, 6, 8
Mills v. *Commonwealth*, 13 Pa. 627 (1850)	11, 12
Moore v. *East Cleveland*, 431 U.S. 494 (1977)	5
Mugler v. *Kansas*, 123 U.S. 623 (1887)	10
Pacific Mut. Life Ins. Co. v. *Haslip*, 111 S. Ct. 1032 (1991)	5
Palko v. *Connecticut*, 302 U.S. 319 (1937)	5
Parris Adult Theater I v. *Slaton*, 413 U.S. 49 (1973)	3, 9
Peoples v. *Commonwealth*, 87 Ky. 487, 9 S.W. 509 (1888)	12
Pierce v. *Society of Sisters*, 268 U.S. 510 (1925)	1, 3, 7
Planned Parenthood of Missouri v. *Danforth*, 428 U.S. 52 (1976)	14
R. v. *Wycherley*, 173 Eng. Rep. 486 (N.P. 1838)	11
Reynolds v. *United States*, 98 U.S. (8 Otto) 145 (1878)	6
Ritter v. *Mutual Life Ins. Co.*, 169 U.S. 139 (1898)	12

TABLE OF AUTHORITIES—Continued

	Page
Roe v. *Wade*, 410 U.S. 113 (1973)	4, 12, 13
Roth v. *United States*, 354 U.S. 476 (1957)	9
Rutan v. *Republican Party of Illinois*, 110 S. Ct. 2729 (1990)	7
Santa Clara County v. *Southern Pac. R.R.*, 118 U.S. 394 (1886)	13, 14
Schad v. *Arizona*, 111 S. Ct. 2491 (1991)	5
State v. *Elliott*, 277 P.2d 754 (Ore. 1954), *cert. denied*, 349 U.S. 929 (1955)	12
State v. *Jones*, 2 Miss. (1 Walker) 39 (1820)	12
Union Pac. R.R. v. *Botsford*, 141 U.S. 250 (1891)	13

TREATISES AND ARTICLES

W. Blackstone, *Commentaries*	11
R. Byrn, "An American Tragedy," 41 *Fordham L. Rev.* 807 (1973)	11
E. Coke, *Third Institute* (1644)	11
M. Hale, *History of Pleas of the Crown* 433 (1736)	11
W. Hawkins, *A Treatise of the Pleas of the Crown* (7th ed. 1795)	11
Abortion and the Constitution (D. Horan, E. Grant, P. Cunningham, eds. 1987)	14
Lafave & Scott, *Substantive Criminal Law* (1986)	9, 12
G. Linton, "Enforcement of State Abortion Statutes After *Roe*," 67 *U. Det. L. Rev.* 157 (1990)	14
J. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* (1978)	13
J. Noonan, *A Private Choice* (1979)	13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

Nos. 91-744 and 91-902

PLANNED PARENTHOOD OF
SOUTHEASTERN PENNSYLVANIA, *et al.*,
Petitioners and Cross-Respondents,

v.

ROBERT P. CASEY, *et al.*,
Respondents and Cross-Petitioners.

**On Writs of Certiorari to the
United States Court of Appeals
for the Third Circuit**

BRIEF OF THE KNIGHTS OF COLUMBUS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS AND CROSS-PETITIONERS

INTEREST OF THE AMICUS CURIAE

Amicus curiae Knights of Columbus is a fraternal organization of 1.5 million members, with a long history of pro-family advocacy. For example, *amicus* largely underwrote the litigation in *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). *Amicus* has also filed briefs *amici curiae* in several of this Court's abortion cases, including *Webster*, *Akron*, *Hodgson*,

and *Rust*, as well as in other types of cases before the Court.

In the present brief *amicus* respectfully suggests a refinement of the historical analyses used by the pluralities in *Barnes* v. *Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991), and *Michael H.* v. *Gerald D.*, 491 U.S. 110 (1989), and by the majority in *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), in evaluating constitutional claims concerning conduct traditionally classified as *malum in se*.

Amicus does not believe its argument is otherwise addressed by the parties or by other *amici*. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Amicus respectfully suggests a refinement of the historical analyses used in *Barnes* v. *Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991) (plurality opinion), *Michael H.* v. *Gerald D.*, 491 U.S. 110 (1989) (plurality opinion), and *Bowers* v. *Hardwick*, 478 U.S. 186 (1986). In *amicus*'s view, acts like abortion that traditionally have been restricted as *mala in se* cannot give rise to a liberty interest under the Fourteenth Amendment. Moreover, the States by definition have a rational basis for criminalizing acts, like abortion, that are *mala in se*.

In *Bowers*, the Court, citing the "ancient roots," and long tradition of proscriptions against sodomy, found "at best, facetious" the claim that sodomy was a fundamental right. 478 U.S. at 192, 194. The plurality in *Michael H.* used a similar historical analysis in rejecting the claim that a natural father has a liberty interest in maintaining a relationship with a child he has fathered adulterously, despite

objections from the child's mother and her husband. And in *Barnes*, both the plurality and Justice Scalia consulted legal history in determining that the state had a sufficient interest in outlawing public nudity. At the same time, the Court has recognized liberty interests in activities that at least some states have outlawed. *See, e.g., Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925) (sending children to parochial schools); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923) (teaching children a foreign language).

In *amicus*'s view these cases are best understood as standing for the proposition that a practice that has traditionally been restricted as specifically *malum in se* is, by definition, not a protected liberty under the Fourteenth Amendment. But a practice that has been outlawed merely as *malum prohibitum* may still constitute such a liberty. Because the common law may readily be consulted on the question of what is or is not *malum in se*, this analysis provides a workable, bright-line distinction between activities like sodomy, polygamy, suicide, etc., on the one hand, and claimed rights to qualitatively different types of behavior, on the other.

The Court has held that the States' interest in preserving morality may itself be a rational basis for criminalizing certain types of conduct. *Bowers*, 478 U.S. at 196; *Parris Adult Theater I* v. *Slaton*, 413 U.S. 49, 61 (1973); *see also Barnes*, 111 S. Ct. at 2462 (plurality opinion); *id.* at 2468; (Scalia, J., concurring in the judgment). *Amicus* believes those cases are best understood as providing that the States by definition possess rational bases for criminalizing activities, like abortion, that are *mala in se*.

Abortion has always been regarded as *malum in se*, from the received English common law, through American common law and statutory law, right up until *Roe* v. *Wade*, 410 U.S. 113 (1973), declared it to be a fundamental right. Under *amicus*'s proposed analysis, abortion thus cannot be the subject of a protected liberty interest, and the States necessarily possess a rational basis for restricting it. *Roe* should therefore be overruled.

ARGUMENT

Amicus files this brief to propose a refinement of the historical analyses used in Chief Justice Rehnquist's plurality opinion in *Barnes* v. *Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991), in Justice Scalia's plurality opinion in *Michael H.* v. *Gerald D.*, 491 U.S. 110, 127-28 n.6 (1989) (plurality opinion), and in Justice White's opinion for the Court in *Bowers* v. *Hardwick*, 478 U.S. 186 (1986). In *amicus*'s view, an activity like abortion that traditionally has been restricted by the States, not merely as *malum prohibitum*, but as *malum in se*, by definition cannot give rise to a protected liberty interest. Moreover, the States, by definition, have a rational basis for criminalizing activities, such as abortion, that are *mala in se*.

I. ACTS TRADITIONALLY CLASSIFIED AS *MALA IN SE* CANNOT BE PROTECTED AS "LIBERTIES" UNDER THE DUE PROCESS CLAUSE.

In *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), this Court said it was, "at best, facetious" to claim that sodomy was a fundamental right. 478 U.S. at 194. The Court explained that proscriptions against sodomy had "ancient roots," that "[s]odomy was a criminal offense at common law," and had been "forbidden

by the laws of the original 13 States." *Id.* at 192. Moreover, sodomy was a crime in 32 of the 37 states when the Fourteenth Amendment was ratified, and was still criminalized in 24 states when *Bowers* was decided. *Id.* at 192-194. "Against this background" the Court quickly rejected the notion that sodomy was " 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty.' " *Id.* at 194, *quoting Moore* v. *East Cleveland*, 431 U.S. 494, 503 (1977), and *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937).

Justice Scalia has advocated a similar mode of analysis for weighing all claimed liberty interests under the Fourteenth Amendment.[1] In his plurality opinion in *Michael H.* v. *Gerald D.*, 491 U.S. 110 (1989), Justice Scalia concluded that a natural father could not claim a liberty interest under the Fourteenth Amendment in maintaining a relationship with a child he adulterously fathered, at least where the child's mother and her husband objected.[2]

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[1] Justice Scalia has also suggested a similar regimen for evaluating procedural due process claims. *See Burnham* v. *Superior Court*, 495 U.S. 604 (1990) (plurality opinion) (personal jurisdiction based only on in-state service of process constitutional under Due Process Clause because of historical acceptance); *see also Schad* v. *Arizona*, 111 S. Ct. 2491, 2507 (1991) (Scalia, J., concurring in part and concurring in the judgment) (submitting to jury different theories of murder under single charge permissible under Due Process Clause because comports with historical norm); *Pacific Mut. Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032, 1046-1054 (1991) (Scalia, J., concurring) (punitive damages constitutional under Due Process Clause because of historical acceptance).

[2] Chief Scalia's opinion was joined in full by Chief Justice Rehnquist, and in part by Justices O'Connor and Kennedy,

Justice Scalia rejected the proposition that such relationships could give rise to a liberty interest, because they had never received any legal protection historically.

Beginning, like *Bowers*, with the common law, the *Michael H.* plurality traced the history of presumptions of legitimacy and found not "a single case, old or new" that had awarded "substantive parental rights to the natural father of a child conceived within and born into, an extant marital union that wished to embrace the child." 491 U.S. at 127. "This," the plurality concluded, "is not the stuff of which fundamental rights qualifying as liberty interests are made." *Ibid. See also Cruzan* v. *Director, Missouri Dep't of Health*, 110 S. Ct. 2841, 2859-60 (1990) (Scalia, J., concurring) (no liberty interest in suicide because suicide has been criminalized ever since the common law); *cf. Reynolds* v. *United States*, 98 U.S. (8 Otto) 145, 164-165 (1878) (noting that at "common law, the second marriage was always void" and that all the States prohibited polygamy, and holding "[i]n the face of all this evidence it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation" outlawing polygamy). In short, the Court's analysis in *Bowers*, and Justice Scalia's analysis in *Michael H.* and *Cruzan* each lead to the conclusion

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who agreed that historical analysis was proper but disagreed on the level of generality appropriate to such analysis. Whereas Justice Scalia's analysis focuses on the legal history of the specific practice in question, 491 U.S. at 127-28 n.6, Justices O'Connor and Kennedy suggested a more general inquiry might sometimes be called for—whether the specific practice was part of a more general right that itself had been protected. *Id.* at 132 (O'Connor, J., concurring).

that conduct that was historically criminalized cannot be a liberty protected by the Fourteenth Amendment.[3]

Nevertheless, the Court has at other times recognized, as being within protected liberties, other activities that one or more states have outlawed. Such activities include teaching children a foreign language, *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), or sending them to parochial schools, *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). And while it is obviously true that the prohibitions in *Meyer* and *Pierce* were idiosyncratic, there is nothing in either opinion to indicate that the Court's judgment would have been any different if the rest of the states had chosen to follow Nebraska's and Oregon's lead. It is thus not dispositive that a certain type of conduct historically has or has not been criminalized; some further analysis is required.

In *amicus*'s view, the above cases are best understood as standing for the proposition that a practice that has traditionally been restricted as specifically *malum in se* is, by definition, not a protected liberty under the Fourteenth Amendment. But a practice

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[3] This approach uses tradition "for giving content only to ambiguous constitutional text," not text that is clear on its face. *Rutan* v. *Republican Party of Illinois*, 110 S. Ct. 2729, 2748 n.1 (1990) (Scalia, J., dissenting). It is thus unnecessary to parse history to determine that racial discrimination, for example, is unconstitutional. The "Fourteenth Amendment's requirement of 'equal protection of the laws,' combined with the Thirteenth Amendment's abolition of black slavery, leaves no room for doubt that laws treating people differently because of their race are invalid." *Ibid.*

that has been outlawed merely as *malum prohibitum* may still constitute such a liberty.[4]

Applying the traditional distinction between *malum in se* and *malum prohibitum* in defining liberty interests would aid this Court, and especially the State and lower federal courts, in weighing future claims under the Fourteenth Amendment. Because the common law tradition may readily be consulted on the question of what is or is not *malum in se*, it would provide a workable bright line distinction between claimed rights to activities like sodomy, polygamy, suicide, public nudity—and abortion, on the one hand, and claimed rights to qualitatively different types of behavior, on the other. Moreover, the distinction is a familiar one both to the lower courts and this Court. This Court, for example, formerly used the distinction in deciding whether a jury trial was required for prosecution of a given offense. *District of Columbia* v. *Colts*, 282 U.S. 63, 73 (1930);[5] *see also In re Ruffalo*, 390 U.S. 544, 555 (1968) (Opinion of White, J.) (suggesting *malum in se* distinction as giving content to attorney disbarment standard).

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[4] In *Michael H.*, Justice Scalia distinguished *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), on the ground that neither of "those cases acknowledged a longstanding and still extant societal tradition withholding the very right pronounced to be the subject of a liberty interest." 491 U.S. at 128 n.6 (Opinion of Scalia, J.).

[5] The Court's current analysis concentrates on the maximum penalty prescribed for the offense. *Blanton* v. *North Las Vegas*, 489 U.S. 538 (1989).

II. THERE IS, BY DEFINITION, A RATIONAL BASIS FOR RESTRICTING ACTS *MALA IN SE*.

Even criminal statutes that do not impinge on protected liberty interests require a rational basis. But the very definition of an act *malum in se* is an act that is inherently disordered and harmful. *See, e.g.*, Lafave & Scott, *Substantive Criminal Law* § 1.6 (1986). The States therefore necessarily possess rational bases for restricting acts *mala in se*.

The *Bowers* Court, for example, had little difficulty in finding a rational basis for the criminal prohibition of sodomy—the state's moral condemnation of it. As the Court noted, the law "is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." 478 U.S. at 196. Consequently, the *Bowers* Court rejected the argument that Georgia's sodomy law was invalid simply because "majority sentiments about the morality of homosexuality" were an "inadequate" basis for it. *Ibid.* As the Court has elsewhere emphasized, the States can "legimately act . . . to protect 'the social interest in order and morality.'" *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 61 (1973) (upholding state ban or obscene displays), *quoting Roth* v. *United States*, 354 U.S. 476, 485 (1957).

In *Barnes* v. *Glenn Theatre, Inc.*, 111 S. Ct. 2456 (1991), a plurality of the Chief Justice and Justices O'Connor and Kennedy, with Justice Scalia writing separately, sounded a similar theme. In *Barnes*, the Court upheld Indiana's ban on public nudity as applied to barroom-style nude dancing. Chief Justice Rehnquist's plurality opinion noted that "[p]ublic nudity was considered an act *malum in se*" at com-

mon law and had traditionally been outlawed by the States. *Id.* at 2461. The plurality consequently found that the statute survived a First Amendment challenge because it "further[ed] a substantial government interest in protecting order and morality." *Id.* at 2462.

Justice Scalia concurred in the judgment. Because he did not find the First Amendment implicated, however, he measured the statute against the Due Process Clause. Citing to history, he found that Indiana's "moral opposition to nudity," like Georgia's moral condemnation of sodomy in *Bowers*, "supplie[d] a rational basis for its prohibition." 111 S. Ct. at 2468 (Scalia, J., concurring in the judgment).

Bowers and *Barnes* were not innovations. The "traditional police power of the States is defined as the authority to provide for the public health, safety *and morals*." *Barnes*, 111 S. Ct. at 2462 (emphasis added). Indeed, laws enacted to further community morality were always thought to be at the very core of the States' police powers, even when this Court circumscribed those powers more narrowly. *See, e.g.*, *Mugler* v. *Kansas*, 123 U.S. 623, 661 (1887) (states' "police powers . . . determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety").

These cases are more than broad enough to encompass *amicus*'s proposed rule—namely that statutes restricting or prohibiting acts traditionally described as *malum in se* by definition possess a rational basis.

III. ABORTION HAS ALWAYS BEEN REGARDED AS *MALUM IN SE*

Abortion has traditionally been regarded as an act *malum in se* because it is the deliberate taking of innocent human life. It was so regarded by the received English Common Law. *See generally* 1 W. Blackstone, *Commentaries* 129 ("Life is . . . a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb"); E. Coke, *Third Institute* 50 (1644) (abortion of a woman "quick with child" is a "great misprision"); 1 W. Hawkins, *A Treatise of the Pleas of the Crown*, ch. 31 § 16 (7th ed. 1795) (same); 1 M. Hale, *History of Pleas of the Crown* 433 (1736) (abortion a "great crime").[6]

It was so regarded by early American common law, in Pennsylvania and elsewhere. *See, e.g., Mills* v. *Commonwealth*, 13 Pa. 627, 633-34 (1850) ("The

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[6] "Quickening" was not a common law standard equivalent to *Roe*'s trimester framework. Rather, it was an evidentiary requirement necessary because of the then-primitive state of medical science. It was used as a practical test to determine whether there had been an assault upon a live human being in the womb and whether that act had caused the child's death. "At all times, the common law disapproved of abortion as *malum in se* . . . and sought to protect the child in the womb from the moment his living biological existence could be proved." R. Byrn, "An American Tragedy," 41 *Fordham L. Rev.* 807, 816 (1973). In 1827 the nature of conception was discovered. And by 1838, at least one English court had reinterpreted the common law rule prohibiting the execution of a woman "quick with child" to apply to a time prior to when the woman would actually feel the child's movements. The court explained, " 'Quick with child' is having conceived." *R.* v. *Wycherley*, 173 Eng. Rep. 486, 487 (N.P. 1838).

moment the womb is instinct with embryo life, and gestation has begun, the crime [of abortion] may be perpetrated . . . . There was therefore a crime at common law sufficiently set forth and charged in the indictment"); *Peoples* v. *Commonwealth*, 87 Ky. 487, 9 S.W. 509 (1888) (abortion a crime *malum in se*). *See also State* v. *Jones*, 2 Miss. (1 Walker) 39 (1820) (prosecuting slave owner for murder of slave; "the killing of a lunatic, an idiot, *or even a child unborn, is murder*, as much as the killing of a philosopher, and has not the slave as much reason as a lunatic, an idiot or an unborn child") (emphasis added).

That tradition continued into modern times. *See, e.g., Karger* v. *Com'r*, T.Ct.Mem. 1954-98, 13 T.C.M. (CCH) 661 (1954) ("In the long category of crimes, few, if any, are considered more reprehensible or revolting to common decency and good public morals" than abortion; even claiming tax deduction for expenses of illegal abortion is *malum in se*); *Ballurio* v. *Castellini*, 29 N.J. Super. 383, 102 A.2d 662 (1954) (abortion a crime of "moral turpitude"); *State* v. *Elliott*, 277 P.2d 754, 758 (Ore. 1954) ("Illegal abortions are *mala in se*"). *See also* Lafave & Scott, *supra*, § 1.6 (abortion *malum in se*).

There is thus no question that, until *Roe* v. *Wade*, 410 U.S. 113 (1973), the common law as it was received from England and as it continued to develop in America condemned abortion as a crime that was *malum in se*. Indeed, this Court itself had once issued a similar *dictum* about abortion. In *Ritter* v. *Mutual Life Ins. Co.*, 169 U.S. 139 (1898), it noted with approval a state court's conclusion that abortion "was condemned alike by the laws of nature and by the laws of all civilized States." *Id.* at 157, *quoting*

Hutch v. *Mutual Life Ins. Co.*, 120 Mass. 550, 552 (1895).[7]

That common law view was reinforced by state statutory law in force at the time of the ratification of the Fourteenth Amendment. *See Roe*, 410 U.S. at 175 n.1 (Rehnquist, J., dissenting) (listing statutes); *see also*, J. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* 200 (1978) ("most of the legislation passed between 1860 and 1880 explicitly accepted the . . . assertions that the interruption of gestation at any point in a pregnancy should be a crime and that the state itself should try actively to restrict the practice of abortion."); J. Noonan, *A Private Choice* 51-52 (1979).[8]

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[7] *Cf. Union Pacific R.R.* v. *Botsford*, 141 U.S. 250, 253 (1891) ("The writ *de ventre inspiciendo*, to ascertain whether a woman convicted of a capital crime was quick with child, was allowed by the common law, in order to guard against the taking of the life of an unborn child for the crime of the mother").

[8] *Amicus* continues to believe that the most fundamental flaw in *Roe* was its refusal to recognize the unborn as persons within the meaning of the Fourteenth Amendment. *See* 410 U.S. at 158. The text of the Fourteenth Amendment itself sets out only two classes of individual: "citizens," who must be born or naturalized in the United States and for whom the privileges and immunities of citizenship are assured, and "persons," a broader class not circumscribed by any specified criteria and for whom the fundamental rights of life, liberty, and property are guaranteed. Lacking any affirmative command to exclude unborn children from the Fourteenth Amendment, the Court should apply "the rule that constitutional provisions for the security of person and property should be liberally construed," *Boyd* v. *United States*, 116 U.S. 616, 635 (1886), and give the word person the broadest possible reading.

Indeed, this Court decided early on that "person" was expansive enough to encompass corporations. *Santa Clara*

It was still the prevailing view in the law of Pennsylvania and the majority of other states when *Roe* was decided. *See* G. Linton, "Enforcement of State Abortion Statutes After Roe: A State-by-State Analysis," 67 *U. Det. L. Rev.* 157, 255-57 (1990) (listing states).

To be sure, a debate over whether to legalize some abortions had recently been joined in some states at the time *Roe* was handed down. It was, however, a debate that was never finished, but was instead abruptly interrupted by the *Roe* Court's pronouncement. So for the past nineteen years the focus of discussion has not been the wisdom and correctness of several centuries of criminal law, but the wisdom and correctness of *Roe*. And the forum of choice has not been the legislatures but this Court. Moreover, following *Roe* the Court handed down a series of cases, beginning with *Planned Parenthood of Missouri* v. *Danforth*, 428 U.S. 52 (1976), that demonstrated to the States the practical futility of attempting to regulate abortion further. Thus, the fact that some states permitted some abortions in 1973, or that most do now, is not enough to dispel the consensus of several centuries that abortion is *malum in se*.

County v. *Southern Pac. R.R.*, 118 U.S. 394 (1886). If the Fourteenth Amendment can reach entities that exist solely in the imagination of the law, it can surely embrace unborn human beings. Indeed, when considered in light of *Santa Clara*, *Roe* takes on a "hauntingly Orwellian" character: "something can be a person without being human, and can be human without being a person." East and Valentine, "Reconciling *Santa Clara* and *Roe* v. *Wade*," in *Abortion and the Constitution* 90 (D. Horan, E. Grant, P. Cunningham eds. 1987). Our argument on this point is set forth more fully in our brief *amicus curiae* in *Webster* v. *Reproductive Health Servs.*, No. 88-605.

It is merely the legacy of the distortion that *Roe* has worked on the political process. Indeed, there are signs that the former consensus is, at least in part, re-emerging. Louisiana, Utah, and the Territory of Guam have all recently enacted legislation severely restricting abortion.[9]

In sum, because abortion is an act *malum in se* it cannot be a protected liberty under the Due Process Clause. And for precisely the same reason there is a rational basis for its restriction or outright prohibition.

CONCLUSION

For the foregoing reasons, the judgment of the Third Circuit should be affirmed, except insofar as it invalidated Pennsylvania's spousal notification requirement, and *Roe* v. *Wade* should be overruled.

Respectfully submitted,

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Dated: April 6, 1992

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[9] Unanimity is unnecessary in any event. Only a minority of states still outlawed sodomy when *Bowers* was decided. 478 U.S. at 193.

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No.'s 91-744 and 91-902

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OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, et. al.,

Petitioners,

v.

CASEY, et. al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Brief of Texas Black Americans for Life as Amicus Curiae in Support of Respondents Casey, et. al.

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INTEREST OF THE AMICUS

The *amicus* Texas Black Americans for Life is an organization which is concerned about the use of abortion as a tool of racial genocide against the African-American community.

ARGUMENT

We wish to advise the Court that if it does not dispose of this case in a manner which recognizes the sovereign right of the states to protect prenatal human life, certain members of Congress will introduce the so-called "Freedom of Choice Act" to override the states' interest in establishing protection for the unborn. Professor Laurence Tribe of Harvard University is on record as declaring that the authority to enact such a statute would fall within the scope of the Interstate Commerce Clause.

The State of Illinois, however, provides by statute, in an operative provision of law, that prenatal human offspring are persons; it also expressly provides that if *Roe v. Wade* is ever overruled, the law of the state shall automatically operate to protect the unborn against abortion unless the mother's life is endangered. I.R.S. Chapter 38, Para. 81-21.

As this Court has already noted, the states have a sovereign right to endow all those subject to their jurisdictions with legal rights and interests for purposes of state law. This Court recognized as much even as it was denying federal personhood to black slaves in its infamous *Dred Scott* decision. 60 U.S. (19 How.) 393, 405, 426 (1857).

To hold, as this Court did in *Roe*, that the states may not now do so is to say that *Dred Scott* went too far to the extent that it *would* allow a person to have rights under the law. *Roe* also states by the same logic that *Dred Scott did not go far enough* in denying persons the ability to have their rights recognized and protected under the law. And the state-

ment of this Court in *Roe* that this is somehow accomplished by the Fourteenth Amendment, which (along with the Thirteenth and Fifteenth Amendments) was designed to bury *Dred Scott* in a crossroad at midnight with a stake driven through its heart, is a statement which is untenable on its face.

Thus, given the chance that Congress will eventually pass some version of the Freedom of Choice Act, if this Court does not overrule *Roe* and simultaneously mention the sovereign right of the states to endow whomsoever they choose with legal rights and interests for purposes of state law, this Court will allow a needless constitutional clash to ensue. It would be in the best interests of federalism, comity, and judicial economy to state beforehand what the basis is of the states' right to protect the unborn. Such a statement could prevent needless litigation over what can only eventually prove to be a vain exercise of authority by Congress. In this way it will be less likely that the people will be misled as to which direction our law is taking.

CONCLUSION

We ask this Court to recognize the sovereign (i.e. Tenth Amendment) right of the states to protect prenatal human life. We ask this Court to overrule *Roe v. Wade* in a manner which so recognizes state sovereignty.

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BRIEF *AMICUS CURIAE* OF THE UNITED STATES CATHOLIC CONFERENCE, THE CHRISTIAN LIFE COMMISSION, SOUTHERN BAPTIST CONVENTION, AND THE NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF RESPONDENTS AND CROSS-PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. BEFORE ADDRESSING THE MERITS OF THIS CASE, THE COURT SHOULD RECONSIDER *ROE v. WADE*	5
II. THE COURT'S APPLICATION OF PRIVACY PRINCIPLES TO ABORTION IN *ROE v. WADE* WAS FUNDAMENTALLY FLAWED	8
A. Abortion Is A Threat To The Preservation Of A Legitimate Sphere Of Protected Privacy	10
B. Abortion Is A Threat To The Community Values Necessary To A Free Society	12
III. THE MEDICAL REGULATION ISSUES IN THIS CASE EXEMPLIFY THE JURISPRUDENTIAL PROBLEMS ENGENDERED BY *ROE v. WADE*	16
A. The Abortion Industry Has Been Arbitrarily Exempted From Effective State Regulation	17
1. Informed Consent	18
2. 24-Hour Waiting Period	20
B. States' Interests In Health And Medical Standards Are Especially Important To The Unborn Child	22
C. States Must Be Allowed To Protect Patients From The Adverse Effects Of Abortion	25
CONCLUSION	28

TABLE OF AUTHORITIES

CASES: Page

Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) 7, 16, 17, 20, 25
Allgeyer v. Louisiana, 165 U.S. 578 (1897) 9
Barsky v. Board of Regents, 347 U.S. 442 (1954) .. 4, 17
Bender v. Williamsport Area School District, 475 U.S. 534 (1986) 6, 8
Bigelow v. Virginia, 421 U.S. 809 (1975) 17
Brophy v. New England Sinai Hospital, 398 Mass. 417, 497 N.E.2d 626 (1986) 17
Colautti v. Franklin, 439 U.S. 379 (1979) 13, 25
Connecticut v. Menillo, 423 U.S. 9 (1975) 17
Dent v. West Virginia, 129 U.S. 114 (1889) 18
Doe v. Bolton, 319 F. Supp. 1048 (N.D. Ga. 1970) .. 7
Doe v. Bolton, 410 U.S. 179 (1973) 3, 7
Doe v. Scott, 310 F. Supp. 688 (N.D. Ill. 1970) 7
Duncan v. Louisiana, 391 U.S. 145 (1968) 16
Eisenstadt v. Baird, 405 U.S. 438 (1972) 11
Friedman v. Rogers, 440 U.S. 1 (1979) 17
Furman v. Georgia, 408 U.S. 238 (1972) 14
Griswold v. Connecticut, 381 U.S. 479 (1965) 3, 11, 13
H.L. v. Matheson, 450 U.S. 398 (1981) 26
Hagans v. Lavine, 415 U.S. 528 (1974) 7
Harris v. McRae, 448 U.S. 297 (1980) 24
Hodgson v. Minnesota, 110 S. Ct. 2926 (1990) 21
Hodgson v. Minnesota, 648 F. Supp. 756 (D. Minn. 1986) 21
In re Guardianship of Grant, 109 Wash.2d 545, 747 P.2d 445 (1987) 17
Jacobson v. Massachusetts, 197 U.S. 11 (1905) 8, 9, 15
Lehr v. Robertson, 463 U.S. 248 (1983) 19
Loving v. Virginia, 388 U.S. 1 (1967) 11, 13
Mansfield C. & L.M.R. Co. v. Swan, 111 U.S. 379 (1884) 6, 8
Meffert v. Packer, 66 Kan. 710 (1903), *aff'd mem.*, 195 U.S. 625 (1904) 18
Meyer v. Nebraska, 262 U.S. 390 (1923) 3, 13
Mitchell v. Maurer, 293 U.S. 237 (1934) 6
Moore v. City of East Cleveland, 431 U.S. 494 (1977) 10, 20
Palko v. Connecticut, 302 U.S. 319 (1937) 9

TABLE OF AUTHORITIES—Continued

Page

Parham v. J.R., 442 U.S. 584 (1979) 11
Pierce v. Society of Sisters, 268 U.S. 510 (1925) 11, 13
Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983) 16, 24
Planned Parenthood v. Casey, 744 F. Supp. 1323 (E.D. Pa. 1990) 6, 21
Planned Parenthood v. Casey, 947 F.2d 682 (3rd Cir. 1991), *cert. granted*, 112 S. Ct. 931 (1992) .. 6
Planned Parenthood v. Danforth, 428 U.S. 52 (1976) 11, 17
Poe v. Ullman, 367 U.S. 497 (1961) 10, 12
Prince v. Massachusetts, 321 U.S. 158 (1944) 11, 13, 14
Roe v. Wade, 410 U.S. 113 (1973) ..... *passim*
Semler v. Board of Dental Examiners, 294 U.S. 608 (1935) 17
Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819) 9
Terry v. Ohio, 392 U.S. 5 (1968) 11
Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) ..... *passim*
Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) 18
Webster v. Reproductive Health Services, 492 U.S. 490 (1989) ..... *passim*
West Virginia State Board v. Barnette, 319 U.S. 624 (1943) 13
Whalen v. Roe, 429 U.S. 589 (1977) 17
Wynn v. Scott, 449 F. Supp. 1302 (N.D. Ill. 1978), *appeal dismissed, Carey v. Wynn*, 439 U.S. 8 (1978), *aff'd*, 599 F.2d 193 (7th Cir. 1979) 24

CONSTITUTION, STATUTES & REGULATIONS:

Constitution of the United States, amend. 14 ..... *passim*
28 U.S.C. § 1331 (1966 and 1990 Supp.) 5, 6
28 U.S.C. § 1343(a)(3) (1976 and 1990 Supp.) 5, 6
28 U.S.C. § 1343(a)(4) (1976 and 1990 Supp.) 5
42 C.F.R. § 441.253(d) (1991) 21
42 C.F.R. § 441.257(a) (1991) 21
42 C.F.R. § 441.258 (1991) 21

TABLE OF AUTHORITIES—Continued

	Page
42 C.F.R. Part 441, Subpt. F, App. (1991)	21
Ala. Code § 22-11A-51 (Michie Supp. 1991)	19
Ariz. Rev. Stat. Ann. § 20-448.01 (West Supp. 1991)	19
Colo. Rev. Stat. § 10-3-1104.5 (Supp. 1991)	19
Fl. Stat. Ann. § 381.004 (West Supp. 1992)	19
Fl. Stat. Ann. § 458.324(2) (West 1991)	19
Fl. Stat. Ann. § 458.325 (West 1991)	18
Hawaii Rev. Stat. Ann. § 325-16 (Michie 1991)	19
Ind. Stat. Ann. §§ 16-8-7-6, 16-8-7.5-14 (Burns 1990)	19
Ky. Rev. Stat. Ann. §§ 214.181, 214.625 (Michie 1991)	19
Mass. General Laws Ann. c. 123, § 23 (West Supp. 1991)	19
Md. Health Gen. Code Ann. § 18-336 (Michie 1990)	19
N.D. Cent. Code Ann. §§ 23-07.5-02, 23-07.5-03 (Michie 1991)	19
N.H. Rev. Stat. Ann. § 141-F:5 (1990)	19
N.M. Stat. Ann. § 24-2B-2 (1991)	19
N.Y. Public Health Law Ann. § 2500-a (McKinney 1985 & Supp. 1992)	18
N.Y. Public Health Law Ann. § 2505 (McKinney 1985)	19
N.Y. Public Health Law Ann. § 2503 (McKinney 1985)	18
Or. Rev. Stat. § 433.045 (1991)	19
Pennsylvania Abortion Control Act, 18 Pa. Cons. Stat. Ann. §§ 3205-3206, 3209 (West 1983 & Supp. 1991)	17, 20, 28
Pennsylvania Abortion Control Act, 18 Pa. Cons. Stat. Ann. § 3203 (West 1983 & Supp. 1991)	28
Pennsylvania Abortion Control Act, 18 Pa. Cons. Stat. Ann. §§ 3207, 3214 (West 1983 & Supp. 1991)	28
Va. Code Ann. § 32.1-37.2 (Michie Supp. 1991)	19
Wis. Stat. Ann. § 146.025 (West 1989 & Supp. 1991)	19

TABLE OF AUTHORITIES—Continued

BOOKS & STUDIES:

	Page
M.A. Glendon, *Rights Talk: The Impoverishment of Political Discourse* (1991)	11, 13
B. Harrison, *Our Right to Choose* (1983)	26
S. Jordan, *Decision Making for Incompetent Persons* (1985)	12
Neonatal-Perinatal Medicine: Diseases of the Fetus and Infant (A. Fanaroff & R. Martin 4th ed.) (1987)	22
J. Noonan, *A Private Choice: Abortion in America in the Seventies* (1979)	11, 14
B. Spirt, L. Gordon & M. Oliphant, *Prenatal Ultrasound: A Color Atlas With Anatomic and Pathologic Correlation* (1987)	22
8 *The Writings of Thomas Jefferson,* (H.A. Washington, ed.) (1871)	15
Williams Obstetrics vii (J. Pritchard & P. MacDonald 16th ed. 1980)	22

MISCELLANEOUS:

	Page
Adolescent Abortion: Psychological and Legal Issues, Report of the Interdivisional Committee on Adolescent Abortion, American Psychological Association (Univ. of Nebraska Press 1986)	26
Blakeslee, "Fetus Returned To Womb Following Surgery," *The New York Times* (Oct. 7, 1986) C1	24
Callahan, "How Technology is Reframing the Abortion Debate," *Hastings Center Report* 33 (Feb. 1986)	23, 24
Chervenak, *et al.*, "Current Concepts: Advances in the Diagnosis of Fetal Defects," 315 *New Eng. J. Med.* 305 (July 31, 1986)	23
Chopko, Harris, Alvaré, "The Price of Abortion Sixteen Years Later" 69 *National Forum* 18 (Fall 1989)	10
Chopko, "*Webster v. Reproductive Health Services*: A Path to Constitutional Equilibrium" 12 Campbell L.R. 181 (Spring 1990)	21

TABLE OF AUTHORITIES—Continued

	Page
Clift, King, Gonzalez, "Taking Issue With NOW," *Newsweek* 21 (Aug. 14, 1989)	26
Daffos, *et al.*, "Prenatal Management of 746 Pregnancies At Risk for Congenital Taxoplasmosis," 318 *New Eng. J. Med.* 271 (Feb. 4, 1988)	22
Ely, "The Wages of Crying Wolf: A Comment on *Roe v. Wade*" 82 Yale L.J. 920 (Apr. 1973)	15
Fletcher & Evans, "Sounding Boards: Maternal Bonding in Early Fetal Ultrasound Examinations," 308 *New Eng. J. Med.* 392 (Feb. 17, 1983)	23
Harrison, *et al.*, "Successful Repair in Utero of a Fetal Diaphragmatic Hernia," 322 *New Eng. J. Med.* 1582 (May 31, 1990)	24
Henig, "Saving Babies Before Birth," *The New York Times* (Feb. 26, 1982) 18 (Magazine)	22
Kolata, "Fetuses Treated Through Umbilical Cords," *The New York Times* (Mar. 29, 1988) C3	23
Longaker, *et al.*, "Maternal Outcome After Open Fetal Surgery," 265 J.A.M.A. 737 (Feb. 13, 1991)	24
"Medical Progress: Pediatric Surgery," 319 *New Eng. J. Med.* 94 (July 14, 1988)	24
National Conference of Catholic Bishops, *Pastoral Plan for Pro-Life Activities: A Reaffirmation* (Nov. 1985)	27
"Occasional Notes: Fetal Treatment 1982," 307 *New Eng. J. Med.* 1651 (Dec. 23, 1982)	24
Steinem, "A Basic Human Right," *Ms.* 39 (Aug. 1989)	26
"Warns of Negative Psychological Impact of Sonography in Abortion" *Ob. Gyn. News* (Feb. 15-28, 1986)	23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

Nos. 91-744 & 91-902

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *et al.*,
Petitioners and Cross-Respondents,

v.

ROBERT P. CASEY, *et al.*,
Respondents and Cross-Petitioners.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF *AMICUS CURIAE* OF THE UNITED STATES CATHOLIC CONFERENCE, THE CHRISTIAN LIFE COMMISSION, SOUTHERN BAPTIST CONVENTION, AND THE NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF RESPONDENTS AND CROSS-PETITIONERS

INTEREST OF *AMICI*

All active Catholic Bishops in the United States are members of the United States Catholic Conference ("Conference"), a non-profit corporation organized under the laws of the District of Columbia. The Roman Catholic Church, the largest religious denomination in the United States, has over 57 million adherents in 20,000 parishes throughout the country. The Bishops' Conference advocates and promotes the pastoral teachings of the Bishops

in such diverse areas as education, family life, health care, social welfare, immigration, civil rights, criminal justice, and the economy. When permitted by court rules and practice, the Conference files briefs as *amicus curiae* in litigation of importance to the Catholic Church and its people throughout the United States. Of the values that the Conference seeks to promote through its participation in litigation, respect for human life is of the highest importance.

The Christian Life Commission ("Commission") is the moral concerns and public policy agency for the Southern Baptist Convention, the nation's largest Protestant denomination, with over 15.2 million members in over 38,000 autonomous local churches. The Christian Life Commission has been charged by the Convention to address public policies affecting the sanctity of human life, the integrity of marriage and the family, and other subjects. Southern Baptists have expressed themselves in repeated resolutions, passed in national conventions over the past two decades, overwhelmingly opposing abortion except to save the life of the mother and calling for the reversal of *Roe v. Wade*, 410 U.S. 113 (1973). The Christian Life Commission seeks to advocate positions consistent with these resolutions by filing briefs as *amicus curiae* in important litigation such as this case.

The National Association of Evangelicals ("NAE") is a nonprofit association of evangelical Christian denominations, churches, organizations, institutions and individuals. It includes some 45,000 churches from 74 denominations and serves a constituency of approximately 15 million people. As its official resolutions attest, NAE is committed to defending the sanctity of human life. The NAE, the Commission, and the Conference believe that the practice of abortion-on-demand in this country undermines respect for all life and jeopardizes other vital interests of individuals, the family, and the community. For this reason, any retreat from the review of abortion jurisprudence begun by this Court in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), will serve only to confuse the law and derogate other fundamental rights, most especially those of countless unborn children. Because the federal right created in *Roe v. Wade* underlies jurisdiction in this case, reconsideration of that case without further delay is appropriate here.

Through their counsel, the parties have consented to the appearance of these *amici*.

SUMMARY OF ARGUMENT

In 1973, this Court held that its privacy jurisprudence "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe v. Wade*, 410 U.S. at 153. It did so, however, recognizing that this decision involved more than the decisions given constitutional protection in cases from *Meyer v. Nebraska*, 262 U.S. 390 (1923), to *Griswold v. Connecticut*, 381 U.S. 479 (1965). Abortion involves the termination of a life and the infringement of other personal and community interests. *Roe v. Wade*, 410 U.S. at 159. For this reason, the Court held open the possibility that these interests could not only be balanced against, but at times override, the now protected choice of abortion. In nineteen years of legislative efforts and litigation experience, that prospect has never meaningfully materialized. Society, the family, men, women, and millions of unborn children have suffered exceedingly as a result.

In his concurring opinion in *Roe v. Wade* and *Doe v. Bolton*, 410 U.S. 179 (1973), Justice Douglas discussed the nature of "liberty" as including "*autonomous control over the development and expression of one's intellect, interests, tastes, and personality.*" 410 U.S. at 211 (emphasis in original). This right, the Justice said, is "absolute, permitting of no exceptions." *Id.* No other rights encompassed by his notion of liberty, including the right of privacy, were denominated autonomous, and no other Justice spoke of autonomy in relation to personal liberty or privacy in those first abortion cases. 410 U.S. at 113-223. Yet by the time the Court reached its decision in *Thorn-*

burgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986), a majority had come to employ the concept of autonomy in direct relation to a woman's decision to abort her child. 476 U.S. at 772. By so doing, the Court truly caused the pregnant woman to be "isolated in her privacy" from all other legitimate interests of society, of her community, of her family, and of her unborn child—an outcome that *Roe v. Wade* originally disavowed. 410 U.S. at 159. Having been promised "freedom of choice" by abortion's supporters, pregnant women find themselves poorly served by the abortion industry's contrived "autonomy." The result of isolating expectant mothers from the aid and support they need has been to expose them to victimization by an abortion industry that masquerades as operating in their best interests, while in fact it seeks to avoid legitimate state regulation aimed at protecting health and safety.

When Pennsylvania enacted minimal medical regulations for clinics performing abortions, the United States District Court for the Eastern District of Pennsylvania enjoined them at the request of the abortion providers. This result protected abortion notwithstanding the state's legitimate authority to license and regulate medical practitioners in the interest of protecting all patients. *Barsky v. Board of Regents*, 347 U.S. 442, 449 (1954). The lower court disregarded this Court's teaching that the states have compelling interests in protecting maternal health, preserving prenatal life, and upholding professional standards. Yet the district judge was only applying the hyperextension of *Roe*, especially the sweeping opinion in *Thornburgh*. That decision completed the distortion of the law begun in *Roe*, and its demise as precedent would be a healthy step. For this reason, this Court must complete the process begun in *Webster v. Reproductive Health Services*.

The primary problem lies not in *Thornburgh*, whose abandonment is presaged by *Webster*, but in *Roe v. Wade* and the collapsing foundation on which it was based. To explain its original extension of the constitutional right

of privacy to abortion, this Court had to engage in speculation as to how certain perceived medical, social, or psychological "detriments" to pregnant women might be alleviated by abortion. *Roe v. Wade*, 410 U.S. at 153. This nation's experience shows that those predictions were unfounded. Unsafe abortion, maternal and infant mortality, family instability, teenage pregnancy, and similar difficulties continue unabated. Widespread abortion has not solved such problems. Indeed, abortion has created its own list of unexpected and undesirable detriments to our society. The only solution for this Court is not to entrench its decisional law further, but to reconsider its rationale for including abortion within the Due Process Clause of the fourteenth amendment. The Court can and should do so because subject matter jurisdiction over this case depends upon abortion remaining a constitutional right. In order for the Court to examine properly its own jurisdiction, as it is bound to do in every case, *Roe v. Wade* must be reconsidered and should, on reflection, be abandoned.

ARGUMENT

I. BEFORE ADDRESSING THE MERITS OF THIS CASE, THE COURT SHOULD RECONSIDER *ROE v. WADE*.

Since November 7, 1991, when petitioners and their counsel publicly announced their strategy for filing a petition for certiorari in this case, there has been rampant speculation across this nation as to whether *Roe v. Wade* would, could or should be reconsidered. For the most part, however, prognosticators have ignored the fundamental fact that subject matter jurisdiction is always open to review, and that jurisdiction over this case depends on this Court's decision in *Roe v. Wade*.

Without discussion, the district judge proclaimed, "I have subject matter jurisdiction over this controversy pursuant to 28 U.S.C. § 1331 (1966 and 1990 Supp.), 28 U.S.C. § 1343(a)(3), (4) (1976 and 1990 Supp.), and the fourteenth amendment to the United States Constitu-

tion." *Planned Parenthood v. Casey*, 744 F. Supp. 1323, 1325 (E.D. Pa. 1990). The court of appeals opinion, on review here, abbreviates but essentially reiterates the district court's jurisdictional proclamation. *Planned Parenthood v. Casey*, 947 F.2d 682, 687 (3rd Cir. 1991), *cert. granted*, 112 S. Ct. 931 (1992). Yet this Court has stated that:

> [E]very federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," even though the parties are prepared to concede it.

Bender v. Williamsport Area School District, 475 U.S. 534, 541 (1986) (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934)). Every federal court is therefore obliged to examine its subject matter jurisdiction, whether the issue is raised by a party, a witness, an intervenor, an *amicus curiae*, or by the court itself. The question of jurisdiction is so "fundamental" that "the court is bound to ask and answer [it] for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." *Bender*, 475 U.S. at 547 (quoting *Mansfield C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)).

The abortion cases filed in federal courts since the Court's decision in *Roe v. Wade* have relied, as this case does, on 28 U.S.C. §§ 1331 and 1343 for federal jurisdiction. Those statutory provisions require, of course, a "deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States" or a claim "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1343 (a)(3) and 1331. Because of this Court's pivotal holding in *Roe v. Wade* that the constitutional "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy," federal courts presume that the jurisdictional requirement of a constitutional deprivation or claim is always extant where

abortion is involved. In fact, many parties do not even raise the issue, concentrating instead on other jurisdictional issues such as plaintiffs' standing, as the parties in this case did below.[1]

Prior to *Roe v. Wade*'s elevation of abortion to constitutionally protected status, federal jurisdiction over abortion cases was not at all clear; lower courts cited one another for assurance that they ought even to entertain these complaints. *See, e.g., Doe v. Bolton*, 319 F. Supp. 1048, 1052 (N.D. Ga. 1970) and *Doe v. Scott*, 310 F. Supp. 688, 689 (N.D. Ill. 1970). This Court has itself assumed jurisdiction in several abortion cases, beginning with *Doe v. Bolton*, 410 U.S. 179 (1973), without ever mentioning that subject matter jurisdiction is wholly dependent on the continued efficacy of *Roe v. Wade*'s central holding.[2] Such silence, however, is decidedly not a binding jurisdictional decision. As this Court noted in another action brought under 28 U.S.C. § 1343:

> Moreover, when questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us. We therefore approach the question of the District Court's jurisdiction to entertain this suit as an open one calling for a canvass of the relevant jurisdictional considerations.

Hagans v. Lavine, 415 U.S. 528, 533 n.5 (1974) (citations omitted). Similarly, this Court is now faced with a consideration of federal jurisdiction under 28 U.S.C. §§ 1331 and 1343; indeed, the obligation to address the issue "is inflexible and without exception," applying "in

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[1] *See, e.g.*, Defendants', Robert P. Casey's, *et al.*, Pretrial Memorandum of Law (filed July 20, 1990) at 3-4; *see also Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. at 754-55.

[2] In both *Thornburgh*, 476 U.S. at 759, and *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 420 n.1 (1983), this Court reaffirmed *Roe v. Wade* without commenting upon the jurisdictional ramification of that holding.

all cases" and "[o]n every writ of error or appeal." *Bender*, 475 U.S. at 547 (quoting *Mansfield C. & L.M.R. Co. v. Swan*, 111 U.S. at 382). In proceeding then to "canvass all relevant jurisdictional considerations," the Court must begin with studied reconsideration of its decision in *Roe v. Wade*, for it is that decision upon which federal jurisdiction rests.

II. THE COURT'S APPLICATION OF PRIVACY PRINCIPLES TO ABORTION IN *ROE v. WADE* WAS FUNDAMENTALLY FLAWED.

In undertaking reconsideration of *Roe v. Wade*, this Court should be guided by its line of privacy cases predating this Court's legitimization of abortion-on-demand. Those precedents show proper balance of individual and societal interests—allowance for personal liberty within a framework that protects human life, respects family relationships, promotes the common good, and preserves our free society. Historically, it was always understood that liberty to engage in certain personal actions is not license. In *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905), Justice Harlan, writing for the majority, explained:

> [T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good . . . . Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.

Although the ability to make certain choices was sometimes given constitutional foundation, often under the Due Process Clause of the fourteenth amendment, this Court has always done so in balance with legitimate, sometimes competing interests rationally related to the

choice. *E.g.*, *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).[3] Protection of basic constitutional values has been the Court's dominant adjudicative principle.[4]

The early debate on what became the privacy doctrine in this century occurred during the process of incorporating "federal" rights to the states through the fourteenth amendment. In a seminal decision, *Palko v. Connecticut*, 302 U.S. 319 (1937), the Court articulated the necessary standard to distinguish those rights "incorporated" from those "unincorporated." The "incorporated" rights were not necessarily enumerated in the Constitution but were those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Id.* at 326. Only those liberties "found to be implicit in the concept of ordered liberty" were incorporated.[5] *Id.* at 591.

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[3] In *Allgeyer*, the Court found that there was certainly a basic right to engage in business contracts as an element of personal liberty that deserved to be protected. But for purposes of this discussion, it should be noted that the Court did "not intend to hold that in no such case can the State exercise its police power." Indeed the Court found that this fundamental right "may be regulated, and sometimes prohibited, when the contracts or business conflict with the policy of the state as contained in its statutes. . . ." *Allgeyer v. Louisiana*, 165 U.S. at 591.

[4] Throughout its cases, the Court has engaged in an effort to apply faithfully those values. Justice Harlan in *Jacobson v. Massachusetts* (197 U.S. at 22) cites approvingly Chief Justice John Marshall in *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 202 (1819) for the idea that the spirit of the Constitution "is to be collected chiefly from its words."

[5] The *Palko* Court employed "freedom of thought" as its primary example: "Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom." 302 U.S. at 327. In his concurring opinion in *Roe v. Wade*, Justice Douglas states that such internal matters as thought or belief are integral to one's autonomy and not subject to *any* infringement by the State. 410 U.S. at 211. Other interests, like the interest in one's health and well-being, are subject to appropriate regulation. *Id.* at 211-14.

In his famous dissent in *Poe v. Ullman*, 367 U.S. 497, 542 (1961), Justice Harlan said that the search for fundamental constitutional values was intended to be a "rational process" that must reflect the "traditions of the country, not judges." He found that personal liberty was somewhat of a "continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . ." *Id.* at 543. In that language, endorsed by a plurality in *Moore v. City of East Cleveland*, Justice Harlan acknowledged that protection of personal liberty often required a balance of different interests.[6] By protecting liberty against "substantial arbitrary" and "purposeless" restrictions, the Court invited express consideration of countervailing interests. In the abortion context, however, the invitation has not, until recently, even been acknowledged, much less accepted.

A. Abortion Is A Threat To The Preservation Of A Legitimate Sphere Of Protected Privacy.

Until *Webster v. Reproductive Health Services*, a majority had characterized itself as protecting a "promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government." *Thornburgh*, 476 U.S. at 772. In actuality, that (now former) majority separated privacy doctrine from its roots. Although it claimed to the contrary, the Court isolated the pregnant woman in her privacy from all other interests. The Court originally offered a number of rationales—legal, medical and social—for so doing. Although these rationales when first offered in 1973 were debatable, on further consideration and through actual, lamentable experience, they have been largely unrealized.[7] What is needed now is thorough reconsideration of that illegitimate foundation upon which constitutional abortion in America has rested for the last nineteen years.

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[6] *Moore v. City of East Cleveland*, 431 U.S. 494, 501-502 (1977).

[7] Chopko, Harris, Alvaré, "The Price of Abortion Sixteen Years Later" 69 *National Forum* 18 (Fall 1989).

Before *Roe*, privacy jurisprudence consisted of a number of discrete cases protecting either certain private places, private relationships, or private spheres of life from unwarranted government intrusion.[8] The shift in privacy jurisprudence that led to *Roe* began with *Griswold v. Connecticut*, when this Court held for the first time that there exists a specific right of privacy formed by "emanations from those [constitutional] guarantees that help give them life and substance."[9] Yet *Griswold* still dealt with marriage, a protected association, and thus did not stray as far from the substance of the Court's earlier conclusions as it implicitly did from the Court's rationale. Where judicial protection of privacy lost any legitimate link with either this Court's precedents or with the Constitution itself was *Eisenstadt v. Baird*, 405 U.S. 438 (1972).[10] *Eisenstadt* abandoned the protectable right of privacy as developed in constitutional litigation by suggesting that personal interests alone—not relational interests such as those at the heart of *Griswold*—are entitled to special protection. 405 U.S. at 453. Having put marriage asunder in *Eisenstadt*, the Court in *Roe* undermined protection for the fruits of marriage—children.

As the majorities in the abortion cases erected a series of "substantial arbitrary impositions and purposeless restraints" on virtually every competing interest, the Court turned legitimate privacy doctrine on its head.[11] *Poe v.*

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[8] *E.g. Terry v. Ohio*, 392 U.S. 5 (1968); *Loving v. Virginia*, 388 U.S. 1 (1967); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

[9] *Griswold v. Connecticut*, 381 U.S. 478, 483 (1965).

[10] J. Noonan, *A Private Choice: Abortion in America in the Seventies* 20-22 (1979); *see generally* M.A. Glendon, *Rights Talk: The Impoverishment of Political Discourse* 56-57 (1991).

[11] For example, it is widely recognized that parents have a general right to protect their children from potential adverse consequences of medical decisions. *Parham v. J. R.*, 442 U.S. 584, 604 (1979) (analyzing and rejecting *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976)). Yet, in the abortion area, parents do not

Ullman, 367 U.S. at 542. By stretching privacy doctrine until it was broad enough to cover abortion, the Court introduced a flaw into its jurisprudence that, in subsequent opinions culminating in *Thornburgh*, became a threat to the very constitutional values and legitimate societal interests the right of privacy was originally meant to protect. When a bare majority of this Court used "autonomy" to describe a woman's decision to abort her child,[12] the very principle of liberty under the fourteenth amendment was infected with an amorphous concept that threatens the right to privacy itself. "Privacy reduced to its extreme is isolation, one of the conditions conducive to the success of totalitarian movements. It is the intention of free states to recognize and protect an area of privacy for the citizen but not to reduce that privacy to isolation." [13] A completely autonomous person becomes a law unto herself; privacy is "reduced to its extreme" and the shared commitment to values necessary to the preservation of a free state is impaired. The results are rifts in the jurisprudence and in the fabric of society.

B. Abortion Is A Threat To The Community Values Necessary To A Free Society.

In perhaps its most candid observation about the nature of the "right" being established in *Roe v. Wade*, the majority specifically recognized that the decisionmaking process it was about to protect differed, in its basic character, from those decisions protected in the line of cases from *Meyer* to *Griswold*. *Roe v. Wade*, 410 U.S. at 159. Even while stating that obvious fact, the Court nonetheless framed the discussion in language that would enable subsequent majorities to run roughshod over other individual, familial and community interests deserving protection, not derision. *E.g.*, *Thornburgh*, 476 U.S. at 772; *Colautti v. Franklin*, 439 U.S. 379 (1979). The *Roe* Court's promise that maternal health, medical standards and "potential life" would be considered alongside abortion proved empty. 410 U.S. at 154. Indeed, that Court's statement that the abortion right was not to be absolute has itself been termed disingenuous because, from the beginning, no rights could be asserted on behalf of the unborn child.[14]

Individuals do have truly private choices—decisions that are entirely personal—that do not affect the interests of others or of the state. In other instances, individuals have their choices protected from interference by the state, whether they concern religious preferences,[15] the education of children,[16] the choice of a spouse,[17] or similar interests. It makes sense that the state should have a heavy burden of proof to engage in restriction of individual choices where there are no third-party or societal interests at stake. This may also be true when the exercise of individual choice falls completely within the context of a protected relationship, like marriage or the family.[18] Yet even in these relationships, the state has regulatory authority, severely circumscribed, but sufficient to ensure that individual choices are worked out in

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have the ability to exercise the same fundamental freedom. Thus has Justice O'Connor observed that, in the area of abortion, different rules come into play and nothing is safe from "ad hoc nullification" at the hands of a majority. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. at 814 (O'Connor, J., dissenting). As shown in Argument III, even traditional principles of informed consent have been abrogated in the abortion context. *See id.* at 798-804 (White, J., dissenting).

[12] *Thornburgh*, 476 U.S. at 772.

[13] S. Jordan, *Decision Making for Incompetent Persons* 132-33 (1985).

[14] M.A. Glendon, *Rights Talk*, *supra* note 10, at 61.

[15] *West Virginia State Board v. Barnette*, 319 U.S. 624 (1943).

[16] *Meyer v. Nebraska*, 262 U.S. at 396-403; *Pierce v. Society of Sisters*, 268 U.S. at 529-36.

[17] *Loving v. Virginia*, 388 U.S. at 2-13.

[18] *Griswold v. Connecticut*, 382 U.S. at 486; *Prince v. Massachusetts*, 321 U.S. at 166.

a balance respectful of all members of the protected relationship.[19]

In considering abortion, however, the calculation is never simply one of individual interests competing with interests of the state. The abortion decision is complex and certainly affects the life interests of others: the unborn child, the father, other members of the family, and society itself. The decision implicates the procreative interests of both partners, affects the integrity of the marriage relationship, and *ends a life*.[20] When a minor becomes pregnant, abortion has other detrimental impacts on family relations, alienating the child from her parents and separating those parents from their unborn grandchild. A constitutional right to abortion subjugates liberties that in other contexts are found to be fundamental, but in this context are considered less worthy of protection.[21]

In *Webster v. Reproductive Health Services*, a plurality of the Court suggested that it is not always wise to distinguish between abortion as a "fundamental right" or as a "limited fundamental constitutional right" or as a "liberty interest protected by the Due Process Clause . . . ." 492 U.S. at 520. The plurality made this assertion while discussing "the State's interest in protecting potential human life," where that interest is "compelling" and exists "throughout pregnancy." *Id.* at 519. In that context, where the state's compelling interest would prevail no matter how the right is denominated, such distinctions may be unnecessary to the Court's conclusion. However, it seems unlikely that this Court still seriously seeks to defend its unrestricted abortion decisions. Therefore, using the historical line of privacy cases, this Court must

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[19] *Prince v. Massachusetts*, 321 U.S. at 166-67.

[20] Ours has always been a society that "strongly affirms the sanctity of life." *Furman v. Georgia*, 408 U.S. 238, 286 (1972) (Brennan, J., concurring).

[21] J. Noonan, *A Private Choice*, *supra* note 10, at 90-95, 190.

reflect accurately that one person's "liberty" is not "license" to control even one's own body where another's interest could suffer or the common good be diminished.[22] *Jacobson v. Massachusetts*, 197 U.S. at 26-27. Because the other vital interests, the unborn child, will suffer death as a result of an exercise of "liberty," the Court must reexamine its basis for making abortion a matter of due process at all.[23]

While debating how to denominate abortion, it is well to remember that the right to life has been recognized as the first right protected by government.[24] The order is not accidental. The right to life is the logical and chronological starting point in any discussion of the fundamental rights of persons. All other rights, interests, and values protected by the state on behalf of its citizens are mean-

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[22] Nor is liberty to be equated with autonomy; the illegitimate concept of bodily autonomy must be left out from under the umbrella of the fourteenth amendment in order to preserve those rights that *are* properly within the sphere of constitutional liberty interests. *See* Argument II. A., *supra*.

[23] As Professor John Hart Ely noted almost twenty years ago:

> What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure . . . . At times the inferences the Court has drawn from the values the Constitution marks for special protection have been controversial, even shaky, but never before has its sense of an obligation to draw one been so obviously lacking.

Ely, "The Wages of Crying Wolf: A Comment on *Roe v. Wade*" 82 Yale L.J. 920, 935-37 (Apr. 1973).

[24] The Declaration of Independence places the right to life first in the list of inalienable rights. The fourteenth amendment lists the right to life first among those rights of which the states cannot deprive a person, without due process. And Thomas Jefferson's March 31, 1809, letter to the Republican Citizens of Washington County, Maryland, stated that: "The care of human life and happiness, and not their destruction, is the first and only legitimate object of good government." 8 *The Writings of Thomas Jefferson* 165 (H.A. Washington, ed.) (1871).

ingless if one does not first possess the right simply to exist. The fourteenth amendment guarantees this foundational value by denying to the states the power to "deprive any person of life, liberty, or property, without due process of law." Since the addition of those thirteen words to the Constitution, this Court has struggled with the scope and meaning of the word "liberty." *Compare, e.g., Duncan v. Louisiana*, 391 U.S. 145 (1968), *with id.* at 162 (Black, J., concurring), *and id.* at 215 (Harlan, J., dissenting). Yet it is plain that "life" is the necessary prerequisite to the exercise of "liberty" and it is through pregnancy that each of us begins to live.

III. THE MEDICAL REGULATION ISSUES IN THIS CASE EXEMPLIFY THE JURISPRUDENTIAL PROBLEMS ENGENDERED BY *ROE v. WADE*.

This Court has developed an abortion jurisprudence which minimizes one salient fact about abortion: regardless of when it is performed, abortion is a surgical procedure that has consequent medical risks and complications. Under *Roe v. Wade*, it was supposedly within a state's authority to regulate abortion because such regulation served legitimate interests in health and safety *and* in maintaining medical standards. 410 U.S. at 155. That supposition has been largely ignored in the face of consistent efforts by states to assert those interests.

In part, the state's interest in ensuring high standards for the medical profession also advances the protection of maternal health. *See, e.g., Akron v. Akron Center for Reproductive Health*, 462 U.S. at 428-29 (assuming without discussion some relation of the two interests); *Roe v. Wade*, 410 U.S. at 163. The maintenance of medical standards is also related to the state's interest in protecting the unborn child. *See Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 486 (1983) (upholding second physician requirement). But beyond these aspects, the interest in regulation of the medical profession by itself justifies reasonable supervision of the physician-patient relationship throughout pregnancy under the state's welfare authority.[25] *See, e.g., Connecticut v. Menillo*, 423 U.S. 9, 11 (1975) (*per curiam*) (upholding physician licensing requirements); *Planned Parenthood v. Danforth*, 428 U.S. at 67 (upholding informed consent requirement); *see also Akron*, 462 U.S. at 460 and nn. 6 & 7 (O'Connor, J., dissenting).

A. The Abortion Industry Has Been Arbitrarily Exempted From Effective State Regulation.

"I had thought it clear," Justice White wrote in *Thornburgh*, "that regulation of the practice of medicine, like regulation of other professions . . . , was a matter peculiarly within the competence of legislatures . . . ." 476 U.S. at 802 (White, J., dissenting); *see also id.* at 783 (Burger, C.J., dissenting). And indeed, before the Court in *Roe v. Wade* threw into doubt constitutional principles it had previously espoused, *id.* at 814 (O'Connor, J., dissenting), regulation of the medical profession in the interest of public welfare was not only a legislative prerogative but a public duty. *See generally Semler v. Board of Dental Examiners*, 294 U.S. 608, 612 (1935). Viewed in this light, Pennsylvania's informed consent, waiting period, and parental and spousal notification requirements are valid exercises of state authority to regulate abortion.[26]

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[25] The authority of a state to license and regulate the practice of medicine is a "vital part of a state's police power." *Barsky v. Board of Regents*, 347 U.S. at 449. *See Bigelow v. Virginia*, 421 U.S. 809, 827 (1975). A licensed physician has no right to practice medicine according to his or her own unfettered judgment but rather is subject to reasonably exercised but extensive authority. *Whalen v. Roe*, 429 U.S. 589, 604 (1977); *see Friedman v. Rogers*, 440 U.S. 1, 9-10 (1979) (Powell, J.) (first amendment interest in medical service name). *See also Brophy v. New England Sinai Hospital*, 398 Mass. 417, 497 N.E.2d 626 (1986); *In re Guardianship of Grant*, 109 Wash.2d 545, 747 P.2d 445 (1987), and cases cited therein (states' interest in the integrity of the medical profession).

[26] Pennsylvania Abortion Control Act, 18 Pa. Cons. Stat. Ann. §§ 3205-3206, 3209 (West 1983 & Supp. 1991).

1. *Informed Consent.*

One classic application of the state's regulatory authority over the medical profession has always been the protection of a citizen's right to be informed before consenting to any surgical procedure. In *Dent v. West Virginia*, 129 U.S. 114, 122 (1889), this Court observed:

> The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as deception and fraud.

Accord Meffert v. Packer, 66 Kan. 710, 714 (1903), *aff'd mem.*, 195 U.S. 625 (1904). Consistent with this Court's decision in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*, state legislatures have not hesitated to act when they find that the medical community is not providing minimally adequate information to patients.[27]

New York, for example, requires that information be provided to pregnant women about the potential adverse impact of medication used during pregnancy and delivery,[28] and to parents about metabolic disorders in their newborns.[29] Florida has enacted legislation designed to guard against too frequent use of electroconvulsive (shock) therapy by adding new consent requirements.[30] Several states have enacted laws requiring that physi-

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[27] *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 750-51, 765 (1976).

[28] N.Y. Public Health Law Ann. § 2503 (McKinney 1985). This gives the woman the right to be informed, in advance of delivery, of the drugs that the physician expects to use during pregnancy and at birth.

[29] *Id.* § 2500-a (McKinney 1985 & Supp. 1992).

[30] Fl. Stat. Ann. § 458.325 (West 1991).

cians provide vicims of breast cancer oral or written summaries of the various alternative treatments prior to assent to any particular procedure.[31] More recently, a number of jurisdictions have enacted legislation requiring that patients be adequately informed before undergoing testing for the human immunodeficiency virus (HIV).[32] These are examples of measures that directly affect the physician-patient relationship by shaping the content of their dialogue.

It follows that Pennsylvania acted well within the authority traditionally accorded to states in this area when it enacted the informed consent statute.[33] In *Akron v.*

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[31] *See, e.g.*, Fl. Stat. Ann. § 458.324(2) (West 1991); *see also* N.Y. Public Health Law Ann. § 2505 (McKinney 1985) (requiring information about infant nutrition and breast-feeding); Mass. General Laws Ann. c. 123, § 23 (West Supp. 1991) (regarding informed consent by mental patients to shock treatment or lobotomy).

[32] Ala. Code § 22-11A-51 (Michie Supp. 1991); Ariz. Rev. Stat. Ann. § 20-448.01 (West Supp. 1991); Colo. Rev. Stat. § 10-3-1104.5 (Supp. 1991); Fl. Stat. Ann. § 381.004 (West Supp. 1992); Hawaii Rev. Stat. Ann. § 325-16 (Michie 1991); Ind. Stat. Ann. §§ 16-8-7-6, 16-8-7.5-14 (Burns 1990); Ky. Rev. Stat. Ann. §§ 214.181, 214.625 (Michie 1991); Md. Health Gen. Code Ann. § 18-336 (Michie 1990); N.H. Rev. Stat. Ann. § 141-F:5 (1990); N.M. Stat. Ann. § 24-2B-2 (1991); N.D. Cent. Code Ann. §§ 23-07.5-02, 23-07.5-03 (Michie 1991); Or. Rev. Stat. § 433.045 (1991); Va. Code Ann. § 32.1-37.2 (Michie Supp. 1991); Wis. Stat. Ann. § 146.025 (West 1989 & Supp. 1991).

[33] The parental consent and spousal notification requirements are similarly within the State's authority. Our legal tradition strongly endorses and preserves the mutual support and interdependence of family members—goals served by the Pennsylvania statutes. Society owes much of its stability to the strength of the family and has a vital interest in preserving family integrity. "The intangible fibers that connect parent and child have infinite value. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases." *Lehr v. Robertson*, 463 U.S. 248, 256 (1983). Indeed, "the Constitution protects the sanctity of the family precisely because the institution

Akron Center for Reproductive Health, this Court found unobjectionable certain information relevant to an informed choice, *i.e.*, the status of one's pregnancy, the availability of community and other resources, the existence and efficacy of alternatives to abortion and public assistance, and the particular risks and benefits of options available to the woman. 462 U.S. 416, 445-46 & n.37 (1983). The kind of information Pennsylvania would require be provided to pregnant women seeking an abortion, like the information described in *Akron*, is "the kind of balanced information . . . all could agree is relevant to a woman's informed choice." *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. at 830 (O'Connor, J., dissenting).

2. *24-Hour Waiting Period.*

The information which Pennsylvania law requires be provided to a pregnant woman seeking an abortion, standing alone, does not ensure that her *consent* will be truly informed. For this to occur, a woman must have a meaningful opportunity to consider all the information she has been given and make a decision based on it. The Pennsylvania statute preserves that opportunity by requiring that 24 hours lapse from the time information is provided until the abortion is performed. The 24-hour waiting period is an attempt to ensure that the provision of information will not be a merely *pro forma* requirement, but will allow for genuine reflection on the woman's part. Except perhaps in cases of medical emergency,[34] patients contemplating a life-affecting medical procedure

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of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Moore v. City of East Cleveland*, 431 U.S. at 503.

[34] The 24-hour waiting period does not apply in cases of medical emergency. Pennsylvania Abortion Control Act, 18 Pa. Cons. Stat. Ann. § 3205.

wisely take some period of time to consider their options.[35] Physicians often insist on as much.[36]

Even possible "delay[s] of a week or more" [37] did not lead this Court to invalidate a parental notification and judicial bypass statute. *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990). The 24-hour waiting period should not be troublesome to this Court in light of its holding that greater delays do not result in a *de facto* violation of the Constitution. The waiting period furthers a legitimate state interest; it protects patients who otherwise would not be provided, or would not avail themselves of, the opportunity of taking even a brief period of time to weigh information before making a decision.[38] To the extent that some women, after contemplating their options, decide against aborting their children, the waiting period also furthers the state's compelling interest in protecting unborn life.

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[35] Requiring a brief waiting period for major life-affecting medical procedures is not unique to the abortion context. For example, Medicaid regulations for women having sterilization procedures require that "at least 30 days . . . have passed between the date of informed consent and the date of sterilization . . . ." 42 C.F.R. § 441.253(d) (1991). *See also* 42 C.F.R. §§ 441.257(a), 441.258 (1991); 42 C.F.R. Part 441, Subpt. F, App. (1991) (requisite consent form and physician's statement showing that sterilization was performed 30 days or more after the date of consent).

[36] Indeed, petitioners themselves routinely allow some time between a woman's first contact with their clinics and the abortion. *See, e.g.*, 744 F. Supp. at 1335 (options counseling consists of several hours of group sessions); *id.* at 1336 (abortions usually scheduled within one week); *id.* at 1337 (options counseling only available on Tuesdays and Thursdays); *id.* at 1340 (often a one to two week wait to obtain an appointment for an abortion).

[37] *Hodgson v. Minnesota*, 648 F. Supp. 756, 763 (D. Minn. 1986).

[38] Chopko, *"Webster v. Reproductive Health Services:* A Path to Constitutional Equilibrium" 12 Campbell L.R. 181, 216 (Spring 1990).

B. States' Interests In Health And Medical Standards Are Especially Important To The Unborn Child.

Although *Roe v. Wade* held out the prospect of a compelling state interest in the life of the unborn child,[39] it was the *Webster* case that finally offered realistic support for that concern. 492 U.S. at 499-522. Throughout other decisions of this and other courts, this compelling interest has been acknowledged, though not always protected, in varying degree and in differing language.[40] In recent years, however, there has been a new term applied to the unborn child—a term that comes from outside the abortion debate and with which none of the advocates can legitimately disagree. That term is *patient*. *Williams Obstetrics* vii (J. Pritchard & P. MacDonald 16th ed. 1980).

In the 1980's, both the scientific literature[41] and the popular press[42] have heralded the latest medical advances

[39] *Roe v. Wade*, 410 U.S. at 163.

[40] The use of different terminology by judges and advocates on all sides of the abortion debate is itself a juridical phenomenon. All engaged in these cases have, consciously or unconsciously, adopted the theory that control of the language determines the outcome of the matter. One of the most misleading labels found in the cases is the adjective "potential" as applied after conception. *See, e.g., Webster*, 492 U.S. at 515-16, 519; *Roe*, 410 U.S. at 150-64. Prior to conception, the phrase "potential human life" *might* have some logical relevance when referring to the ovum and the sperm. At conception, however, that potential has been realized. Life exists, and it can only be human. The debate may rage over whether to call this life a fetus or a baby, but actual human life, fully capable of further development, clearly exists. No human being exactly like this one has existed before, and none like it will be conceived ever again.

[41] *See, e.g.*, Daffos, *et al.*, "Prenatal Management of 746 Pregnancies At Risk for Congenital Taxoplasmosis," 318 *New Eng. J. Med.* 271 (Feb. 4, 1988); *Neonatal-Perinatal Medicine: Diseases of the Fetus and Infant* (A. Fanaroff & R. Martin 4th ed.) (1987); B. Spirt, L. Gordon & M. Oliphant, *Prenatal Ultrasound: A Color Atlas With Anatomic and Pathologic Correlation* (1987).

[42] *See, e.g.*, Henig, "Savings Babies Before Birth," *The New York Times* (Feb. 26, 1982) at 18 (Magazine).

in the field of *in utero* diagnosis and treatment. The technology that has led the way to many of these advances is ultrasonography. Using ultrasound signals, physicians are able to scan the womb, producing a sonogram or television-like live image of the child in the womb.[43] With ever-increasing refinements in technique and equipment, they can visually diagnose the baby's condition and, if necessary, perform highly delicate surgical and other procedures. Not only are the infant's external features discernible, but internal organs, heartbeat and blood flow can be examined, and gestational age may be determined.[44]

Innovative treatments now mean that conditions which previously could have proved crippling or fatal to the newborn infant are being treated before birth.[45] Babies delivered prematurely, with extremely low birthweight, are being saved by new high-technology therapy.[46] Maternal behavior and enyironmental conditions that can affect the development of the unborn child are being studied and treated.[47] Fetal surgery is not only increas-

[43] Chervenak, *et al.*, "Current Concepts: Advances in the Diagnosis of Fetal Defects," 315 *New Eng. J. Med.* 305-306 (July 31, 1986).

[44] One unexpected but welcome byproduct of the sonogram is its tendency to promote parental bonding with the prenatal child, even in the earliest stages of pregnancy. Fletcher & Evans, "Sounding Boards: Maternal Bonding in Early Fetal Ultrasound Examinations," 308 *New Eng. J. Med.* 392 (Feb. 17, 1983). Once they have seen the living human being inside themselves, some mothers immediately forego thoughts of abortion. *Id.* For this very reason, some abortion supporters openly advise against allowing the mother to see the baby's image for fear she will be discouraged from having an abortion. "Warns of Negative Psychological Impact of Sonography in Abortion" *Ob. Gyn. News* (Feb. 15-28, 1986). Those who advise this course clearly place a higher priority on maximizing abortions than on informed consent or "freedom of choice."

[45] Kolata, "Fetuses Treated Through Umbilical Cords," *The New York Times* (Mar. 29, 1988) at C3.

[46] Callahan, "How Technology is Reframing the Abortion Debate," *Hastings Center Report* 33-34 (Feb. 1986).

[47] *Id.* at 36.

ing, but can even be accomplished by removing the baby from the womb, operating, and then returning the child until the pregnancy comes full term.[48] Such medical achievements have caused at least one defender of *Roe* to admit that "the same skills that can be used to rescue extremely premature newborns can be brought to bear in these cases [saving aborted fetuses]."[49] Thus medical science has reached a point where the fetus is a patient for all purposes, not only *in utero* but post-abortion as well. This medical realization should be reflected in proper legal recognition of the unborn child's unique status.

In one oft-quoted passage from *Harris v. McRae*, this Court noted that abortion is "inherently different from other medical procedures" precisely because it terminates a life.[50] And in *Ashcroft*, Missouri's requirement that a second physician be present to try to save the infant victim of a third-trimester abortion was upheld as a legitimate exercise of state regulation. 462 U.S. at 485. In the *Webster* case, the Chief Justice, in abandoning *Roe*'s trimester approach, said:

> That framework sought to deal with areas of medical practice traditionally subject to state regulation, and

[48] Longaker, *et al.*, "Maternal Outcome After Open Fetal Surgery," 265 J.A.M.A. 737 (Feb. 13, 1991); Harrison, *et al.*, "Successful Repair in Utero of a Fetal Diaphragmatic Hernia," 322 *New Eng. J. Med.* 1582 (May 31, 1990); "Occasional Notes: Fetal Treatment 1982," 307 *New Eng. J. Med.* 1651 (Dec. 23, 1982); "Medical Progress: Pediatric Surgery," 319 *New Eng. J. Med.* 94 (July 14, 1988). *See also* Blakeslee, "Fetus Returned To Womb Following Surgery," *The New York Times* (Oct. 7, 1986) at C1.

[49] Callahan, *supra* note 46, at 35. The author then raises the question of whether a woman who chooses to abort is entitled only to the end of pregnancy or to a dead fetus. *See Wynn v. Scott*, 449 F. Supp. 1302, 1321 (N.D. Ill. 1978) ("It never could be argued that she has a constitutionally protected right to kill the fetus."), *appeal dismissed, Carey v. Wynn*, 439 U.S. 8 (1978), *aff'd*, 599 F.2d 193 (7th Cir. 1979).

[50] *Harris v. McRae*, 448 U.S. 297, 325 (1980).

> it sought to balance once and for all by reference only to the calendar the claims of the State to protect the fetus as a form of human life against the claims of a woman to decide for herself whether or not to abort a fetus she was carrying.

492 U.S. at 520. Because Pennsylvania's statute falls within the traditional regulation of medical practice, the claim of a right to abort, if any, must be balanced against the unique status of the unborn child as a *patient*, not against the calendar.

Viewed as a patient, the unborn child is entitled to consideration "of all attendant circumstances—psychological and emotional as well as physical—that might be relevant to the well-being of the patient." *Colautti v. Franklin*, 439 U.S. at 394. The ramifications are obvious and compelling. Prenatal patients cannot protect themselves; cannot be informed or give consent; cannot be made to understand their condition, nor can they choose treatments. Considered from this perspective, the state should be afforded more, not less, latitude to regulate or prevent the surgery known as abortion.

C. States Must Be Allowed To Protect Patients From The Adverse Effects Of Abortion.

Another reason that greater state regulation of abortion is called for is to minimize its other known adverse effects. Two of the many tragic ironies of the jurisprudence begun with *Roe v. Wade* are: (1) it predicted great benefits would flow from abortion, yet never subsequently faced the many resulting detriments; and (2) it held that a woman's health was only of interest to the state after she had been pregnant for at least three months. 410 U.S. at 163. The flaw in this latter point was illustrated by Justice O'Connor in *Akron*:

> The fallacy inherent in the *Roe* framework is apparent: just because the State has a compelling interest in ensuring maternal safety once an abortion may be more dangerous than childbirth, it simply does not

follow that the State has no interest before that point that justifies state regulation to ensure that first-trimester abortions are performed as safely as possible.

462 U.S. at -460. The fallacy identified by Justice O'Connor is remedied by protection of the interest in life throughout pregnancy. *Webster*, 492 U.S. at 520. Indeed, as should have been obvious to the *Roe* majority, protection of women's health is of vital concern at all times. Pregnancy should only heighten, not weaken, this concern. And, as has been demonstrated in the past nineteen years, abortion should raise the level of legitimate state concern even higher.[51]

Despite knowledge of abortion's adverse consequences, persons supporting an "abortion privacy right" often mischaracterize the issue as though it involved only a woman's right to "keep the government out of the bedroom." [52] Some further contend that women's childbearing capacities have been improperly used as a justification for discrimination against them, and that the only effective remedy for this sexism is women's assumption of sole control over every aspect of their reproductive capabilities, including unfettered access to abortion.[53] These assertions are not

[51] There is little doubt that the abortion decision is life-affecting. This Court has noted that the "emotional and psychological effects of the pregnancy and abortion experience are markedly more severe in girls under 18 than in adults." *H.L. v. Matheson*, 450 U.S. 398, 411 n.20 (1981). The American Psychological Association reported in 1986 that "[c]ompared with adults, adolescents appear to have somewhat more negative responses on average following abortion." *Adolescent Abortion: Psychological and Legal Issues*, Report of the Interdivisional Committee on Adolescent Abortion, American Psychological Association (Univ. of Nebraska Press 1986).

[52] Clift, King, Gonzalez, "Taking Issue With NOW," *Newsweek* 21-22 (Aug. 14, 1989). In the same article a Planned Parenthood consultant comments: "Framed that way, it becomes the all-American message."

[53] *See, e.g.*, Steinem, "A Basic Human Right," *Ms.* 39 (Aug. 1989); B. Harrison, *Our Right to Choose* 199 (1983).

only misleading, they are detrimental to women's dignity, health and well-being.[54] What should be a paramount concern for the health and welfare of the patients—both mother *and* child—is lost.

The widespread practice of abortion since *Roe*, premised on a popular misconception that constitutional privacy equals personal autonomy, has increased pressure upon women to abort for a variety of discretionary reasons. Laboring against these pressures are those who willingly explore numerous alternative means for handling difficult pregnancies.[55] The answer to the problems caused by abortion does not lie in making abortion more available but in efforts to ensure that no woman need ever resort to abortion. The process of change will not be easy. Worthwhile solutions never are. This Court can help begin the turn from a society that condones abortion while ignoring its insidious consequences, to one that protects the health of its citizens and respects the lives of their offspring. Restoring the traditional authority of Pennsylvania and other states to regulate the medical profession in order to achieve these goals is an important first step.

[54] *See* note 7 and accompanying text, *supra*.

[55] These efforts include, *inter alia*, eliciting additional emotional and financial support from the father, family, and friends, additional social welfare support for families, better employer child care policies, and greater adoption services. National Conference of Catholic Bishops, *Pastoral Plan for Pro-Life Activities: A Reaffirmation* (Nov. 1985).

CONCLUSION

This Court should reconsider its essential constitutional and jurisdictional holdings concerning abortion. The judgment of the court of appeals finding the Pennsylvania Abortion Control Act, Sections 3203 (definition of medical emergency), 3205 (informed consent), 3206 (parental consent), 3214(a) (reporting requirements) and 3207(b) and 3214(f) (public disclosure of clinics' reports) constitutional should be affirmed. The judgment of the court of appeals finding Section 3209 (spousal notice) unconstitutional should be reversed.

Respectfully submitted,

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April 6, 1992

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Nos. 91-744 and 91-902

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA,

Petitioner,

v.

ROBERT P. CASEY, Et Al,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF JAMES J. CROOK AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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MOTION FOR LEAVE TO FILE BRIEF OF JAMES J. CROOK AS *AMICUS CURIAE* SUPPORTING RESPONDENTS AND REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 37.2 of the Rules of this Court, Amicus James J. Crook respectfully moves the Court for leave to file the attached brief *amicus curiae* in support of Respondents. Counsel for Respondents, through his agent, Ms. Kate Mershimer, has replied to Movant's letter requesting consent to file his brief *amicus curiae* stating that, if given, consent would not

be forthcoming until early March of 1992 in order for Counsel to first review other such *amicus* briefs. Ms. Andrea Miller, agent for Ms. Kathryn Kolbert, Counsel for Petitioner, had given verbal consent to the filing of this brief *amicus curiae* of James J. Crook, however, suggested consent first be put in writing. This request was put in writing. Subsequently, Counsel for Petitioner, in a February 3, 1992 conversation with James J. Crook, clarified that verbal consent had not been given by her office and further stated that consent, if given, would not be forthcoming until March or April of 1992. No consent from Counsels for Petitioner and for Respondents has been received by Movant at this time. Movant admits to an early filing of this motion. In the event consent is subsequently received from Counsels for Petitioner and Respondents, a motion to disregard the Motion of James J. Crook For Leave to File Brief *Amicus Curiae* will be filed with dispatch.

INTEREST OF JAMES J. CROOK

James J. Crook is a citizen of the United States with acute ethical, philosophical, theological and humanitarian interests **and ordinary compassion** in the outcome of the Instant Case before this Honorable Court as the outcome may literally preserve or destroy the present and future lives and birthrights of millions of innocent, unborn American citizens and members of the human race. This prospective *amicus curiae* has previously sent **an essay** to each Justice of the United States Supreme Court on the abortion issue and is now proceeding with these previous perceptions plus additional insights in the form of a proposed *amicus curiae* brief so that the perceptions herein may possibly be considered as a helpful addition to the briefs filed and/or to be filed by the Respondents before this Honorable United States Supreme Court.

THE QUESTION PRESENTED IN THE INSTANT CASE

The question presented in the Instant Case is a matter of continuing importance to James J. Crook. Briefly stated, the question is whether **the notion of the sacredness of human existence, *at all stages***, should be **entrenched** philosophically in our Society and established as a legal doctrine with reference to the **fetal rights** of the **innocent**, unborn, **living** person as an extension of and an addition to the presently evolving Civil Rights Movement in this Nation, thereby **entitling this class of people to the full and *equal protection of the law*.**

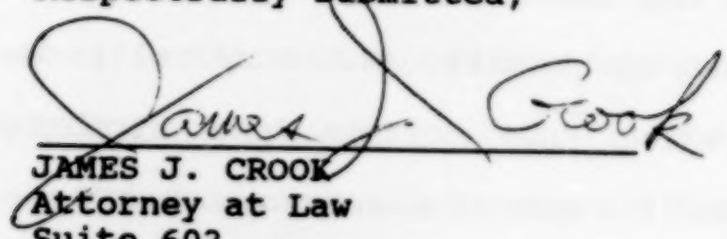
The interest of James J. Crook is thus predicated on the substantial and *far-reaching* consequences that any decision in the Instant Case may have regarding any limitation, placed by legal precedent or fiction, on the dimension of innocent human existence. As a side editorial, the long lists of childless parents **desperately** seeking to adopt unwanted children has always been an available option for the

pregnant, pro-choice female preferring not to keep the unborn child, without, in our society, having to legally and corporally destroy, by abortion, the notions and birthright of a person's **right of existence**. For these reasons, James J. Crook requests an opportunity to present his views on the Instant Case before this Court by Brief *Amicus Curiae* and oral argument.

CONCLUSION

For the above stated reasons, James J. Crook respectfully urges the Court to grant this motion for leave to file the accompanying *amicus curiae* brief in the Instant Case in support of the position of the Respondents.

Respectfully submitted,



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Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

THE QUESTION PRESENTED 2

SUMMARY OF ARGUMENT 2

ARGUMENT 3

A. INTRODUCTION 3

B. ANALYSIS OF THE 1973 *ROE v. WADE* DECISION 4

C. RIGHT TO PRIVACY AS IRRELEVANT TO NOTIONS OF THE BEGINNING OF HUMAN LIFE ENTITLED TO FULL AND EQUAL PROTECTION OF THE LAWS 5

D. THE FALLACY OF THE "VIABILITY" TEST FICTION AS THE STARTING POINT TO ACTIVATE EQUAL PROTECTION OF THE LAW AND THE RIGHT TO EXISTENCE OF THE LIVING, UNBORN HUMAN BEING 16

E. *ROE v. WADE* AS INTRODUCTION OF ARBITRARINESS INTO THE LAW 21

F. AN ENDANGERMENT OF SOCIETY AND CIVILIZATION RESULTED FROM THE *ROE v. WADE* DECISION 26

CONCLUSION 31

TABLE OF AUTHORITIES

CASES: **Page**

Jane Roe, et al v. Henry Wade,
410 U.S. 113, 35 L.Ed.2d 147;
93 S.Ct. 705, reh. den.,
410 U.S. 959, 35 L.Ed.2d
694, 93 S. Ct. 1409 3

CONSTITUTIONAL PROVISIONS:

Constitutional Law,
Section 82 4

STATUTES:

Texas R. Civil Statutes,
Article 1196 5

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BRIEF OF *AMICUS CURIAE* JAMES J. CROOK IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*

Axiom: "Either innocent human existence is sacred or it is not."

The interest of *amicus curiae* James J. Crook, as set out in the motion accompanying this brief, is an ethical, philosophical and theological concern with reference to the legal right to human existence, **especially of the innocent, living, nonviable, unborn person.** The

amicus curiae brief is intended, in a helpful sense, to present a clear direction and **simple overview** of the basic social issues inherent in the Instant Case without an in-depth involvement in the apparent **quagmire of legalities** which has presently brought this case before the United States Supreme Court.

THE QUESTION PRESENTED

Whether the laws of the Federal Government, the States, counties and municipalities of the United States of America can Constitutionally place **any legal limits**, or arbitrary limits, upon the right of existence of **innocent, unborn,** ***living*** **human beings**, regardless of the individual's particular stage of existence or development **prior to birth**, including the non-viable.

SUMMARY OF ARGUMENT

The sacredness of human existence and legality of innocent human beings, at any stage,

including the unborn, nonviable, living person, cannot be denied, for to do so would be to fracture the fundamental notions and basic principles of civilization.

ARGUMENT

A. Introduction

In 1973, the Supreme Court of the United States, in the case of *Jane Roe v. Henry Wade*, 410 U.S. 113, 35 L.Ed.2d 147, 93 S.Ct. 705, reh. den., 410 U.S. 959, 35 L.Ed.2d 694, 93 S.Ct. 1409, reversed an 1854 anti-abortion law in Texas, of which similar laws existed in the majority of the States, that had **endured** the wisdom of time and intellectual and scientific contemplation for over a century. The Opinion written for the Majority Court by Justice Blackmun struck down the Texas law and declared that a law prohibiting abortion at any stage violated the Due Process Clause of the Fourteenth Amendment of the *United States Constitution* regarding one's **liberty** which, the

Opinion declared, included a woman's **qualified right to choose to end a pregnancy**, but that the right was **not** absolute. Justice Blackmun further stated that subsequent to the first trimester of pregnancy, States could only **regulate** the method of abortion, but not stop it. And finally, the Opinion stated that **only** after the living child reached viability (the ability to live, grow, and develop *on its own*) could the States proscribe abortion.

B. **Analysis of The 1973 *Roe v. Wade* Decision**

The Opinion restated Constitutional Law, Section 82, which, in defining **person**, stated "the word 'person' as in the Fourteenth Amendment **does not include the unborn.**" However, the Opinion stated that **"the State has a legitimate interest in protecting the potentiality of human life which interest grows and reaches a *compelling* point."** The High Court then, recounting the ancient history of abortion law which, in an inordinate sense, occupies

almost half the Opinion, **appeared** to search for **direction** or justification for **spreading** the responsibility for its **monumental landmark pro-abortion decision.** The Supreme Court, in its 1973 Opinion, **concluded** that viability of the unborn child may not be reached until the twenty-sixth or twenty-eighth week of pregnancy. The absolute-first-trimester right to abortion was medically grounded on the rhetoric that abortion was **safer** to the mother versus the second or third trimester of pregnancy, without any mention of the rights of the unborn child.

C. **Right to Privacy as Irrelevant to Notions of the Beginning of Human Life Entitled to Full and Equal Protection of the Law**

When the dust cleared, the United States Supreme Court, referring to *Roe v. Wade*, stated that Article 1196 of the Texas Code proscribing abortion at any stage "must fall as Unconstitutional." In reading the text of the Opinion, it appears that the right of privacy interpreted as a (remote) dimension of

"liberty," as protected by the Fourteenth Amendment's Due Process Clause, was the legal hook on which the Supreme Court hung the hat of its Opinion, but in reality, **the right of privacy appeared to be irrelevant to pregnancy, notions of the *beginning* of human life, and the medical, surgical procedure called abortion.** Further, the Court's adoption of Constitutional Law, Section 82's definition of a person as "not including the unborn," is an incongruity, and apparently anarchistic now **as the 1973 Landmark Opinion itself recognized the unborn person as a person past the viability stage** of pregnancy, legally protected, thereby legally and historically **activating** the Civil Rights of the Unborn Person in that instance, under the laws of the United States, entitling the **unborn** person to "Equal Protection Of The Law."

The Opinion further appears to be incongruous when declaring that the State has a "legitimate interest in protecting the **potentiality** of human life ... which interest

grows and reaches a compelling point" as if to declare that a four-to-six-month old or younger, nonviable, alive, **unborn human being** has **no potentiality** for human life, an arbitrary and unreasonable exercise of logic and reason, and an indulging in a scientific fantasy divorced from reality when considering the **very** healthy and "kicking", normal, four to six month old child **alive and well** in the womb, and the younger child with a heartbeat readily discernible, **a reality** to which almost **every** woman who has given birth can attest. This is an **arbitrary fiction,** at best.

The nonviable standard appears to be shallow and without substance. **Abortion is the real limit on the potentiality of human life and not nonviability,** just as homicide is the limiting of the potentiality of human life **beyond** the viability or birth stage of a human being. Within the framework of this concept and perception and aside from illusion and fiction, abortion and homicide are true synonyms, as they

both describe and define the actual "killing" of a human being.

To offer an example regarding the potentiality for human life, when a husband determines that his wife is pregnant, is the child not real and are their joys based on a fiction and not the existence of a real human life? If based on a fiction, what is the reality basis of the couple's jubilant acknowledgment of the child?

It appears that the more realistic, **honest** and non fictitious standard to measure the "movement" of the **potentiality** for human life should be that **the potentiality for human life commences at the Instant of Conception.** This appears to be in conformity with one of the definitions in Webster's New Collegiate Dictionary defining viability as "capable of growing or developing **-seeds, eggs.**" A human pregnancy that **can** result in the birth of a human being-short of a **fiction** admitted to be **arbitrarily created** regarding the "moment" of

potentiality for human life - is the **true** test of the potentiality of human life. The arbitrary selection of when human life was legally entitled to begin, short of conception, was an exercise in incredible insensitivity and arrogance and so monumental a gesture that it assumed a **deity dimension** in its far-reaching results since the 1973 Opinion which ended the existence of literally millions of unborn, **living** people tantamount to a United States ***doctrine of legal genocide of the innocent,*** probably the **first** such instance in American history. The awesome result of this arbitrary and **nonvisionary nonviability standard,** admittedly to have been whimsically "plucked out of the air," has been nothing less than inconceivable and staggering to the imagination, if not mind-numbing. ***The issue presently before the Court in magnitude is probably the most profound issue in human history*** and must be dealt with **correctly** to avoid a continuing tragedy of unimaginable proportions.

Considering the pro-abortion rhetoric, it is only **the insensitive and unenlightened**, for personal convenience and personal comfort's sake alone, **regardless of a concern for the rights of other persons**, including the living, **unborn** person, viable and nonviable alike, who are **hypocritical** and less than honest or, in a mitigating sense, their "senses" are **truly** asleep in this instance. In considering these people, **their pro-abortion rhetoric - staunchly** refusing to recognize the biological reality of the unborn, living and existing person inside of a woman - **is merely a *convenient disguise* designed to obscure biological reality in order to socially and psychologically justify the homicide referred to as abortion** which was recently legalized by the 1973 Decision.

Even with the pro-choice individuals, however, most of them among us are not to be faulted as their vision is usually blinded and has been obscured by the pro-abortion rhetoric. If they could obtain a **clear vision**, beyond the

rhetoric, of what they are really, biologically engaged in regarding abortion, their natural, **instinctive and ordinary human compassion**, it is felt, would prevent them from doing so. As with many social causes **and social ills**, the problem again and almost invariably seems to be one of vision or the lack thereof. **Perception carved by faulty rhetoric *becomes* one's reality.**

Regarding pregnancy and abortion as with notions of one's **limited personal rights** to one's own comfort, the **critical misperception** occurs when the notion becomes one in which we are dealing with one person and not ***two separate people,*** being the mother and the unborn **living** child nourishing itself from its mother's "life support system" **within the womb** much the same as the identical living child **subsequently** nourishing itself from its mother's breasts **outside the womb.**

The reality of the existence of two separate people becomes a clear and a most compelling biological scientific fact, divorced

from theory, when realizing that the fertilized ovum of a mother can be taken from her body **and transplanted** into another woman's body **and achieve birth**. The scientific reality, hence, becomes undeniable that the mother is ***just*** **the life support system** to the separate person, the unborn, existing individual inside of her, and nothing more. From the successful transplantation procedure now established by **medical science**, it is a biological fact that the mother and the child are not one in the same but two persons. This is a necessary and critical reality and perception and must be recognized and acknowledged in order to **substantively** consider and accurately assess, **with clear vision**, the socially profound issue now before this Most Honorable Court. Regarding the abortion issue, our limitation is only the limits of our vision. Scientific proof of the fertilized ovum and the mother being **two persons** rather than one appears to dispel the **fiction pushers'** argument that the nonviable child is

not really a human being. In the face of current medical science, that "convenient", tongue-in-cheek fiction now has as much persuasive force as convincing one that an apple is really a doorknob, that black is white, and that a nonviable, unborn, **living** human being is really a kangaroo. The fact that Medical Science is now removing organs and parts from unborn, nonviable people for transplantation to born people, indicates the unborn, nonviable person is very much a living human being. At some compelling point, the normal rational mind repulses such fantasies so divorced from reality.

It appears that **society's safe solution and focus, whether it be from individual preference or population control, is the "*prevention*" of new human existence through education and medical science, rather than its *extermination*.**

Even if one's personal comfort and privacy were relevant to abortion, for argument's sake,

there are also mothers whose privacy and personal comfort are limited and compromised by a child **already born**. Just as the mother's right to her personal comforts cannot exist as a **criterion** to limit the existence or legal rights of a one-week-old, living person, her choice of her limited right to her personal comfort similarly cannot be a criterion for limiting the existence and legal rights of the unborn, **living, viable or nonviable** person either. Sometimes perception for many of us is obscured by rhetoric and passion and we need to "blink" back into reality. As an axiom, the preference of one's limited right to one's own personal comforts cannot be a sound reason for limiting or destroying the legal rights or existence of another human being. Such would be a dangerous, legal precedent, indeed. The only separating difference between the born and the unborn person is the shallow wall of the womb. Aside from that thin separating membrane, **both** young people **are alive** with one living in a ***water***

world and the other living in a ***world of air.***

The only exception to abortion should be when it places the life of the mother at risk. Abortion, **even in a case of rape**, should not be permissible because the child is living. The focus should be upon the living child's right to existence. Regarding the victim mother, this is one of the tragedies that we have to absorb, among others, for living in an imperfect world. The justification here is that Society obtains a very strong grip on the control problem invited when the law leaves even a small crack in the door which could endanger these innocent, unborn people. As a result, **Society is safer** by retaining the integrity of the principle of a reverence for all human existence, without exception. The merit of this view becomes clearer when considering that an innocent person involved in an automobile collision and losing a kidney could not take the kidney of another human being in existence, born or unborn and viable or nonviable. For this principal of

reverence to continue to protect Society, the focus must remain on the unborn living person's right to existence and not the victim mother. To elucidate, if the rape victim's unborn child was beyond the viability stage, even under the present law, the mother could not abort the child. For a permanent, effective solution to protect all members of society without exception, the principle must remain fully intact.

D. **The Fallacy of the "Viability" Test Fiction as a Starting Point to Activate Equal Protection of The Law and the Right to Existence of the Living, Unborn Human Being**

Another one of the definitions of viability in ***Webster's New Collegiate Dictionary*** **is "capable of living".** An in-depth consideration of the logic of the viability stage as the foundation upon which to activate the legal rights of the living, unborn person, makes it appear to be a **weak fiction at best.** Regarding the soundness

of this viability doctrine to justify prenatal genocide, are not the crippled among us, the individual entombed in an iron lung, the person on life support systems, the quadraplegics, the advanced infirm, the retarded, the paralyzed, and the insane nonviable? Does this mean that the nonviable persons among us are not entitled to any legal rights and are to be **stripped** of the birth right of existence? **Wouldn't this notion be a backslide of civilization into the jungle of our "beginnings" and a regression of social evolution?** Within this logical analysis, the legal validity of the nonviability test, regarding prenatal human life, **collapses.**

Stretching further now, substantively considering the **entire concept of viability,** since human **viability,** in some instances, is further **contingent upon new technology** such as "Preemies", prematurely born babies, whose survival is contingent upon neonatally, and astronauts who would be nonviable in space except for the same technological life

supporting systems, are these people truly nonviable also? Does this mean, in principle, that the nonviable people among us are disenfranchised from the concept of Equal Protection of The Law? **Regarding the worthiness of the nonviable**, one of the greatest astronomers of all time, a young American, still living, can barely move a muscle and, in a physical sense, is **absolutely nonviable**. If these nonviable persons mentioned are **not** legally disenfranchised based on nonviability which appears to be the case, then wouldn't it be **discriminatory**, arbitrary, and unreasonable to disenfranchise the nonviable, prenatal, **living** human being **based on nonviability**? Such a concept and notion regarding viability, in view of the above comments, appears to be patently unjust, arbitrary and grounded in the **illogical** as Justice Rehnquist pointed out in his Dissent.

A society that legally disenfranchises the nonviable individuals would be a cosmetic,

nonsubstantive, arbitrary and **unsafe** society, indeed. Even the notions of abortion due to preferred gender or abortion based on inconclusive amniocentesis tests - which is **whimsical**, genetic guessing especially in the degree of imperfection, **if any**, due to the vain parents who will only allow the life of a perfect child if there ever was such a thing, which again invites the same control problem referencing the corrupt among us - appear to be shallow and dangerous thinking. A young, popular, teenage actor in a current, successful television series wouldn't be here if his life and right to existence rested on a summary amniocentesis test. These social notions contain cosmetic treachery and represent a reappearance of that familiar social cancer - an absence of a reverence for human life - much the same as Adolf Hitler's notion of a world that only had room for an Aryan Race of perfect, blonde-haired and blue-eyed people. The only ethical, legal axiom is: *There is room for the*

imperfect individuals among us. This includes the born and unborn, viable and nonviable, alike. **The imperfect have their place.** If this is not true, then it cannot be said that anyone among us is legally safe for long in our ever changing society. **The civilized notion of the sacredness of human existence is the permanent anchor for a safe society in perilous times and in peaceful waters, as well.**

For the reasons stated, it is clear that the nonviability test cannot stand as a sound legal basis and logical justification upon which to deny Equal Protection of The Law and the **right of existence** to the unborn, **nonviable, living** human being. **In conclusion, *viability appears to be logically irrelevant to the right to human existence of the unborn person, non-viable and viable, alike***. If this is the case, then when do the rights of the unborn, **living** person begin? This question must be answered mercifully soon to deliver our Society from confusion, vexation, **anguish** and turbulence. It

appears there is and has always been **only one** obvious and same answer to this question. On revisiting the definition of viability as used by the Court in *Roe v. Wade* as **"the ability to live, grow, and develop on its own"**, can it even be accurately stated that a newborn person also qualifies under this viability standard? Can a newborn person really live and develop *on its own*? If not ultimately cared for by others, wouldn't the newborn child *also* die within a few days? Isn't the **newborn child**, hence by definition and analysis, non-viable also? In this sense, even a child **after having achieved birth**, does not qualify to the right of existence under the **ill-conceived, non-relevant** viability standard to activate the Civil Rights of the unborn, living, viable person. This arbitrary, nonviability fiction, more and more, appears to be *a quick fix* to the very perplexing abortion issue, indicating that vision on this profound issue has been **most difficult *and slow in coming***.

E. ***Roe v. Wade* As Introduction Of Arbitrariness Into The law**

It appears that **the first-trimester-absolute-standard-of-legally-allowing-the-killing-of-the-fetus (the unborn but *alive* child) rule** - (based, in a legally "stretching" sense, on a woman's right of privacy and an extension of that standard until the unborn child is six to six-and-a-half months old, declaring that, prior to that time, there is no **potential for human life**) - even by medical, scientific and layman standards, ***appears to have been "plucked out of the air,"*** as Supreme Court Justice Blackmun, who *authored* that **arbitrary standard**, according to recent news releases, *admitted to be the case*. Justice Rehnquist's dissent attacking the relevancy, logic, and soundness of the **legal basis** of the Court's **landmark decision** as involving the right to privacy, **appears to have merit.**

Even if the definition of liberty were extended to include the right to privacy, the

right is not an **unlimited** right as an unlimited freedom is tantamount to anarchy, because the right to privacy, or any right, **does not include the right to do whatever one chooses**, and it, like all rights, ends where the rights of another **person**, ***legally recognized***, begin. The very notion of civilization, by necessity, is **the concept of limited rights.**

For the protection of the mutual rights of everyone, one must, on occasion, suffer the discomfort of limited personal comforts and freedoms in order for the rest of society to be able to live in harmony. In this respect, the rights of the populace supersedes and are at a higher priority than one's right to his or her own individual, personal comfort. As an axiom, **one's preference for one's limited right to one's personal comforts cannot be allowed to compromise the legal rights of another person under *any* circumstances,** otherwise, the concepts of Due Process of Law and Equal Protection of the Law are only illusions. It is submitted

that this axiom also applies to the unborn, living, viable and nonviable person.

The **"moment" of potentiality of human life** seems to be the question before the United States Supreme Court in reconsidering *Roe v. Wade* as regards the 1973 legal precedent which allows the legal abortion (**extermination**) of unborn, nonviable, *alive* human beings. When *do* and when *should* the legal rights of the unborn human being begin?

It appears that **the new minority** group, now testing its legal rights in America's continuing **civil rights movement**, is *our* living, unborn people. It further appears that the new Subcategory of America's Civil Rights Movement now evolving in this Country is **fetal rights**. The thesis and **strong caveat** of this writer is that if the time, **legalistically** speaking, that an unborn person **or any person** can be destroyed, was **arbitrarily** selected or is arbitrarily selected, it can be arbitrarily selected **again** *and extended*, for argument's sake, conceivably

and alarmingly, to the *full length of pregnancy* and beyond pregnancy to the point of including the **infirm**, the **elderly**, the **retarded**, the **insane**, the **crippled** and the **genetically non-preferred**, depending upon the sentiment of the public and the political pressures of the times. Why is this more possibility than fantasy? It is **because the basic building block of civilization has been assaulted in the 1973 landmark decision** legalizing abortion. That building block is **a reverence for human life.**

Regarding a reverence for human life and historically speaking, once there is a legal "crack in the door", an **expansion** of the law usually follows as the crack lends itself to *multiple* future, legal interpretations by the Courts and, hence, **civilization itself is no longer safe**, as can be witnessed by the genocide in Cambodia and Nazi Germany **where the basic social necessity of a reverence for human life, without exception,** *appeared to be absent or misperceived*. The African-Americans experienced

this misperception and **irreverence** in this Country up until the recent Mid-Sixties, indicating that ***we, as a Society, are not far removed from this "social cancer"***, and **moral confidence** at the present time is not justified.

To be a **solid axiom**, either human existence is recognized as sacred or, legally speaking, it is not. ***There is no in-between.*** To rest the destruction of unborn, alive human beings - **especially the nonviable** due to the absence of logic supporting the viability extermination doctrine - on **an arbitrary standard**, admittedly "plucked out of the air" is, undeniably and logically, to introduce **acceptable arbitrariness** into the law. *In this event, the law itself is no longer safe.* This is exactly what happened in *Roe v. Wade* - an awkward and nervous position for the Champion of Due Process of Law in which to find itself during its up and coming **reconsideration** and future possible considerations of the *soundness* of its 1973 Decision legalizing abortion.

F. **An Endangerment of Society and Civilization Resulted from the *Roe v. Wade* Decision**

For argument's sake, **even if** there is no expansion of the non-reverence-for-human-life (at all stages) legal crack in the door, established in 1973 by the United States Supreme Court in the legalization of abortion, the arbitrary law is *unsafe* due to the **control problem** inherent therein. Who is to control the fraud invited by the 1973 Decision when the frustrated mother and fee-hungry doctor fabricate the eight or nine month old, unborn child to be under six months old and legally nonviable when aborted? Further, who is or would be inquiring? **To emphasize the *alarming seriousness* of this very real control problem**, amply documented by State Prosecutors, even under the **present law** legalizing abortion, using the-26-to-28-week-of-pregnancy viability standard, ***mass murder is and will be continually occurring*** because of this mother/physician corruption, previously mentioned. **The law is**

impotent to protect these human lives because ***"Pandora's Box" has been opened.*** There is no control and, historically, for the safety of society, when there is no control, the courts of this Country have always left the door slammed shut to those areas of the law in order to avoid the legal uncertainty that usually follows. The 1973 Landmark Decision unwisely departed from this major, fundamental legal doctrine and blew the top off of the United States Supreme Court's own legal Pandora's Box.

In addition, because the lack of control and inherent fraud, aforementioned, invite the killing of significant numbers of living, unborn human beings **past** the viability stage, human decency mandates that the Courts find a solution to where these **viable** unborn lives will be protected under our laws. Moral compulsion requires that the United States Supreme Court, upon whom the ultimate responsibility for these lives rests, engage the control problem in a way that will spare these viable and legally

recognized lives. There is only **one sure way** to achieve the control of this problem and that is the proscription of abortion.

The storm of confusion and the uncertainty of the law will continue for decades, if not generations, until all the pieces of what is left of the basic, civilized notion and concept of the sacredness of human existence, at all stages, born and unborn, viable and nonviable, are reaffirmed and put back in this legal "pandora's box". Thus, the lid will be slammed shut **permanently** by the United States Supreme Court *to any notion* of the non-sacredness of innocent human existence and an absence of a reverence for **any** human life being dangerously injected into our laws.

The Past has indicated a historical yo-yo of this **ancient issue** regarding the beginning of human life with the result that many past and present societies continue in uncertainty and confusion in their laws. The abortion-issue-historical yo-yo will **continue to vexate**

societies until a basic axiom is finally laid down. **The only irrefutable and unassailable axiom that seems to qualify to end the legal uncertainty and to render society *safe* is the social and legal recognition of the sacredness of human existence *at all stages* from its Inception.** It is assumed that this axiom would have more validity, certainly, with reference to **innocent human existence.** Only at this time will this vexating crack in the door be *slammed shut for good* for all future generations, and only then will the uncertainty in the law be removed, and a **reverence** for human existence, born and unborn, **viable and nonviable**, be established and anchored as a legal doctrine in the United States of America, and a **model axiom** created for other civilizations to emulate. This would be ***a Noble Act,*** indeed, and **an advancement of civilization itself.**

In terms of *birth control* and *population control*, **"prevention"**, to repeat, rather than **"extermination"** appears to be the most sensible,

safe, wholesome and only ethical **path to the solution** by a decent and guilt-free society.

As stated, it appears in the United States that another Subchapter of the American Civil Rights Movement has been born for **another minority** regarding the civil rights of the tens of millions of *innocent*, very much **alive** but unborn human beings - ***the fetal rights movement.***

At this moment, these *tens of millions* of innocent, **living**, unborn human beings, viable and nonviable alike, and *hundreds of millions* of future, unborn, living human beings **have no one truly protecting their lives** and have no Legal Guardian or Champion of their legal rights and rights to existence and safety, especially considering the control problem **invited** by the inherent fraud, except possibly the current Supreme Court Justices of the Highest Court in our Land. This is an **awesome, *enormous*, unenviable and overwhelming responsibility**, indeed.

CONCLUSION

For the reasons stated, the United States Supreme Court's decision in *Roe v. Wade* **must be reversed** and a United States citizen's legal right to abortion must be **outlawed in all instances** - at home *and abroad*, to prevent circumvention of the law, a civil rights violation against **an innocent, living, unborn person** entitled to the full and **equal protection of the law**, and an attack against humanity, and to insure the **safety** of all members of society - to re-entrench the axiom that ***the notion of the sacredness of human "existence" is the cornerstone of civilization.***

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CERTIFICATE OF SERVICE

I, James J. Crook, certify that a true and correct copy of the foregoing Brief *Amicus Curiae* was mailed, hand delivered or faxed to all Counsel of Record on this the 13th day of February, 1992.

JAMES J. CROOK

CERTIFICATE OF MAILING

I hereby certify, based upon my personal knowledge of such, that the original and 40 copies of the foregoing Motion For Leave To File Brief and Brief of James J. Crook as Amicus Curiae Supporting Respondents were deposited in a United States mailbox, with first-class postage prepaid, within the permitted time, on February 13th, 1992.

JAMES J. CROOK

SWORN TO AND SUBSCRIBED BEFORE ME, the undersigned notary public, on this the 13th day of February, 1992.

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April 23, 1994

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In the Supreme Court of the United States

OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, et al.,
Petitioners and Cross-Respondents,
vs.
ROBERT P. CASEY, et al.,
Respondents and Cross-Petitioners.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Brief of Catholics United for Life, Orthodox Christians for Life, National Organization of Episcopalians for Life, Presbyterians Pro-Life, American Baptist Friends of Life, Baptists for Life, Lutherans For Life, WELS Lutherans for Life, United Church of Christ Friends for Life, Disciples for Life, Nazarenes For Life, Task Force of United Methodists on Abortion and Sexuality, Concerned Women for America, the American Center for Law and Justice, the Catholic League for Religious and Civil Rights, and the Christian Action Council as Amici Curiae in Support of Respondents and Cross-Petitioners

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
INTEREST OF AMICI vii
SUMMARY OF ARGUMENT 1
ARGUMENT 3
I. THE TERM "PERSON" UNDER THE FIFTH AND FOURTEENTH AMENDMENTS INCLUDES ALL HUMAN BEINGS 4
II. THERE IS NO JUSTIFICATION FOR EXCLUDING FROM THE TERM "PERSON" THE CLASS OF HUMAN BEINGS CONCEIVED BUT NOT YET BORN 6
A. *Roe v. Wade* Gave No Valid Basis for Creating an Exception for Unborn Children 6
1. Alleged absence of precedent 6
2. Postnatal application of other constitutional provisions 7
3. Apparent inconsistency of state anti-abortion laws with personhood of unborn children 8
4. Alleged laxity of nineteenth century abortion laws 9
B. No Other Basis Exists For Creating an Exception for Unborn Children 11
1. The framers of the fourteenth amendment did no distinguish between "human beings" and "persons." .. 11
2. Science rejects the exclusion of unborn children from the class of human beings. 14
3. Logic militates against the creation of an exception for unborn children in the term "person." 16
4. Legal consistency would not be served by the exclusion of unborn children from the protection of the fifth and fourteenth amendments. 20
5. Justice demands the inclusion of unborn children within the term "person." 24
III. THE PERSONHOOD OF THE UNBORN REQUIRES THE REJECTION OF PLANNED PARENTHOOD'S ATTACK UPON THE PENNSYLVANIA STATUTES ... 26
CONCLUSION 30
APPENDIX: PROCLAMATION 5761 (personhood of unborn) A-1

TABLE OF AUTHORITIES

Cases **Page**

Amadio v. Levin, 509 Pa. 199, 501 A.2d 1085 (1985) 11
Baldwin v. Butcher, 155 W. Va. 431, 184 S.E.2d 428 (1971)..... 22
Betts v. Brady, 316 U.S. 455 (1942) 25
Bolling v. Sharpe, 347 U.S. 497 (1954) 27
Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946)..... 21
Britt v. Sears, 150 Ind. App. 487, 277 N.E.2d 20 (1971) ... 22
Brown v. Board of Educ., 347 U.S. 483 (1954) (*Brown I*) .. 9, 29
Brown v. Board of Educ., 349 U.S. 294 (1955) (*Brown II*) . 9, 29
Chrisafogeorgis v. Brandenberg, 55 Ill. 2d 368, 304 N.E.2d 88 (1973)..... 22
City of Akron v. Akron Center for Reprod. Health, Inc., 462 U.S. 416 (1983)..... 18
City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985)..... 4
Commonwealth v. Cass, 392 Mass. 799, 467 N.E.2d 1324 (1984)..... 5, 21
Commonwealth v. Lawrence, 404 Mass. 378, 536 N.E.2d 571 (1989)..... 21
Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971), *vacated*, 410 U.S. 950 (1973)..... 16
Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990)..... 27
Danos v. St. Pierre, 402 So. 2d 633 (La. 1981) 22
DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989)..... 27, 28
DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489, *reh'g denied*, 320 N.C. 799, 361 S.E.2d 73 (1987) 22
Egbert v. Wenzl, 199 Neb. 573, 260 N.W.2d 480 (1977) ...-23
Eich v. Gulf Shores, 293 Ala. 95, 300 So. 2d 354 (1974)... 22
Endresz v. Friedberg, 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969) 23
Espadero v. Feld, 649 F. Supp. 1480 (D. Colo. 1986) 22
Evans v. Olson, 550 P.2d 924 (Okla. 1976) 22
Fowler v. Woodward, 244 S.C. 608, 138 S.E.2d 42 (1964) . 22
Furman v. Georgia, 408 U.S. 238 (1972)..... 25
Gideon v. Wainwright, 372 U.S. 335 (1963)..... 25
Gorke v. Leclerc, 23 Conn. Supp. 256, 181 A.2d 448 (1962) . 22

Graf v. Taggart, 43 N.J. 303, 204 A.2d 140 (1964) 23
Greater Southeast Community Hosp. v. Williams, 482 A.2d 394 (D.C. 1984)..... 22
Hale v. Manion, 189 Kan. 143, 368 P.2d 1 (1962)..... 22
Hamby v. McDaniel, 559 S.W.2d 774 (Tenn. 1977).... 22, 23
Hernandez v. Garwood, 390 So. 2d 357 (Fla. 1980) 23
Hopkins v. McBane, 359 N.W.2d 862 (N.D. 1984), *appeal after remand*, 427 N.W.2d 85 (N.D. 1988) 22
Justus v. Atchison, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977)..... 23
Keeler v. Superior Court, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970) (en banc)..... 20
Kuhnke v. Fisher, 683 P.2d 916 (Mont. 1984) 23
Kwaterski v. State Farm Mutual Ins. Co., 34 Wis. 2d 14, 148 N.W.2d 107 (1967) 22
Lawrence v. Craven Tire Co., 210 Va. 138, 169 S.E.2d 440 (1969) 23
Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1870)..... 4
Levy v. Louisiana, 391 U.S. 68 (1968) 5
Libbee v. Permanente Clinic, 268 Or. 258, 518 P.2d 636, *reh'g denied, id.*, 520 P.2d 361 (1974)..... 22
McKillip v. Zimmerman, 191 N.W.2d 706 (Iowa 1971).... 23
Michael H. v. Gerald D., 491 U.S. 110 (1989)..... 26
Michael M. v. Superior Court, 450 U.S. 464 (1981)..... 9
Milkovich v. Lorain Journal Co., 110 S. Ct. 2695 (1990) .. 24
Milton v. Cary Medical Center, 538 A.2d 252 (Me. 1988).. 23
Mitchell v. Couch, 285 S.W.2d 901 (Ky. 1955) 22
Moen v. Hanson, 85 Wash. 2d 597, 537 P.2d 266 (1975)... 22
Mone v. Greyhound Lines, Inc., 368 Mass. 354, 331 N.E.2d 916 (1975)..... 22
O'Grady v. Brown, 654 S.W.2d 904 (Mo. 1983) 22
O'Neill v. Morse, 385 Mich. 130, 188 N.W.2d 785 (1971) . 22
Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft, 462 U.S. 476 (1983) 16
Poe v. Ullman, 367 U.S. 497 (1961)..... 25
Polinquin v. MacDonald, 101 N.H. 104, 135 A.2d 249 (1957) 22
Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955) 11
Presley v. Newport Hosp., 117 R.I. 177, 365 A.2d 748 (1976)..... 16, 18, 22, 23
Rainey v. Horn, 221 Miss. 269, 72 So. 2d 434 (1954) 22
Re Certification of Question of Law from United States District Court, 387 N.W.2d 42 (S.D. 1986)..... 22

Regan v. Taxation with Representation, 461 U.S. 540 (1983) 27
Roe v. Wade, 410 U.S. 113 (1973) ..... 1, *passim*
Rosen v. Louisiana State Bd. of Medical Examiners, 318 F. Supp. 1217 (E.D. La. 1970), *vacated*, 412 U.S. 902 (1973) 16, 24
Salazar v. St. Vincent Hosp., 95 N.M. 150, 619 P.2d 826 (Ct. App. 1980) 22
San Francisco Arts & Athletics, Inc., v. United States Olympic Comm., 483 U.S. 522 (1987) 27
Santa Clara County v. Southern Pac. R.R. Co., 118 U.S. 394 (1886) 20
State ex rel. Odham v. Sherman, 234 Md. 179, 198 A.2d 71 (1964) 22
State v. Burrell, 237 Kan. 303, 699 P.2d 499 (1985) 21
State v. Horne, 282 S.C. 444, 319 S.E.2d 703 (1984) 21
Steinberg v. Brown, 321 F. Supp. 741 (N.D. Ohio 1970) . 6, 7, 16
Summerfield v. Superior Court, 144 Ariz. 467, 698 P.2d 712 (1985) (en banc) 22
Thellusson v. Woodford, 31 Eng. Rep. 117 (Ch. 1798) 7
Thornburgh v. American College of Obstets. & Gynecs., 476 U.S. 747 (1986) 15, 17, 18, 19, 27
United States v. Salerno, 481 U.S. 739 (1987) 28, 29
Vaillancourt v. Medical Center Hosp. of Vermont, Inc., 139 Vt. 138, 425 A.2d 92 (1980) 22
Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949) 22
Volk v. Baldazo, 103 Idaho 570, 651 P.2d 11 (1982) 22
Wade v. United States, 745 F. Supp. 1573 (D. Haw. 1990) . 22
Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) 5, 18
Werling v. Sandy, 17 Ohio St. 3d 45, 476 N.E.2d 1053 (1985) 22
West Virginia Board of Educ. v. Barnette, 319 U.S. 624 (1943) 25
White v. Yup, 85 Nev. 527, 458 P.2d 617 (1969) 22
Witty v. American Gen. Capital Distribs., Inc., 30 Tex. Sup. Ct. J. 244, 727 S.W.2d 503 (1987) 23
Worgan v. Greggo & Ferrara, Inc., 50 Del. 258, 128 A.2d 557 (Super. Ct. 1956) 22
Yick Wo v. Hopkins, 118 U.S. 356 (1886) 27

Constitutional, Statutory & Regulatory Provisions

U.S. Const. art. I, § 2, cl. 2 7
U.S. Const. art. I, § 2, cl. 3 12
U.S. Const. art. I, § 3, cl. 3 7
U.S. Const. art. I, § 9, cl. 1 7
U.S. Const. amend. IV 8
U.S. Const. amend. V ..... 1, *passim*
U.S. Const. amend. XIV, § 1 ..... 1, *passim*
Cal. Penal Code § 187 (West 1988) 21
Ill. Ann. Stat. ch. 38, paras. 9-1.2, 9-2.1, 9-3.2 (Smith-Hurd Supp. 1991) 21
Ill. Ann. Stat. ch. 70, para. 2.2 (Smith-Hurd 1989) 23
La. Rev. Stat. Ann. §§ 14:32.5 - 32.8 (West Supp. 1992) 21
Minn. Stat. Ann. §§ 609.2661-609.2665, 609.268(1) (West 1987 & Supp. 1992) 21
N.D. Cent. Code §§ 12.1-17.1-02 to 12.1-17.1-04 (Supp. 1991) .. 21
Pa. Cons. Stat. Ann. § 3203 28
Pa. Cons. Stat. Ann. § 3205 28
Pa. Cons. Stat. Ann. § 3206 28
Pa. Cons. Stat. Ann. § 3207 28
Pa. Cons. Stat. Ann. § 3209 28
Pa. Cons. Stat. Ann. § 3214 28
Proclamation No. 5761, 3 C.F.R., 1988 Comp., p. 3 26
Tenn. Code Ann. § 20-5-106(c) (Supp. 1991) 22, 23

Other Authorities

Annotation, *Homicide Based on Killing of Unborn Child*, 40 A.L.R.3d 444 (1971) 21
Annotation, *Liability for Prenatal Injuries*, 40 A.L.R.3d 1222 (1971) 21
Annotation, *Right to Maintain Action or to Recover Damages for Death of Unborn Child*, 84 A.L.R.3d 411 (1978) 21
L. Arey, *Developmental Anatomy* (7th ed. 1974) 15
Bopp, Jr. & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. Pub. L. 181 (1989) 23
Byrn, *Abortion in Perspective*, 5 Duq. U.L. Rev. 125 (1966-67) 27
Cong. Globe, 35th Cong., 1st Sess. App. 65-66 (1858) 14
Cong. Globe, 37th Cong., 2d Sess. 1449 (1862) 13

Cong. Globe, 37th Cong., 2d Sess. 1640 (1862) 25
Cong. Globe, 38th Cong., 1st Sess. 1753 (1864) 13
Cong. Globe, 39th Cong., 1st Sess. 74 (1865) 12
Cong. Globe, 39th Cong., 1st Sess. (1866) 13
Cong. Globe, 40th Cong., 1st Sess. 542 (1867) 13
Cong. Globe, 42nd Cong., 1st Sess. App. 229 (1871) 17
3 Cong. Rec. 1794 (1875) 13
Declaration of Independence para. 2 (U.S. 1776) 25
Dellapenna, "Abortion and the Law," in *Abortion and the Constitution* 137 (D. Horan, E. Grant & P. Cunningham eds. 1987) 10, 11
Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. Pitt. L. Rev. 359 (1979) 10
Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 Cal. L. Rev. 1250 (1975) ... 6
Gorby, *The "Right" to an Abortion, the Scope of Fourteenth Amendment "Personhood," and the Supreme Court's Birth Requirement*, 1979 S. Ill. U.L.J. 1 ..... 5, 8
W. Hamilton & H. Mossman, *Human Embryology* (4th ed. 1972) 15
The Human Life Bill: Hearings on S.158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 14, 16, 17 (1982) 15
Krimmel & Foley, *Abortion: An Inspection into the Nature of Human Life and Potential Consequences of Legalizing its Destruction*, 46 U. Cin. L. Rev. 725 (1977) 14
K. Moore, *The Developing Human: Clinically Oriented Embryology* (2d ed. 1977) 16
H. Storer, *Criminal Abortion in America* (1860) 7, 21
13 Transactions of the American Medical Association 41-42 (1860) 11
Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 St. Mary's L.J. 29 (1985) 21

INTEREST OF AMICI

Catholics United for Life

Catholics United for Life (CUL) is the pro-life apostolate of the St. Martin de Porres Dominican Community. Formed in 1974, CUL has twenty-two affiliates across the country, and promotes sidewalk counseling, a technique it developed for saving babies from abortion. Sidewalk counselors work to save each individual baby threatened by abortion — through prayer, persuasion, offers of assistance, and distribution of literature. CUL also supplies literature on a national level to promote respect for all human life.

Orthodox Christians for Life

Orthodox Christians for Life is a religious-educational prolife organization consisting of members from all jurisdictions of the Eastern Orthodox Church in the United States and Canada. It was founded and functions in a spirit of synergistic cooperation with the hierarchy, clergy, and laity of the Orthodox Church regardless of jurisdiction or geographical location. The organization supports the doctrines and canons of the Church. Its activities have included the recent coordination and creation of an Amicus Brief submitted to the United States Supreme Court on behalf of the Holy Orthodox Church in *Webster v. Reproductive Health Services* (No. 88-605).

In its moral teachings, the Orthodox Church has had a long and continuous history of outspoken condemnation of abortion which dates back to Apostolic times. In fact, the humanity of the unborn child, his "personhood," and his possession of a soul from the moment of conception have been universally understood in the Eastern Church from the earliest times; these understandings remain unchanged and unchallenged in Orthodox theology to this day.

The Holy Orthodox Church remains a unique witness to historical Christianity's understanding of the sacredness of human life: that the unborn are indeed "persons" and that abortion is considered an act of premeditated murder. Orthodox Chris-

tians for Life supports and advocates these historical positions and promotes them not only to the faithful, but to the secular culture at large.

National Organization of Episcopalians for Life

National Organization of Episcopalians for Life Research and Education Foundation, Inc. (NOEL), a non-profit Maryland corporation with national offices in Fairfax, Virginia, is a general organization of the Episcopal Church. NOEL's purposes affirm the sacredness and the right to life of all human beings from conception to natural death. NOEL supports the 1988 General Convention Resolution of the Episcopal Church which "emphatically oppose[s] abortion as a means of birth control, family planning, sex selection or any reason of mere convenience," promotes alternatives to abortion, including adoption, and assists those faced with problem pregnancies through its 121 chapters in 36 states.

Presbyterians Pro-Life

Presbyterians Pro-Life is organized within the Presbyterian Church (USA), a denomination with nearly three million members. Its objectives are to proclaim the Church's obligation to protect all innocent human life from conception to natural death and to support women in crisis pregnancies by offering alternatives to abortion. It is governed by a board of directors of lay men and women and pastors, all members of the Presbyterian Church (USA). It has a network of local chapters throughout the denomination and publishes a quarterly newsletter that reaches 25,000 families and churches.

American Baptist Friends of Life

American Baptist Friends of Life is a pro-life advocacy organization within the American Baptist Churches/USA, representing the pro-life position of a large percentage of American Baptists. Directed by an eight member executive committee, it publishes a regular newsletter and is taking leadership in the implementation of its new denominational resolution on abortion passed in June of 1988 which states, "as American Baptists, we oppose abortion as a means of avoiding responsibility for conception."

Baptists for Life

Baptists for Life is a Christian pro-life organization representing independent Baptist Churches throughout the United States with main offices in Grand Rapids, Michigan. Baptists for Life believes in the sacredness of human life at every stage of biological development and in its value throughout the life continuum. It exists to provide alternatives to abortion through the over 2,000 church congregations which it represents.

Lutherans For Life

Lutherans For Life is a national, pan-Lutheran, pro-life organization founded in 1978. In addition to individual members, there are some 280 local chapters across North America engaged in a wide variety of educational and compassionate efforts.

Lutherans For Life believes that the Church is compelled by God's Word to speak and act on behalf of those who are vulnerable and defenseless. The crisis of our time is the repudiation of Biblical truth manifested in the wanton destruction of innocent human life through legalized abortion-on-demand and the growing threat to the lives of others through legalized assisted suicide and euthanasia. Therefore, as Lutherans For Life, we strive together to give witness, from the Biblical perspective, to the Church and society on these and related issues such as chastity, postabortion healing and family living.

LFL assists Lutheran individuals and congregations to work and witness for life. We produce a wide-variety of educational materials; publish a newsletter and magazine; host a national convention and numerous seminars and workshops. State and local chapters support a wide range of compassionate outreaches such as the post-abortion outreach *Healing Hearts* or the crisis pregnancy support ministries *The Guide Program* and *The Tender Shepherd Program*. LFL also produces a nationwide pro-life radio program on the *Jubilee Network* (TM).

WELS Lutherans for Life

WELS Lutherans for Life is para-synod organization in fellowship with the 440,000 member Wisconsin Evangelical

Lutheran Synod (WELS). WELS Lutherans for Life consists of 26 chapters and 20 congregational branches throughout the United States. WELS resolved at its 1979 synod convention that "the Holy Scriptures clearly teach that the living yet unborn are persons in the sight of God . . . and that we continue to urge our membership to make God's will in this matter known." WELS Lutherans for Life is that specialized ministry which seeks to make known God's will of life and to provide assistance to others in all life issues.

United Church of Christ Friends for Life

United Church of Christ Friends for Life is a duly constituted special interest group recognized by the General Synod of the United Church of Christ. Since the General Synod has taken a pro-choice/pro-abortion stand, UCC Friends for Life upholds the sanctity of human life from conception to natural death and encourages the Church to protect unborn children while providing abortion alternatives to women in crisis pregnancy. This belief is proclaimed in quarterly newsletters and a recently published book, *Affirming Life*. A growing pro-life network within the denomination works to educate its members and provide compassionate ministry.

Disciples for Life

Disciples for Life is a pro-life advocacy organization made up of members of the Christian Church (Disciples of Christ). It provides a monthly column in the publication: 'Disciple Renewal,' supplies educational materials to the church, and is establishing chapters throughout the denomination. Disciples for Life promotes the sanctity of human life and opposes abortion on demand.

The structure of the Christian Church (Disciples of Christ) is such that the official statements and actions of the highest (or general) level does not necessarily reflect the diversity of its one million members; it is a denomination that emphasizes freedom and autonomy to its members and churches. Its general level endorsement for abortion on demand is a position at odds with many in the church.

Nazarenes For Life

Nazarenes For Life is composed of laymen who have come together to support the pro-life stand that we see the Scriptures reveal, and which the manual of the Church of the Nazarene supports. We therefore have accepted the challenge to become involved in educating the church on pro-life and pro-family issues, supporting existing pro-life organizations within our area, and providing a support network to women and families in need.

To fulfill this purpose, we have worked in many areas including the following:

1. Invited guest speakers, sponsored seminars, classes, and special presentations to large and small groups.
2. Supported homes for pregnant women and Crisis Pregnancy Centers.
3. Supplied literature and videos on abortion, abstinence, sexually transmitted diseases, and help for the post-abortal woman.
4. Actively counseled women in crisis pregnancy as well as women suffering from past abortions.
5. Worked to educate pastors, church leaders, and laymen on the realities of abortion in today's world, and on the personhood and humanity of the unborn.
6. Encouraged a more active role by the church body in taking a stand on the moral issues of our day.

Task Force of United Methodists on Abortion and Sexuality

The Task Force of United Methodists on Abortion and Sexuality is a national network of over 5,800 pastors, theologians, churches, and laity dedicated to minister to the deepening problems of abortion recidivism and abortion-as-contraception. The view that "life does not begin until live birth" does not represent the position of a large segment of the United Methodist Church. According to our Discipline, only our General Conference speaks the position of the Church, *not* our General Board of Church and Society *nor* our Women's Division. Furthermore, it is recognized that our *Book of Discipline* is the primary source of

order and purpose in the Church, not our *Resolutions*. Since 1972, General Conference has asserted in the *Book of Discipline* "our belief in the sanctity of unborn human life." Then in 1988, General Conference stated in *Book of Discipline* paragraph 71G that "We recognize tragic conflicts of life with life that may justify abortion and in such cases support the legal option of abortion under proper medical procedures. We cannot affirm abortion as an acceptable means of birth control and we unconditionally reject it as a means of gender selection." That abortion involves human life before birth is signified by the phrase "conflicts of *life* with *life*" (emphasis added). That abortion should be restricted to minimize indiscriminate practice is signified by saying that "we cannot affirm abortion as an acceptable means of birth control and we unconditionally reject it as a means of gender selection."

Concerned Women for America

Concerned Women for America ("CWA") is an national, nonprofit organization representing approximately 600,000 people. CWA's purpose is as follows:

> The purpose of CWA is to preserve, protect and promote traditional and Judeo-Christian values through education, legal defense, legislative programs, humanitarian aid, and related activities which represent the concerns of men and women who believe in these values.

One of the foremost concerns and desires of CWA is to protect the lives of the unborn.

American Center for Law and Justice

The American Center for Law and Justice is a national public interest law firm, chartered to enter the legal arena on issues of a broad public interest. The American Center has members in all fifty States. Attorneys from every State of the Union have affiliated with the American Center, to assist in the restoration of pro-liberty, pro-life and pro-family values.

On behalf of its members, the American Center calls for an end to the systematic exploitation and victimization of women

by the abortion industry, and an end to the holocaust of the destruction of our progeny.

Catholic League for Religious and Civil Rights

The Catholic League for Religious and Civil Rights is a nonprofit voluntary association, national in membership, organized to combat all forms of religious prejudice and discrimination. The Catholic League is committed to ensuring the American people's continued enjoyment of the strong protection afforded religious liberty by the religion clauses of the First Amendment, and it supports the religious freedom rights of Catholics and others through a wide range of activities.

Christian Action Council

The Christian Action Council (CAC), founded in 1975 as a Protestant evangelical pro-life organization, is incorporated in the District of Columbia. Since its founding, the CAC has established 400 crisis pregnancy centers around the country. These crisis pregnancy centers serviced more than 200,000 women in 1990, providing them with support, encouragement, and necessary services to enable them to carry their babies to term. The CAC also counsels and supports women who suffer from the aftermath of abortion. CAC has 120 local CAC affiliate chapters that are activist-oriented and involved politically in promoting pro-life legislation and seeking a reversal of *Roe v. Wade*.

The parties to the present case have consented to the filing of this brief; letters granting consent are being filed with this Court.

Nos. 91-744 and 91-902

In the Supreme Court of the United States

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, et al.,
Petitioners and Cross-Respondents,
vs.
ROBERT P. CASEY, et al.,
Respondents and Cross-Petitioners.

SUMMARY OF ARGUMENT

This case presents a challenge, by Planned Parenthood of Southeastern Pennsylvania and others (hereinafter, "Planned Parenthood"), to various Pennsylvania statutes alleged to violate a constitutional "right" to abortion. The threshold question, as the court below acknowledged, is the proper standard of review for analyzing alleged violations of a right to abortion. This standard, in turn, depends upon the status of the asserted abortion liberty and whether abortion is a constitutional right at all.

Planned Parenthood's challenge must fail. The fourteenth amendment secures no "right" to abortion. On the contrary, this amendment guarantees the right to life of all human beings, a right which is fundamentally inconsistent with any claim of an abortion right.

In *Roe v. Wade*, 410 U.S. 113 (1973), a majority of this Court held that unborn children are not "persons" with rights under the fourteenth amendment to the United States Constitution, and that the fourteenth amendment includes a right to abortion. As demonstrated in this amicus brief, the *Roe* Court erred on both counts. This Court should now repudiate the exclusion of unborn children from constitutional protection, and overrule *Roe v. Wade*.

The fifth and fourteenth amendments secure protection for the minimum human rights a state must respect: the rights to life,

liberty, and property. These amendments would be of little value, however, if those invoking their guarantees had to prove their explicit entitlement to constitutional protection. Rather, these amendments apply to all living human beings *by virtue of their humanity*.

No valid basis exists for excluding human beings conceived but not yet born from the protection afforded "persons" under the Constitution.

The *Roe* Court offered no defensible justification for such an exception. The alleged absence of precedents for the personhood of unborn children is not only incorrect, but also irrelevant in view of the similar dearth of such precedents for any other class of humans. The postnatal applicability of some provisions of the Constitution referring to "persons" does not imply that those excluded, e.g., from eligibility for Congress or for citizenship, are not persons; moreover, the assertedly ambiguous scope of other constitutional provisions referring to persons provides no basis for anything but circular arguments as to their scope. The alleged inconsistency of exceptions in state anti-abortion laws with the personhood of unborn children merely identifies possible constitutional defects in those laws; such defects do not justify the categorical exclusion, from all constitutional protection, of the class suffering discrimination. The supposed laxity of state abortion legislation in much of the nineteenth century is historically misleading because it ignores the fact that stringent anti-abortion legislation, largely representing a response to the scientific discovery of the humanity of unborn children from the moment of fertilization, preceded and accompanied passage of the fourteenth amendment. Furthermore, even prior to this legislation, abortion was illegal at common law and, until after the technical developments of the late eighteenth century, practically unavailable and virtually suicidal.

Contrary to *Roe*, history, science, logic, law, and justice all weigh in favor of including unborn children within the protection of the fifth and fourteenth amendments. The framers of those amendments clearly drew no distinction between "persons" and biological "human beings." Science demonstrates that each individual member of the human race begins life at the moment of fertilization. Logic supports no essential distinction between human beings on the basis

of their dwelling inside or outside the maternal womb, or on the basis of their status as "viable" or "nonviable" individuals. Legal consistency supports the rejection of distinctions, in matters of basic rights, between born and unborn children, as well as between "viable" and "nonviable" unborn children. Finally, the intrinsic sanctity of every human life compels the rejection of any arbitrary exclusion of unborn children from entitlement to the most basic of human rights.

This Court should overrule *Roe v. Wade*. Any challenge to the Pennsylvania statutes predicated upon a supposed right to abortion must accordingly fail.

A challenge to certain of the Pennsylvania statutes might rest on the basis that these statutes provide *insufficient* protection for unborn persons. Planned Parenthood has not raised or indicated any wish to raise such constitutional objections; nor would Planned Parenthood likely have standing to do so. The Attorney General of Pennsylvania, however, who is a party to this case, may have authority to vindicate the rights of unborn children. This Court should therefore uphold the personhood of children conceived but not yet born, and set this case for further briefing and reargument on the question of the proper disposition of this appeal.

ARGUMENT

Planned Parenthood challenges the state statutes at issue in this case on the basis of a supposed federal constitutional right to abortion under the fourteenth amendment. *See* Brief for Petitioners and Cross-Respondents §§ I, IV. The fourteenth amendment, however, contains no "right" to abort developing human offspring. On the contrary, that amendment explicitly secures the rights to life and to equal protection for every human being.

As demonstrated in this brief, the term "person" as used in the fourteenth and fifth amendments applies to all human beings, including those conceived but not yet born. Accordingly, there can be no "right" to abort such persons under either the fourteenth or the fifth amendments. Planned Parenthood's claim predicated upon such a nonexistent "right" must fail.

I. THE TERM "PERSON" UNDER THE FIFTH AND FOURTEENTH AMENDMENTS INCLUDES ALL HUMAN BEINGS.

The fifth amendment to the Constitution of the United States provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The fourteenth amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.* amend. XI, § 1. These amendments secure protection for the basic, minimum human rights any government must respect. It is imperative that categories of human beings not be read out of the terms of these amendments.

The Constitution is not a legislative code designed to specify its application in every conceivable situation. "We do not expect to find in a constitution minute details. It is necessarily brief and comprehensive. It prescribes outlines, leaving the filling up to be deduced from the outlines." *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 532 (1870). Thus, the vitality of constitutional principles depends upon their straightforward and faithful application.

If there were ever a term whose broad scope demands unconditional respect, it is the term "person." For whoever is not a person lacks not only the privileges of citizenship, but even the barest minimum of human rights. A person need not have every right — prisoners, minors, and aliens, for example, do not possess the full panoply of rights and privileges afforded under the Constitution — but a non-person has *no* rights whatsoever. A non-person is no better off than property, entirely subject to the whim of the owner and whatever permissible regulation the government may deign to impose.

The constitutional protection for "persons" simply cannot function if each individual or class of human beings must prove explicit inclusion in some unwritten catalogue of "persons." Does the term "person" include mentally disabled individuals? There is not likely much, if any, explicit support for that particular proposition in the text, history, or early application of the fifth and fourteenth amendments. Yet these are certainly persons. *E.g., City of Cleburne v.*

Cleburne Living Center, Inc., 473 U.S. 432 (1985) (discrimination against mentally retarded persons triggers equal protection scrutiny). Does "person" include citizens of hostile nations? Children under the age of eighteen? Convicted misdemeanants or felons? Comatose individuals? Each of these classes of human beings lacks either the legal or physical ability to exercise certain rights, yet each is unquestionably a class of persons. This is so, not because members of each class can *prove* their particular inclusion under the fifth and fourteenth amendments, but because they are included *by virtue of their humanity*.[1] "They are humans, live, and have their being." *Levy v. Louisiana*, 391 U.S. 68, 70 (1968) (discussing illegitimate children). Therefore, "[t]hey are clearly 'persons'" within the meaning of the Constitution. *Id.*

Human offspring conceived but not yet born are likewise "humans, live, and have their being." They are "a form of human life," *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 520 (1989) (plurality opinion), as are infants, toddlers, teens, adults, and the elderly. As human beings, prenatal children do not need to overcome any additional hurdles in order to establish their right to inclusion within the term "person" as used in the Constitution.[2] Nor

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[1] The importance of this fundamental point cannot be stressed enough:

> The idea of human rights is based upon the notion that certain rights obtain *by virtue of being human* and *may be conditioned upon no other requirement*. An attempt to restrict entitlement to those rights by the creation of criteria other than mere humanness is incompatible with the idea of "human rights" . . . .

Gorby, *The "Right" to an Abortion, the Scope of Fourteenth Amendment "Personhood," and the Supreme Court's Birth Requirement*, 1979 S. Ill. U.L.J. 1, 10 n.58 (emphasis added).

[2] As the Supreme Judicial Court of Massachusetts explained in a different context,

> In keeping with approved usage, and giving terms their ordinary meaning, the word "person" is synonymous with the term "human being." An offspring of human parents cannot reasonably be considered to be other than a human being, and therefore a person, first within, and then in normal course outside, the womb. . . . By the use of the term[] "person" . . . the Legislature has given no hint of a contemplated distinction between pre-born and born human beings.

Commonwealth v. Cass, 392 Mass. 799, _____, 467 N.E.2d 1324, 1325 (1984) (construing vehicular homicide statute).

does any justification exist for the arbitrary exclusion of such children from the protection of basic human rights under the Constitution.

II. THERE IS NO JUSTIFICATION FOR EXCLUDING FROM THE TERM "PERSON" THE CLASS OF HUMAN BEINGS CONCEIVED BUT NOT YET BORN.

In *Roe v. Wade*, 410 U.S. 113, 158 (1973), a majority of this Court read into the term "person" in the fourteenth amendment an exception for unborn children.[3] There is no valid justification for the creation of such an exception.

A. *Roe v. Wade* Gave No Valid Basis for Creating an Exception for Unborn Children.

The *Roe* Court made several arguments to support its conclusion that the word "person" does not include the unborn. None of these arguments withstands analysis.

1. Alleged absence of precedent

First, the Court observed that "no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment." *Roe v. Wade*, 410 U.S. at 157.

This observation is factually incorrect. In *Steinberg v. Brown*, 321 F. Supp. 741 (N.D. Ohio 1970) (three-judge court), the court rejected a challenge to Ohio's abortion laws, holding that the implied right to privacy

> must inevitably fall in conflict with the express provisions of the Fifth and Fourteenth Amendments that no *person* shall be deprived of life without due process of law. The difference between this case and *Griswold* [overturning a ban on the use of contraceptives] is clearly apparent, for *here there is an embryo or fetus* incapable of protecting itself.

[3] "The primary question presented in *Roe* was this: may the Court create substantive exceptions to the enjoyment of fundamental rights where none appear in the Constitution?" Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 Cal. L. Rev. 1250, 1288 (1975).

Id. at 745-46 (emphasis added). As the court in *Steinberg* explained, "a new life comes into being with the union of human egg and sperm cells," *id.* at 746, and "[o]nce human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state a duty of safeguarding it," *id.* at 746-47.

Moreover, as a legal matter, an absence or dearth of case support for unborn personhood is irrelevant. There may well not be any cases, for example, holding newborn infants to be persons. This obviously does not mean, however, that such children are beyond the scope of the fourteenth or fifth amendments. As discussed above, such a cramped construction of the text would largely negate the effect of these amendments.

2. Postnatal application of other constitutional provisions

Second, the Court noted that the use of the word person in "nearly all" other parts of the Constitution "is such that it has application only postnatally. None [of these uses] indicates, with any assurance, that it has any possible prenatal application." *Roe*, 410 U.S. at 157 (footnote omitted). But this simply begs the question. Those provisions that *cannot* apply prenatally explicitly limit the class of human beings to which they apply. *E.g.*, U.S. Const. art. I, § 2, cl. 2 (person must be at least age twenty-five to be a Representative); *id.* art. I, § 3, cl. 3 (person must be at least age thirty to be a Senator); *id.* amend. XIV, § 1 (person who is born, if born in the United States, is a citizen). Such exclusions obviously do not imply that those excluded (e.g., with respect to Representatives, those under age twenty-five) are not persons. Moreover, those provisions — like the fifth and fourteenth amendments — that *can* apply to unborn children,[4] *e.g.*, *id.* art. I, § 9, cl. 1 (tax on importation of

[4] It bears mention that the holding of an office need not, in theory, be limited to competent adults. History, for example, has seen numerous infants wear the royal crown. Furthermore, unborn children have been explicitly recognized as capable of serving as the executor of an estate. H. Storer, *Criminal Abortion in America* 92 (1860) ("an infant in utero . . . at every stage of [gestation], no matter how early, . . . may be appointed executor . . . "). *Accord Thellusson v. Woodford*, 31 Eng. Rep. 117, 163 (Ch. 1798).

"persons"); *id.* amend. IV (security of the person against unreasonable searches and seizures), contain no exclusion for any particular class of children, born or unborn.

3. Apparent inconsistency of state anti-abortion laws with personhood of unborn children

Third, the Court pointed to allegedly fatal inconsistencies in the abortion laws of Texas and other states.

> [I]f the fetus is a person who is not to be deprived of life without due process of law, . . . does not the Texas exception [for abortion necessary to save the life of the mother] appear to be out of line with the Amendment's command? . . .
>
> . . . If the fetus is a person, why is the woman not a principal or an accomplice [to an unlawful abortion]? . . . If the fetus is a person, may the penalties be different [for abortion and first degree murder]?

Roe, 410 U.S. at 157 n.54.

Here the *Roe* Court confused two distinct issues: the constitutionality of the Texas abortion laws, and the constitutional personhood of unborn children.

The government, of course, may not exclude from the general protection of the criminal law a particular class of innocent persons.[5] This fundamental obligation does not disappear simply because the

[5] Whether an exception for the life of the mother would entail a denial of equal protection would depend upon the scope of that exception. There is a grave moral and legal difference between, on the one hand, allowing a physician to remove an ectopic pregnancy or cancerous uterus from a pregnant woman, with the death of her unborn child occurring as an unintended effect of that necessary operation, and, on the other hand, giving permission for the direct, intentional killing of the unborn child whenever such is claimed to be necessary to save the mother's life.

The total exemption of the pregnant woman herself from the scope of criminal prohibitions against abortion would, like total parental immunity from prosecution for serious child abuse, be unconstitutional. *But cf.* Gorby, *supra* note 1, at 20 (lenient treatment of women who abort and reduced levels

(cont'd on next page)

government fails to comply with it. In *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*), for example, it would have been outrageous to suggest that the long history and widespread practice of segregated public education meant that black people were not persons. On the contrary, this segregation represented a constitutional violation.

Similarly, the denial of equal statutory treatment to unborn children does not support a categorical denial of constitutional protection to such children. As the Court emphasized in *Brown v. Board of Education*, 349 U.S. 294, 300 (1955) (*Brown II*), "the vitality of . . . constitutional principles cannot be allowed to yield simply because of disagreement with them." If the state or federal government in fact denies due process or equal protection to a class of humans, the remedy is to declare the discrimination unconstitutional, not to deny that members of the victimized class are persons. To hold otherwise would be to deny the possibility of unconstitutional action by government, and to turn civil rights litigation upside down.

4. Alleged laxity of nineteenth century abortion laws

Fourth, the Court cited its "observation" that "throughout the major portion of the 19th century prevailing legal abortion practices were far freer" than in 1973, *Roe*, 410 U.S. at 158, presumably as evidence that the framers and those who ratified the fourteenth amendment did not regard unborn children as human persons.

of punishment for offense of abortion not inconsistent with personhood of unborn victim of abortion); *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (sustaining, against equal protection challenge, statutory rape law that only applied to male offenders). Prosecutorial discretion, of course, is fully capable of handling situations in which the mother is more accurately considered a victim instead of an offender.

The primary effect of holding the unborn child to be a person would be that the child could no longer be regarded as beyond the equal protection of the criminal law. In other words, if all of the elements of a statute defining an offense against a person were satisfied, the statute could not be held inapplicable simply because the victim was not yet born.

The state may properly create a separate and additional offense of abortion which could apply without proof of pregnancy or causation of fetal death. *See infra* note 14.

On this point the *Roe* opinion refutes itself. The fourteenth amendment was adopted in 1868, precisely the time when the scientific discovery of the humanity of the unborn had become widely known, and precisely at the time when this discovery prompted vigorous opposition to abortion by means of numerous statutory bans. *See* 410 U.S. at 129 (observing that abortion laws in effect in 1973 "derive from statutory changes effected, for the most part, in the latter half of the 19th century"); *id.* at 141 (noting the "anti-abortion mood prevalent in this country in the late 19th century"); *id.* at 141-42 (noting that the concern of the medical profession for prenatal human life destroyed by abortion "may have played a significant role in the enactment of stringent criminal abortion legislation during that period"); *see also id.* at 174-77 (Rehnquist, J., dissenting) (noting the multiplicity of state and territorial anti-abortion laws at the time of the adoption of the fourteenth amendment).

Furthermore, the assumption by the *Roe* Court that abortion was freely and legally available, even in the early part of the nineteenth century, simply ignores reality. As Professor Joseph W. Dellapenna has demonstrated, the primitive state of medical technology meant that, prior to the late eighteenth century, abortion techniques were either ineffective or so dangerous as to be practically suicidal. Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. Pitt. L. Rev. 359, 371-76 (1979).[6] Thus, while abortion was indeed unlawful at common law, prosecutions were infrequent because they were unnecessary. Dellapenna, "Abortion and the Law," in *Abortion and the Constitution* 137, 146 (D. Horan, E. Grant & P. Cunningham eds. 1987).

> During this period, techniques to induce abortions were either magical, and hence punishable as witchcraft (whether they were successful or not), or extremely crude invasions of the woman's body, likely to be fatal to the woman as well as to the fetus. In the few cases where an abortionist was punished, it was for killing the mother. In fact,

[6] It would therefore be nonsensical to claim that women had a legal "liberty to abort" during the period preceding enactment of the fifth amendment.

> there is no evidence of voluntary abortion during this time. Abortions, if they occurred, seem to have resulted from assaults upon women rather than by their choice. Even then, abortion prosecutions were hampered by ignorance of medical knowledge about the gestation process. The net result of these circumstances was that abortion was rare and the law did not have to deal with it because hanging the abortionist for killing the mother was sufficient punishment for the few cases that did arise.

Id. at 145 (footnotes omitted). The disposal of "unwanted" children was effectuated instead by infanticide. *Id.* (citing numerous authorities). When new abortion techniques finally became available in the late eighteenth century, the result was the initiation of anti-abortion legislation. *Id.* at 146. This legislative movement subsequently expanded in response to embryological discoveries that identified fertilization as the beginning of human life. *Id.* at 147.[7]

B. No Other Basis Exists For Creating an Exception for Unborn Children.

Roe failed to give any justification for reading an exception for unborn children into the scope of the term "person" as used in the fourteenth amendment. Nor does any valid justification appear from other sources. On the contrary, history, science, logic, law, and justice all militate against the imposition of any such arbitrary limitation on personhood as birth or viability.

1. The framers of the fourteenth amendment did not distinguish between "human beings" and "persons."

Roe v. Wade distinguished between human beings and persons, holding that unborn children were not persons even if they

[7] Another scholar has analyzed the scope, terminology, penalty provisions, statutory classification and context, and history of anti-abortion legislation in the nineteenth century to demonstrate that "the legislatures ratifying the fourteenth amendment did consider human fetuses to be persons." Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 St. Mary's L.J. 29, 31 (1985) (providing extensive legal and historical analysis).

were human beings. 410 U.S. at 159 ("We need not resolve the difficult question of when life begins"). Such a distinction, however, was foreign to the men who proposed and adopted the fourteenth amendment.[8]

If one thing is overwhelmingly clear from the record of the debates leading up to and surrounding the thirteenth and fourteenth amendments and the post-war civil rights legislation, it is that the legislators considered personhood and biological humanity to be interchangeable terms.

Thus Representative Thaddeus Stevens, on the day the thirteenth amendment was declared ratified, proclaimed:

> This is man's Government; the Government of all men alike; not that all men will have equal power and sway within it. Accidental circumstances, natural and acquired endowment and ability, will vary their fortunes. But equal rights to all the privileges of Government is *innate in every immortal being, no matter what the shape or color of the tabernacle which it inhabits.*

Cong. Globe, 39th Cong., 1st Sess. 74 (1865) (emphasis added).

Likewise Representative John A. Bingham, author of section one of the fourteenth amendment, declared in reference to the fifth amendment the principle he viewed as fundamental:

> [T]he Constitution of the United States . . . declared that "no person shall be deprived of life, liberty, or property without due process of law." By that great law of ours it is not inquired whether a man is "free" by the laws of England; it is only to be inquired *is he a man*, and therefore free by the law of that creative energy which breathed into his nostrils the breath of life, and he became a living soul, endowed with the rights of life and liberty. . . . Before that great law *the only question to be asked of a creature claiming its protection is this: Is he a man?* Every man is entitled to the protection of American law, because its divine spirit of equality declares that all men are created equal.

Cong. Globe, 40th Cong., 1st Sess. 542 (1867) (emphasis added).

Representative James S. Brown, similarly, denied the notion that personhood required something more than human life.

> [D]oes the term "person" carry with it anything further than a simple allusion to the existence of the individual? It certainly cannot be strained into any recognition of slavery, since the very recognition of personality excludes [an institution which] does not regard its victims as persons but as chattels.

Cong. Globe, 38th Cong., 1st Sess. 1753 (1864).

Indeed, examples are legion to demonstrate the basic assumption of the framers and their contemporaries that "in the eyes of the Constitution, every *human being* within its sphere . . . from the President to the slave, is a *person.*" Cong. Globe, 37th Cong., 2d Sess. 1449 (1862) (Sen. Sumner) (first emphasis added).[9]

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[8] The same conclusion applies to the framers of the fifth amendment. The founding fathers considered even slaves to be persons. *See* U.S. Const. art. I, § 2, cl. 3 (distinguishing between "free Persons" and "other Persons" for purposes of apportionment of taxes and legislators). There is no reason to believe that these same men, when adding the fifth amendment, denied the personhood of certain human beings. Indeed, the framers of the fourteenth amendment, who clearly repudiated the notion of a distinction between "persons" and "human beings," *see infra*, saw their work as the vindication, not the rejection, of the political theory of the framers of the Bill of Rights.

[9] *E.g.*, Cong. Globe, 39th Cong., 1st Sess. 77 (1866) (Sen. Trumbull) ("any legislation or any public sentiment which deprives any human being in the land of those great rights of liberty will be in defiance of the constitution"); *id.* at 322-23 (Sen. Trumbull) ("great object of securing to every human being within the jurisdiction of the Republic equal rights before the law"); *id.* at 1159 (Rep. Windom) (rights to life, liberty, and pursuit of happiness are "rights of human nature," and the most basic "right of human nature [is] the right to exist"); *id.* at 1151 (Rep. Thayer) ("relief of human nature" secured in thirteenth amendment); 3 Cong. Rec. 1794 (1875) (Senator Allen G. Thurman) (may not deny equal protection to "any person" in the jurisdiction, "be he sane or be he insane, *be he old or be he young*, be he innocent or he criminal, be he learned or be he ignorant") (emphasis added).

There is, therefore, no warrant for the conclusion that a class of human beings might be excluded from the persons protected under the fourteenth amendment. As forcefully stated by Representative Joshua R. Giddings,

> Our fathers, recognizing God as the author of human life, proclaimed it a "self-evident" truth that every human being holds from the Creator an inalienable right to live . . .
>
> . . . If this right be denied, no other can be acknowledged. If there be exceptions to this central, this universal proposition, that *all* men, without respect to complexion or condition, hold from the Creator the right to live, who shall determine what portion of the community shall be slain? And who may perpetrate the murders?

Cong. Globe, 35th Cong., 1st Sess. App. 65-66 (1858) (emphasis in original).

2. Science rejects the exclusion of unborn children from the class of human beings.

Science does not purport to identify the value society should place upon human life. Science does indisputably show, however, that each individual human organism begins life at the moment of fertilization. *See generally* Krimmel & Foley, *Abortion: An Inspection into the Nature of Human Life and Potential Consequences of Legalizing its Destruction*, 46 U. Cin. L. Rev. 725, 744-62 (1977) (analysis of biochemical and genetic evidence shows that the life of a specific human being begins at conception). Thus science offers no valid basis for excluding prenatal human life from the category of "persons" protected under the Constitution.

> However one answers the metaphysical or theological question whether the fetus is a "human being" or the legal question whether it is a "person" as that term is used in the Constitution, one must at least recognize, first, that the fetus is an entity that bears in its cells all the genetic information that characterizes a member of the species homo sapiens and distinguishes an individual member of that species from all others, and second, that there is no

> nonarbitrary line separating a fetus from a child or, indeed, an adult human being.

Thornburgh v. American College of Obstets. & Gynecs., 476 U.S. 747, 792 (1986) (White, J., joined by Rehnquist, J., dissenting).

This principle of continuous development is not unique to human beings.

> In biology and in medicine, it is an accepted fact that the life of *any* individual organism reproducing by sexual reproduction begins at conception, or fertilization — the time when the egg cell from the female and sperm cell from the male join to form a single new cell, the zygote. The zygote is the starting cell of the new organism.
>
> . . . It is important to also remember . . . that like begets like. In other words, the zygote is always a member of the biological species of its parents from the time of fertilization throughout all of its life, before as well as after birth. No study or experiment has ever refuted these scientific facts, and no competent scientist denies them.

The Human Life Bill: Hearings on S.158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 14, 16 (1982) (testimony of Dr. Micheline Mathews-Roth, principal research associate, Dept. of Medicine, Harvard Medical School) (emphasis added). The conclusion in the case of human life rests, therefore, not only upon human embryological research, but upon the findings of a broad area of biological study.

> So, therefore, it is scientifically correct to say that an individual human life begins at conception, when egg and sperm join to form the zygote, and that this developing human always is a member of our species in all stages of its life.

Id. at 17. *Accord* W. Hamilton & H. Mossman, *Human Embryology* 14 (4th ed. 1972) ("the fusion of two germ cells . . . one, the spermatozoan from the male parent; the other, the ovum from the female parent . . . is the formation of the first cell of the new individual, the zygote"); L. Arey, *Developmental Anatomy* 55 (7th

ed. 1974) (union "of a male and female sex cell . . . definitely marks the beginning of a new individual"); K. Moore, *The Developing Human: Clinically Oriented Embryology* 1 (2d ed. 1977) (a zygote "results from fertilization of an oocyte by a sperm and is the beginning of human life").[10]

Science cannot identify a spiritual soul or assign a moral value to a given creature. Science does identify individual members of a particular species, such as homo sapiens. Unborn children are unquestionably individual members of this species, and thus the conclusions of science utterly reject the arbitrary exclusion of prenatal humans from the term "person."

3. Logic militates against the creation of an exception for unborn children in the term "person."

According to *Roe v. Wade*, unborn children are non-persons, and aborting such children is a constitutional right. But it is plainly absurd to draw so tenuous a border as birth (or, for that matter, viability) between what is a constitutional liberty and what is homicide.

First of all, the act of abortion itself cannot sensibly be what distinguishes between persons and non-persons. Presumably no member of this Court would deny that "a newborn infant, whether the product of a normal birth or an abortion," *Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft*, 462 U.S. 476, 503 n.10 (1983) (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting), is a person under the fifth and fourteenth amendments.

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[10] *See also Corkey v. Edwards*, 322 F. Supp. 1248 (W.D.N.C. 1971), *vacated*, 410 U.S. 950 (1973):

> During fertilization, sperm and egg pool their nuclei and chromosomes. Biologically, a living organism belonging to the species homo sapiens is created out of this organization. Genetically, the adult man was from such a beginning all that he essentially has become in every cell and human attribute.

322 F. Supp. at 1252 (citations omitted). *Accord Rosen v. Louisiana State Bd. of Medical Examiners*, 318 F. Supp. 1217, 1223 (E.D. La. 1970), *vacated*, 412 U.S. 902 (1973); *Steinberg v. Brown*, 321 F. Supp. 741, 746-47 (N.D. Ohio 1970) (three-judge court); *Presley v. Newport Hosp.*, 117 R.I. 177, ___, 365 A.2d 748, 751 (1976).

The point of detachment from the mother — whether by normal birth, induced delivery, or abortion — likewise fails as a logical point for creating an exception to personhood. For a considerable period prior to birth, the unborn child is viable, and thus capable of surviving premature delivery. The child of seven or eight months' gestation who still resides in the maternal womb is essentially indistinguishable from the child of identical age who has been born prematurely.

The fourteenth amendment does distinguish between born and unborn children of the same age for purposes of citizenship. *See* U.S. Const. amend. XIV, § 1 ("persons born . . . in the United States . . . are citizens"). But citizenship is a political classification the boundaries of which are necessarily arbitrary.

Personhood, in contrast, entitles an individual to the basic, minimal protections accorded to humanity. Whether the mother in labor while traveling interstate gives birth in Texas today or Mexico tomorrow is a question with political ramifications for the child; such incidental details, however, cannot reasonably determine whether the child may be slain. "No governmental power exists to say that a viable fetus should not have every protection required to preserve its life." *Thornburgh*, 476 U.S. at 784 (Burger, C.J., dissenting). As Senator Arthur S. Boreman explained in regard to the then recently enacted protections of the fourteenth amendment:

> This . . . is not confined to citizens of the United States, but it includes every person that is found within these States, and guaranties to all life, liberty, and property, and equal protection of the laws. . . . It is not restricted to guarantying the right of a "citizen" . . . but it extends to every "person," whether he has come from another State or not, to *every person residing anywhere, everywhere*, within the United States. So that while, before this amendment, if there was any question whether there were *any class of persons* in this country over whom the protection of the Constitution of the United States was not extended, there cannot now be any longer any question on that subject.

Cong. Globe, 42nd Cong., 1st Sess. App. 229 (1871) (emphasis added).

The total meaninglessness of birth as a criterion for personhood is more apparent today than ever, when induced, "scheduled" deliveries are commonplace, when babies are removed from the womb for surgery and then replaced within their mothers, and when irremediably harmed mothers are sustained on life support systems solely to await the delivery of the uninjured child within the womb.[11] Birth changes *where* the person is, not *what* the person is.

Nor does the concept of viability supply a logical alternative to birth as a boundary for excluding some unborn children from personhood.

> If we profess allegiance to reason, it would be seditious to adopt so arbitrary and uncertain a concept as viability as a dividing line between those persons who shall enjoy the protection of our remedial laws and those who shall become, for most intents and purposes, nonentities. It seems that if live birth is to be characterized, as it so frequently has been, as an arbitrary line of demarcation, then viability, when enlisted to serve that same purpose, is a veritable *non sequitur*.

Presley v. Newport Hosp., 117 R.I. 177, ___, 365 A.2d 748, 754 (1976).

Members of this Court have already strongly criticized reliance upon the concept of viability for drawing constitutional lines. *Webster v. Reproductive Health Services*, 492 U.S. 490, 519 (1989) (plurality opinion). *See, e.g., City of Akron v. Akron Center for Reprod. Health, Inc.*, 462 U.S. 416, 456-58 (1983) (O'Connor, J., joined by White and Rehnquist, JJ., dissenting) (point of viability is unstable because tied to contemporaneous

[11] Already *in vitro* fertilization, embryonic transfer, and surrogate motherhood have demonstrated beyond all doubt the fundamental biological independence of the newly conceived child from any particular woman, genetic mother or not, and the capacity of an unborn child to live outside of the womb altogether, if only for the initial stages of development. It is now clear, in other words, that intrauterine gestation is not even the first stage of life, but is merely an intermediate stage subject to technical manipulation regarding both its duration and the identity of the woman who bears the child.

state of medical technology, and is therefore unsuitable as a basis for judicial decision making). Justice White, in his dissent in *Thornburgh*, elaborated upon this point with regard to the state interest in protecting human life:

> The government interest at issue is in protecting those who will be citizens if their lives are not ended in the womb. The substantiality of this interest is in no way dependent on the probability that the fetus may be capable of surviving outside the womb at any given point in its development, as the possibility of fetal survival is contingent on the state of medical practice and technology, factors that are in essence morally and constitutionally irrelevant. The State's interest is in the fetus as an entity in itself, and the character of this entity does not change at the point of viability under conventional medical wisdom. Accordingly, the State's interest, if compelling after viability, is equally compelling before viability.

476 U.S. at 795 (White, J., joined by Rehnquist, J., dissenting) (footnote omitted). The same rationale applies to constitutional personhood, i.e., the claim to minimal protection of basic human rights. One's capacity for survival is "constitutionally irrelevant" because "the character of the entity does not change at the point of viability."

The very notion of viability as a criterion for denying legal protection is gravely flawed. Viability is not a transcendent concept — it refers to conditional circumstances. The Arctic explorer is viable *if* sufficiently clothed. The serious diabetic is viable *if* properly treated. The newborn, full-term infant is viable *if* fed and nurtured. And the unborn child is viable *if* not prematurely expelled from the necessary environment, be it a petri dish or a womb. To deny protection on the basis of one's need for protection is no more sensible than to deny those who cannot swim the right to stay on board a ship. *Roe* stripped protection from precisely those who most need the minimum safeguards of the Constitution. This is topsy-turvy jurisprudence.

4. Legal consistency would not be served by the exclusion of unborn children from the protection of the fifth and fourteenth amendments.

The integrity of the law is not served, but rather is harmed, by the arbitrary exclusion of unborn children from constitutional protection.[12] The history of legal developments of the past century and a half regarding prenatal human life has been a history of increasing recognition and protection of unborn children. The creation of an exception to the fourteenth or fifth amendments which would deny protection to such children represents a reversion to outmoded and unworkable legal fictions, and leads to disrespect for the law.

The ordinary legal guardians of the civil rights to life, liberty, and property are the criminal law and the law of torts. In both of these areas of law, courts and litigants have struggled with, and to a large extent overcome, the absurdity and injustice of arbitrary distinctions between born and unborn children, and between viable and nonviable unborn children.

The common law is considerably older than contemporary knowledge of prenatal human development. Ignorance of fertilization and the nature of the human embryo consequently left its marks on the common law. In particular, the considerable problems of proof facing those alleging the perpetration of wrongs against unborn children led to the recognition of various arbitrary rules. These rules, for want of better guides, tied civil and criminal liability to observable phenomena such as quickening (the detection of the child moving in the womb) and live birth.

The criminal law has found it difficult to "outgrow" these arbitrary rules, presumably because of a combination of stare decisis, concern for advance notice to defendants of the criminality of particular conduct, and the rule of strict construction in favor of the defendant. *E.g., Keeler v. Superior Court*, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970) (en banc). As a result, the general rule

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[12] Compounding the irony and absurdity of this arbitrary exclusion is the fact that this Court has held that *corporations* enjoy the status of "persons" under the fourteenth amendment. *Santa Clara County v. Southern Pac. R.R. Co.*, 118 U.S. 394, 396 (1886).

today remains that the homicide of an unborn child cannot be established without proof that the mortally wounded infant survived, even if only momentarily, outside the womb. *See* Annotation, *Homicide Based on Killing of Unborn Child*, 40 A.L.R.3d 444 (1971).[13] States have responded to this archaic requirement, however, by amending their criminal codes and specifying that the destruction of an unborn child is a crime.[14]

The law of torts has demonstrated a greater ability to "keep pace with the sciences," *Bonbrest v. Kotz*, 65 F. Supp. 138, 143 (D.D.C. 1946) (allowing action for prenatal injuries), and to adjust its rules of liability in the face of increased scientific knowledge. Thus, for example, the courts have overwhelmingly recognized the right of a live child to recover for prenatal injuries, even if inflicted prior to viability. Annotation, *Liability for Prenatal Injuries*, 40 A.L.R.3d 1222 (1971). Likewise, the courts universally allow recovery for the wrongful death of a child born alive whose injuries were inflicted before birth. Annotation, *Right to Maintain Action or to Recover Damages for Death of Unborn Child*, 84 A.L.R.3d 411 (1978). Similarly, after a protracted struggle over the issue, the

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[13] *But see Commonwealth v Lawrence*, 404 Mass. 378, 536 N.E.2d 571 (1989) (homicide laws apply to slaying of viable unborn child); *Commonwealth v. Cass*, 392 Mass. 799, 467 N.E.2d 1324 (1984) (viable unborn child is "person" under vehicular homicide statute); *State v. Horne*, 282 S.C. 444, 319 S.E.2d 703 (1984) (viable unborn child is "person" for purposes of criminal homicide); *State v. Burrell*, 237 Kan. 303, 699 P.2d 499 (1985) (applying involuntary manslaughter statute to death of viable unborn child).

[14] *E.g.*, Cal. Penal Code § 187 (West 1988) (murder); Ill. Ann. Stat. ch. 38, paras. 9-1.2, 9-2.1, 9-3.2 (Smith-Hurd Supp. 1991) (homicide and manslaughter of unborn child); La. Rev. Stat. Ann. §§ 14:32.5-32.8 (West Supp. 1992) (feticide); Minn. Stat. Ann. §§ 609.2661-609.2665, 609.268(1) (West 1987 & Supp. 1992) (murder, manslaughter, and felony death of unborn child); N.D. Cent. Code §§ 12.1-17.1-02 to 12.1-17.1-04 (Supp. 1991) (murder, manslaughter, and negligent homicide of unborn child).

One of the curious consequences of the difficulties in proving destruction of unborn children was that the lives of such children could better be protected by laws prohibiting abortion *without* proof of pregnancy, destruction of the unborn child, or intent to destroy such child. The American Medical Association incorporated precisely these features into its model anti-abortion statutes in the nineteenth century. *See* 13 Transactions of the American Medical Association 41-42 (1860); H. Storer, *Criminal Abortion in America* 94, 97-100 (1860).

courts of a clear majority of jurisdictions — thirty-five states and the District of Columbia, with eleven states opposed, and four undetermined — now allow recovery for the wrongful death of a viable unborn child who dies while still in the womb. *Id.*[15] And while few courts have addressed the issue, already one state supreme court has convincingly argued that wrongful death liability cannot sensibly be

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[15] The following decisions allow recovery for the wrongful death of a viable unborn child: *Eich v. Gulf Shores*, 293 Ala. 95, 300 So. 2d 354 (1974); *Summerfield v. Superior Court*, 144 Ariz. 467, 698 P.2d 712 (1985) (en banc); *Espadero v. Feld*, 649 F. Supp. 1480 (D. Colo. 1986); *Gorke v. Leclerc*, 23 Conn. Supp. 256, 181 A.2d 448 (1962); *Worgan v. Greggo & Ferrara, Inc.*, 50 Del. 258, 128 A.2d 557 (Super. Ct. 1956); *Greater Southeast Community Hosp. v. Williams*, 482 A.2d 394 (D.C. 1984); *Porter v. Lassiter*, 91 Ga. App. 712, 87 S.E.2d 100 (1955); *Wade v. United States*, 745 F. Supp. 1573 (D. Haw. 1990); *Volk v. Baldazo*, 103 Idaho 570, 651 P.2d 11 (1982); *Chrisafogeorgis v. Brandenberg*, 55 Ill. 2d 368, 304 N.E.2d 88 (1973); *Britt v. Sears*, 150 Ind. App. 487, 277 N.E.2d 20 (1971); *Hale v. Manion*, 189 Kan. 143, 368 P.2d 1 (1962); *Mitchell v. Couch*, 285 S.W.2d 901 (Ky. 1955); *Danos v. St. Pierre*, 402 So. 2d 633 (La. 1981); *State ex rel. Odham v. Sherman*, 234 Md. 179, 198 A.2d 71 (1964); *Mone v. Greyhound Lines, Inc.*, 368 Mass. 354, 331 N.E.2d 916 (1975); *O'Neill v. Morse*, 385 Mich. 130, 188 N.W.2d 785 (1971); *Verkennes v. Corniea*, 229 Minn. 365, 38 N.W.2d 838 (1949); *Rainey v. Horn*, 221 Miss. 269, 72 So. 2d 434 (1954); *O'Grady v. Brown*, 654 S.W.2d 904 (Mo. 1983); *White v. Yup*, 85 Nev. 527, 458 P.2d 617 (1969); *Polinquin v. MacDonald*, 101 N.H. 104, 135 A.2d 249 (1957); *Salazar v. St. Vincent Hosp.*, 95 N.M. 150, 619 P.2d 826 (Ct. App. 1980); *DiDonato v. Wortman*, 320 N.C. 423, 358 S.E.2d 489, *reh'g denied*, 320 N.C. 799, 361 S.E.2d 73 (1987); *Hopkins v. McBane*, 359 N.W.2d 862 (N.D. 1984), *appeal after remand*, 427 N.W.2d 85 (N.D. 1988); *Werling v. Sandy*, 17 Ohio St. 3d 45, 476 N.E.2d 1053 (1985); *Evans v. Olson*, 550 P.2d 924 (Okla. 1976); *Libbee v. Permanente Clinic*, 268 Or. 258, 518 P.2d 636, *reh'g denied, id.*, 520 P.2d 361 (1974); *Amadio v. Levin*, 509 Pa. 199, 501 A.2d 1085 (1985); *Presley v. Newport Hospital*, 117 R.I. 177, 365 A.2d 748 (1976); *Fowler v. Woodward*, 244 S.C. 608, 138 S.E.2d 42 (1964); *Re Certification of Question of Law from United States District Court*, 387 N.W.2d 42 (S.D. 1986); *Vaillancourt v. Medical Center Hosp. of Vermont, Inc.*, 139 Vt. 138, 425 A.2d 92 (1980); *Moen v. Hanson*, 85 Wash. 2d 597, 537 P.2d 266 (1975); *Baldwin v. Butcher*, 155 W. Va. 431, 184 S.E.2d 428 (1971); *Kwaterski v. State Farm Mutual Ins. Co.*, 34 Wis. 2d 14, 148 N.W.2d 107 (1967). One additional state, Tennessee, has legislated this result. *See* Tenn. Code Ann. § 20-5-106(c) (Supp. 1991) (legislatively overruling *Hamby v. McDaniel*, 559 S.W.2d 774 (Tenn. 1977)). Thus, thirty-seven jurisdictions now allow recovery for the wrongful death of a viable unborn child.

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limited to wrongs inflicted upon *viable* unborn children. *Presley v. Newport Hosp.*, 117 R.I. 177, 365 A.2d 748 (1976).[16]

Roe's imposition of birth and viability requirements (as predicates for personhood and a compelling state interest in protecting prenatal life, respectively) therefore represented a major setback in the law. *See generally* Bopp, Jr. & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. Pub. L. 181, 246-83 (1989) (survey of fetal rights in legal contexts other than abortion). *Roe* purported to constitutionalize the very same distinctions that the law of torts (and, to a lesser extent, crimes) was in the process of finally and completely repudiating.

The consequences in terms of respect for the law are all too obvious. The jealous ex-husband who forcibly aborts his pregnant ex-wife's child may be convicted of homicide, but the professional abortionist cannot be. A woman who is hit by a car and miscarries on the way to an abortion business may sue for the loss of the child she planned to destroy. A disabled child may recover large sums to compensate for harm suffered in the womb, but the mother could have had that same child killed because she did not want a handicapped baby.

Such contrasts make a mockery of the law. The malleable and uncertain lines separating viability from nonviability, or prematurity from pregnancy, simply cannot support the difference between con-

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Disallowing recovery are the following: *Justus v. Atchison*, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977); *Hernandez v. Garwood*, 390 So. 2d 357 (Fla. 1980); *McKillip v. Zimmerman*, 191 N.W.2d 706 (Iowa 1971); *Milton v. Cary Medical Center*, 538 A.2d 252 (Me. 1988); *Kuhnke v. Fisher*, 683 P.2d 916 (Mont. 1984); *Egbert v. Wenzl*, 199 Neb. 573, 260 N.W.2d 480 (1977); *Graf v. Taggart*, 43 N.J. 303, 204 A.2d 140 (1964); *Endresz v. Friedberg*, 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969); *Hamby v. McDaniel*, 559 S.W.2d 774 (Tenn. 1977), legislatively overruled, Tenn. Code Ann. 20-5-106(c) (Supp. 1991); *Witty v. American Gen. Capital Distribs., Inc.*, 30 Tex. Sup. Ct. J. 244, 727 S.W.2d 503 (1987); *Lawrence v. Craven Tire Co.*, 210 Va. 138, 169 S.E.2d 440 (1969).

The courts of Alaska, Arkansas, Utah, and Wyoming have not yet resolved the question.

[16] Another state has abolished the viability distinction by statute. Ill. Ann. Stat. ch. 70, para. 2.2 (Smith-Hurd 1989).

stitutional rights and crimes. The shifting sands of consent to abortion cannot support the distinction between homicidal torts and constitutional liberties.

Either the unborn child is a person, or he is not. While the law in theory can consider someone a person for some purposes and not for others, in practice such artificiality results in contempt for a legal system full of technicalities that contradict reality. The integrity of the legal system calls for inclusion, not exclusion, of the class of unborn children within the term "person" in the fifth and fourteenth amendments.

5. Justice demands the inclusion of unborn children within the term "person."

Finally, considerations of justice call for the renunciation of the arbitrary denial of equal protection to children who happen to reside within their mothers' wombs.

Not everyone has *every* right. But no one except a person has *any* rights. Thus *Roe v. Wade* asked the wrong question when it queried whether unborn children were "recognized in the law as persons in the whole sense," 410 U.S. at 162. The issue is not whether children conceived but not yet born should receive the full range of the rights of citizenship, such as the right to vote, but whether they may lay claim to the barest minimum of human rights: "the right to *survive* on a basis of equality with human beings generally," *Rosen v. Louisiana State Bd. of Medical Examiners*, 318 F. Supp. 1217, 1226 (E.D. La. 1970) (emphasis added), *vacated*, 412 U.S. 902 (1973). The law prior to *Roe* had generally accorded that much recognition, and more, to the child in the womb. And in so doing the law recognized a difference in kind between unborn children and tonsils, worms, or trees. This difference is the difference of personhood.

This difference relates to "our basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty." *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2708 (1990) (internal quotation marks and citation omitted). As Justice Brennan put it in another context,

> At bottom, the battle has been waged on moral grounds. The country has debated whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death.

Furman v. Georgia, 408 U.S. 238, 296 (1972) (Brennan, J., concurring) (overturning Georgia death penalty). If this observation holds true with regard to the life of a convicted felon, it is much more so for the innocent baby growing in the womb.

The answer to the fundamental moral issue is clear: society "must treat its members with respect for their intrinsic worth as human beings," for "if the deliberate extinguishment of human life has any effect at all, it more likely tends to lower our respect for life and brutalize our values." *Id.* at 270, 303 (Brennan, J., concurring).

Justice Harlan, dissenting in *Poe v. Ullman*, 367 U.S. 497 (1961), emphasized the central role of tradition and history in the interpretation of the Constitution. "A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound." *Id.* at 542 (Harlan, J., dissenting).

Roe v. Wade represents precisely such a radical departure from the history, indeed the founding principles, of this nation. Like *Betts v. Brady*, 316 U.S. 455 (1942), overruled in *Gideon v. Wainwright*, 372 U.S. 335 (1963), *Roe* "made an abrupt break" with what "seems to us to be an obvious truth," *Gideon*, 372 U.S. at 344: "We hold these truths to be self-evident: that *all* men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are *Life*, Liberty, and the pursuit of Happiness." The Declaration of Independence para. 2 (U.S. 1776) (emphasis added).

The fifth and fourteenth amendments represent an "assurance . . . that no man shall ever, in the coming future, as long as the Republic stands . . . be deprived of his life, of his liberty, or his property without due process of law." Cong. Globe, 37th Cong., 2d Sess. 1640 (1862) (Rep. Bingham). As this Court explained in *West*

Virginia Board of Education v. Barnette, 319 U.S. 624, 638 (1943), the "very purpose" of a constitutional declaration of rights

> was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life . . . and other fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.

Roe v. Wade created an exception to personhood where none existed or could exist. This Court should now correct this fundamental injustice by overruling *Roe v. Wade* and upholding the right to life and equal protection of all human beings, regardless of age, size, health, or condition of dependency.[17]

III. THE PERSONHOOD OF THE UNBORN REQUIRES THE REJECTION OF PLANNED PARENTHOOD'S ATTACK UPON THE PENNSYLVANIA STATUTES.

The constitutional personhood of human beings conceived but not yet born dictates the rejection of Planned Parenthood's constitutional challenge to the Pennsylvania statutes at issue here.

Planned Parenthood predicates its challenge upon an alleged "abortion right," Brief for Petitioners and Cross-Respondents at 15. Such a "right," however, is fundamentally inconsistent with the right to life of persons conceived but not yet born. A "right" to abort, where the life of an unborn person is at stake, would make no more sense than "a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person's body," *Michael H. v. Gerald D.*, 491 U.S. 110, 124 n.4 (1989) (plurality opinion). As this Court acknowledged in *Roe*, "[i]f this suggestion of personhood is established, the [challengers'] case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment." 410 U.S. at 156-57.

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[17] The Executive Branch has already recognized the "unalienable personhood" of unborn children as well as the fundamental importance of upholding the equal right to life of unborn children under the fifth and fourteenth amendments. Proclamation No. 5761, 3 C.F.R., 1988 Comp., p. 3. *See* Appendix (text of proclamation).

The personhood of unborn children imposes a duty upon the state to afford equal protection to humans conceived but not born. *Cf. DeShaney v. Winnebago Dep't of Social Servs.*, 489 U.S. 189, 197 n.3 (1989) ("the State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause") (citation omitted). "[L]egislation, which would remove the life of a person in the womb from the full and equal protection of the law, would be discriminatory, as 'irrational,' and as inimical to the equal protection clause as the legislative classification of races." Byrn, *Abortion in Perspective*, 5 Duq. U.L. Rev. 125, 135 (1966-67). As Justice Stevens observed in the *Thornburgh* case, unless there is a "fundamental" difference between unborn and born human offspring, "the permissibility of terminating the life of the fetus could scarcely be left to the will of the state legislatures." 476 U.S. at 779 (concurring opinion) (footnote omitted). "For the very idea that one may be compelled to hold his life . . . at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). *See also Cruzan v. Director, Mo. Dep't of Health*, 110 S. Ct. 2841, 2863 (1990) (Scalia, J., concurring) ("Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me").[18]

Thus, in view of the general prohibition of homicide, a proper litigant could challenge the constitutionality of laws which did *not* provide at least the minimum equal protection demanded by the fourteenth amendment: the outlawing of all abortions.

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[18] Furthermore, "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (footnote omitted). The fifth amendment, while lacking an explicit guarantee of equal protection, nevertheless also "contains an equal protection component." *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 542 n.21 (1987) (citation omitted). "This Court's approach to Fifth Amendment equal protection claims has . . . been precisely the same as to equal protection claims under the Fourteenth Amendment." *Id.* (internal quotation marks and citations omitted). *Accord Regan v. Taxation with Representation*, 461 U.S. 540, 542 n.2 (1983).

Planned Parenthood has not challenged the Pennsylvania statutes on this basis. Nor has Planned Parenthood indicated any desire to do so. Moreover, it is far from clear that this private entity, which is not a guardian of unborn children, and which promotes interests diametrically opposed to those of such children, could have standing to raise objections predicated upon the personhood of the unborn. The Attorney General of Pennsylvania, however, who is a party to this case, is a proper party to seek vindication of the rights of unborn persons. This Court should therefore hold that the fourteenth amendment protects unborn children as persons, and set this case for further briefing and reargument on the question of the proper disposition of this particular appeal.[19]

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[19] The challenged reporting requirements of the Pennsylvania statutes, 18 Pa. Cons. Stat. Ann. §§ 3207(b), 3214, are clearly constitutional. Such official gathering of information about abortion is entirely consistent with the constitutional rights of unborn persons.

On the other hand, statutes which affirmatively authorize abortions violate the fourteenth amendment. Any law which categorically permits the deliberate deprivation of an unborn child's life invidiously denies equal protection to such children. *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 197 n.3 (1989). Thus, the judicial bypass sections of the Pennsylvania parental consent statute, which provide that a judge "shall authorize" the abortion of a child under certain circumstances, 18 Pa. Cons. Stat. Ann. § 3206(c), (d), are unconstitutional.

Some of the challenged statutes expressly contemplate the commission of abortions, but may not in themselves affirmatively authorize abortions. *See* 18 Pa. Cons. Stat. § 3205 (informed consent), § 3206(a) (parental consent), § 3209 (spousal notice). If these laws were to be construed to authorize abortions, they would be unconstitutional. On the other hand, these laws could be construed to apply only to such abortions as are independently authorized under other provisions of law. Under this interpretation, the challenged sections would themselves pose no threat to the constitutional rights of unborn persons. Once laws permitting or authorizing abortions gave way to recognition of the constitutional rights to life and equal protection, laws merely assuming the legality of abortion would become, as applied to abortion, dead letters. Thus, a construction is readily available which saves, from facial unconstitutionality, laws which only presuppose the legality of abortion. *United States v. Salerno*, 481 U.S. 739, 745 (1987) (facial constitutional challenge must establish that no set of circumstances exist under which statute is valid).

The statutory definition of a medical emergency, 18 Pa. Cons. Stat. § 3203, bears directly upon the circumstances under which abortions are

(cont'd on next page)

This Court followed a similar course in the school desegregation cases. In *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*), this Court declared that racial segregation in public education violated the fourteenth amendment. The Court then set further proceedings to consider the implications of *Brown I* for the resolution of the particular cases before it. *See Brown v. Board of Educ.*, 349 U.S. 295, 298-99 (1955) (*Brown II*). Recognition of the constitutional rights of unborn children would, like the holding in *Brown I*, represent a very significant vindication of fundamental human rights. Thorough review of the ramifications of this holding, as well as the proper means of upholding these rights in the case at bar, would therefore be wise.

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permitted under the other statutory sections. The constitutionality of this statute therefore depends upon the scope of the emergency exception. The phrase, "death or . . . serious risk of substantial and irreversible impairment of bodily function" might be interpreted narrowly to encompass only those actions — removal of an ectopic pregnancy or a cancerous uterus, for example — which do not directly destroy the unborn child, which seek to preserve the life of the child if possible, and which result in the death of the child, if at all, only as an unintended consequence of an independently justified operation. The availability of such a narrow, constitutionally permissible construction suffices to defeat a facial challenge to the statute. *Salerno*, 481 U.S. at 745.

CONCLUSION

There is no valid basis for excluding unborn children from the fundamental protections afforded all persons under the fifth and fourteenth amendments to the United States Constitution. This Court should therefore overrule *Roe v. Wade*, 410 U.S. 113 (1973), and set this case for further briefing and reargument on the issue of the proper disposition of this appeal.

Respectfully submitted,

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APRIL 6, 1992

APPENDIX
PROCLAMATION 5761 — NATIONAL SANCTITY OF HUMAN LIFE DAY, 1988
January 14, 1988
By the President of the United States of America

A PROCLAMATION

America has given a great gift to the world, a gift that drew upon the accumulated wisdom derived from centuries of experiments in self-government, a gift that has irrevocably changed humanity's future. Our gift is twofold: the declaration, as a cardinal principle of all just law, of the God-given, unalienable rights possessed by every human being; and the example of our determination to secure those rights and to defend them against every challenge through the generations. Our declaration and defense of our rights have made us and kept us free and have sent a tide of hope and inspiration around the globe.

One of those unalienable rights, as the Declaration of Independence affirms so eloquently, is the right to life. In the 15 years since the Supreme Court's decision in *Roe v. Wade*, however, America's unborn have been denied their right to life. Among the tragic and unspeakable results in the past decade and a half have been the loss of life of 22 million infants before birth; the pressure and anguish of countless women and girls who are driven to abortion; and a cheapening of our respect for the human person and the sanctity of human life.

We are told that we may not interfere with abortion. We are told that we may not "impose our morality" on those who wish to allow or participate in the taking of the life of infants before birth; yet no one calls it "imposing morality" to prohibit the taking of life after people are born. We are told as well that there exists a "right" to end the lives of unborn children; yet no one can explain how such a right can exist in stark contradiction of each person's fundamental right to life.

That right to life belongs equally to babies in the womb, babies born handicapped, and the elderly or infirm. That we have killed the

unborn for 15 years does not nullify this right, nor could any number of killings ever do so. The unalienable right to life is found not only in the Declaration of Independence, but also in the Constitution that every President is sworn to preserve, protect, and defend. Both the Fifth and Fourteenth Amendments guarantee that no person shall be deprived of life without due process of law.

All medical and scientific evidence increasingly affirms that children before birth share all the basic attributes of human personality — that they in fact are persons. Modern medicine treats unborn children as patients. Yet, as the Supreme Court itself has noted, the decision in *Roe v. Wade* rested upon an earlier state of medical technology. The law of the land in 1988 should recognize all of the medical evidence.

Our Nation cannot continue down the path of abortion, so radically at odds with our history, our heritage, and our concepts of justice. This sacred legacy, and the well-being and the future of our country, demand that protection of the innocents must be guaranteed and that the personhood of the unborn be declared and defended throughout our land. In legislation introduced at my request in the First Session of the 100th Congress, I have asked the Legislative branch to declare the "humanity of the unborn child and compelling interest of the several states to protect the life of each person before birth." This duty to declare on so fundamental a matter falls to the Executive as well. By this Proclamation I hereby do so.

Now, Therefore, I, Ronald Reagan, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim and declare the unalienable personhood of every American, from the moment of conception until natural death, and I do proclaim, ordain, and declare that I will take care that the Constitution and laws of the United States are faithfully executed for the protection of America's unborn children. Upon this act, sincerely believed to be an act of justice, warranted by the Constitution, I invoke the considerate judgment of mankind and the gracious favor of Almighty God. I also proclaim Sunday, January 17, 1988, as National Sanctity of Human Life Day. I call upon the citizens of this blessed land to gather on that day in their homes and places of worship to give

thanks for the gift of life they enjoy and to reaffirm their commitment to the dignity of every human being and the sanctity of every human life.

In Witness Whereof, I have hereunto set my hand this 14th day of January, in the year of our Lord nineteenth hundred and eighty-eight, and of the Independence of the United States of America the two hundred and twelfth.

RONALD REAGAN

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
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(37) (30)

Nos. 91-744, 91-902

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *et al.*,
Petitioners and Cross-Respondents,

v.

ROBERT P. CASEY, *et al.*,
Respondents and Cross-Petitioners.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF CERTAIN AMERICAN STATE LEGISLATORS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS IN NO. 91-744, AND PETITIONERS IN NO. 91-902

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64

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICI*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. ONLY FUNDAMENTAL RIGHTS, IMPLICIT IN THE CONCEPT OF ORDERED LIBERTY AND HISTORICALLY AND TRADITIONALLY CONSIDERED BEYOND THE PROPER SCOPE OF GOVERNMENT REGULATION, ARE PROTECTED BY THE RIGHT OF PRIVACY	4
II. THE COMMON LAW OF ENGLAND, AS RECEIVED BY THE AMERICAN COLONIES AND STATES, PROHIBITED AND PUNISHED ABORTION AFTER QUICKENING AS A CRIMINAL OFFENSE	7
III. THE NINETEENTH CENTURY ABORTION STATUTES, WHICH ABOLISHED THE COMMON LAW QUICKENING DISTINCTION AND PROHIBITED ABORTION THROUGHOUT PREGNANCY EXCEPT TO SAVE THE LIFE OF THE MOTHER, WERE ENACTED WITH AN INTENT TO PROTECT UNBORN HUMAN LIFE	11
IV. IN VIEW OF THE LONG-STANDING CONDEMNATION OF ABORTION IN ENGLISH AND AMERICAN COMMON LAW, AND THE OVERWHELMING EVIDENCE THAT NINETEENTH CENTURY ABORTION STATUTES WERE ENACTED WITH AN INTENT TO PROTECT UNBORN HUMAN LIFE, THERE IS NO HISTORICAL BASIS FOR CONCLUDING THAT EITHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OR THE RIGHT OF PRIVACY WHICH HAS BEEN DERIVED THEREFROM ENCOMPASSES A FUNDAMENTAL RIGHT TO CHOOSE ABORTION	28
CONCLUSION	30

TABLE OF AUTHORITIES

Cases: Page

American Cases:

Abrams v. Foshee, 3 Iowa 273 (1856) 9, 17
American College of Obstetricians & Gynecologists v. Thornburgh, 737 F.2d 283 (3rd Cir. 1984), *aff'd*, 476 U.S. 747 (1986) 29
Anderson v. Commonwealth, 190 Va. 665, 58 S.E.2d 72 (1950) 16
Arnold v. Gaylord, 16 R.I. 573, 18 A. 177 (1889) .. 10
Beecham v. Leahy, 130 Vt. 164, 287 A.2d 836 (1972) 30
Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958) 17
Bowers v. Hardwick, 478 U.S. 186 (1986) 4-6, 29
Bowlan v. Lunsford, 176 Okla. 115, 54 P.2d 666 (1936) 16, 21
Cheaney v. State, 259 Ind. 138, 285 N.E.2d 265 (1972) 22
Committee to Defend Reproductive Rights v. Myers, 29 Cal.3d 252, 172 Cal.Rptr. 866, 625 P.2d 779 (1981) 30
Commonwealth v. Bangs, 9 Mass. 387 (1812) 9
Commonwealth v. Parker, 50 Mass. (9 Met.) 263 (1845) 9
Commonwealth v. W., 3 Pittbs. R. 462 (1871) 17
Doe v. Bolton, 410 U.S. 179 (1973) 29
Doe v. Rampton, No. C-234-70 (D. Utah 1971), *vacated and remanded*, 410 U.S. 950 (1973) 18
Dougherty v. The People, 1 Colo. 514 (1872) 16, 18
Dunn v. People, 29 N.Y. 523 (1864) 24
Earll v. People, 99 Ill. 123 (1881) 17
Eggart v. State, 40 Fla. 527, 25 So. 144 (1898) 9
Eisenstadt v. Baird, 405 U.S. 438 (1972) 6
Evans v. People, 49 N.Y. 86 (1872) 10
Foster v. State, 182 Wis. 298, 196 N.W. 233 (1923) 18
Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967) 16
Griswold v. Connecticut, 381 U.S. 479 (1965) 6
Hall v. People, 119 Colo. 141, 201 P.2d 382 (1948) 16

TABLE OF AUTHORITIES—Continued

Page

Hans v. State, 147 Neb. 67, 22 N.W.2d 385 (1946), *on rehearing*, 147 Neb. 73, 25 N.W.2d 35 (1946) 17
Hatchard v. State, 79 Wis. 357, 48 N.W. 380 (1891) 18
In re T.W., 551 So.2d 1186 (Fla. 1989) 30
Joy v. Brown, 173 Kan. 833, 252 P.2d 889 (1953) 16, 21
Lamb v. State, 67 Md. 524, 10 A. 208 (1887) 10, 17
Loving v. Virginia, 388 U.S. 1 (1967) 6
Margaret S. v. Edwards, 488 F. Supp. 181 (E.D. La. 1980) 29
Marmaduke v. People, 45 Colo. 357, 101 P. 337 (1909) 10
McClure v. State, 214 Ark. 159, 215 S.W.2d 524 (1949) 17
Meyer v. Nebraska, 262 U.S. 390 (1923) 4
Michael H. v. Gerald D., 491 U.S. 110 (1989) 5-6, 29
Miller v. Bennett, 190 Va. 162, 56 S.E.2d 217 (1949) 16, 21
Mills v. Commonwealth, 13 Pa. 630 (1850) 10
Mitchell v. Commonwealth, 78 Ky. 204 (1879) 9
Moe v. Secretary of Admin. and Finance, 382 Mass. 629, 417 N.E.2d 387 (1981) 30
Moore v. East Cleveland, 431 U.S. 494 (1977) 5, 7
Nash v. Meyer, 54 Idaho 283, 31 P.2d 273 (1943) .. 16
National Bank v. County of Yankton, 101 U.S. 129 (1880) 14
Nelson v. Planned Parenthood Center of Tucson, Inc., 19 Ariz. App. 142, 505 P.2d 580 (1973), *modified on rehearing* pursuant to *Roe* 22
Palko v. Connecticut, 302 U.S. 319 (1937) 4, 5
Passley v. State, 194 Ga. 327, 21 S.E.2d 230 (1942) 16, 21
People v. Belous, 71 Cal.2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969) 17
People v. Lovell, 40 Misc. 2d 458, 242 N.Y.S.2d 959 (1963) 16, 22
People v. Nixon, 42 Mich. App. 332, 201 N.W.2d 635 (1972), *on remand*, 50 Mich. App. 39, 212 N.W.2d 607 (1973) 17

TABLE OF AUTHORITIES—Continued

	Page
People v. Olmstead, 30 Mich. 431 (1874)	17
People v. Sessions, 58 Mich. 594, 26 N.W. 291 (1886)	9-17
Pierce v. Society of Sisters, 268 U.S. 510 (1925)	6
Railing v. Commonwealth, 110 Pa.St. 100, 1 A. 314 (1885)	17
Right to Choose v. Byrne, 91 N.J. 287, 450 A.2d 925 (1982)	30
Rodgers v. Danforth, 486 S.W.2d 258 (Mo. 1972)	22
Roe v. Wade, 410 U.S. 113 (1973)	*passim*
Rosen v. Louisiana Board of Medical Examiners, 318 F. Supp. 1217 (E.D. La. 1970), *vacated and remanded*, 412 U.S. 902 (1973)	16
Sasaki v. Commonwealth, 485 S.W.2d 897 (Ky. 1972), *vacated and remanded*, 410 U.S. 951 (1973)	22
Schulte v. Douglas, 567 F. Supp. 522 (D. Neb. 1981), *aff'd per curiam, sub nom. Womens' Servs., P.C. v. Douglas*, 710 F.2d 465 (8th Cir. 1983)	29
Scott v. State, 49 Del. 401, 117 A.2d 831 (1955)	17
Skinner v. Oklahoma, 316 U.S. 535 (1942)	6
Smith v. Gaffard, 31 Ala. 45 (1857)	9
Smith v. State, 33 Me. 48 (1851)	9, 17, 18
Smith v. State, 112 Miss. 802, 73 So. 793 (1916), *overruled on other grounds, Ladnier v. State*, 155 Miss. 348, 124 So. 432 (1929)	17
Snyder v. Massachusetts, 291 U.S. 97 (1934)	4
Stanley v. Georgia, 394 U.S. 557 (1969)	6
State v. Alcorn, 7 Idaho 599, 64 P. 1014 (1901)	16
State v. Atwood, 54 Or. 526, 102 P. 295 (1909), *aff'd on reh.*, 54 Or. 526, 104 P. 195 (1909)	16
State v. Ausplund, 86 Or. 121, 167 P. 1019 (1917)	16, 20
State v. Bassett, 26 N.M. 477, 194 P. 867 (1921)	17, 21
State v. Cooper, 22 N.J.L. 52 (1849)	9
State v. Cox, 197 Wash. 67, 84 P.2d 357 (1938)	16
State v. Crook, 16 Utah 212, 51 P. 1091 (1898)	17, 19
State v. Dickinson, 41 Wis. 299 (1877)	18
State v. Emerich, 13 Mo. App. 492 (1883), *aff'd*, 87 Mo. 110 (1885)	9

TABLE OF AUTHORITIES—Continued

	Page
State v. Farnam, 82 Or. 211, 161 P. 417 (1916)	16, 24
State v. Gedicke, 43 N.J.L. 86 (1881)	16, 19
State v. Hoover, 252 N.C. 113, 113 S.E.2d 281 (1960)	16, 22
State v. Howard, 32 Vt. 380 (1859)	16, 18
State v. Jordon, 227 N.C. 579, 42 S.E.2d 674 (1947)	16
State v. Magnell, 19 Del. (3 Penne.) 307, 51 A. 606 (1901)	17
State v. Miller, 90 Kan. 230, 133 P. 878 (1913)	16
State v. Millette, 112 N.H. 458, 299 A.2d 150 (1972)	17
State v. Moore, 25 Iowa 128 (1866)	17, 18
State v. Munson, 86 S.D. 663, 201 N.W.2d 123 (1972), *vacated and remanded*, 410 U.S. 950 (1973)	22
State v. Murphy, 27 N.J.L. 112 (1858)	15, 24
State v. Powell, 181 N.C. 515, 106 S.E. 133 (1921)	16
State v. Rudman, 126 Me. 177, 136 A. 817 (1927)	17
State v. Siciliano, 21 N.J. 249, 121 A.2d 490 (1956)	15, 16
State v. Steadman, 214 S.C. 1, 51 S.E.2d 91 (1948)	16
State v. Reed, 45 Ark. 333 (1885)	10
State v. Slagle, 83 N.C. 630 (1880)	10
State v. Tippie, 89 Ohio St. 35, 105 N.E. 75 (1913)	16
State v. Watson, 30 Kan. 281, 1 P. 770 (1883)	16
Sylvia v. Gobeille, 101 R.I. 76, 220 A.2d 222 (1966)	17
Territory v. Young, 37 Haw. 150 (1945), *appeal dismissed*, 160 F.2d 289 (9th Cir. 1947)	17
Thompson v. State, 493 S.W.2d 913 (Tex. Crim. App. 1971), *vacated and remanded*, 410 U.S. 950 (1973)	22
Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986)	3
Trent v. State, 15 Ala. App. 485, 73 So. 834 (1916)	16, 20

TABLE OF AUTHORITIES—Continued

	Page
Urga v. State, 155 Fla. 86, 20 So.2d 685 (1944)	17
Walsingham v. State, 250 So.2d 857 (Fla. 1971)	17
Webster v. Reproductive Health Services, Inc., 492 U.S. 490 (1989)	3
Weightnovel v. State, 46 Fla. 1, 35 So. 856 (1903)	17
Williams v. United States, 138 F.2d 81 (D.C. Cir. 1943)	18
Worthington v. State, 92 Md. 222, 48 A. 355 (1901)	17, 19
English Cases:	
R. v. Bourne, 1 K.B. 687 (1939)	9
R. v. Wycherly, 8 Car. & P. 262, 173 Eng. Rep. 486 (N.P. 1838)	10
Statutes:	
U.S. Const., art. IV, § III, cl. 2	14
U.S. Const. amend. XIV, § 1	*passim*
Alabama: Ala. Pen. Code, ch, VI, § 2, p. 238 (Meek Supp. 1841)	12
Ala. Code, § 3605, p. 690 (1866-67)	12, 25
Arizona: Ariz. (Terr.) Code, ch. X, div. 5, § 45, p. 54 (1865)	14
Ariz. Pen. Code, § 455, p. 711 (1887), repealed and re-enacted, Ariz. Pen. Code, § 244, p. 1228 (1901)	23
Arkansas: Ark. Rev. Stat., ch. 44, div. III, art. II, § 6 (1838)	12, 26
Act of Nov. 8, 1875, § 1, Ark. Acts., No. IV, p. 5 (1875)	26
California: Cal. Sess. Laws, ch. 99, § 45, p. 233 (1849-1850)	13
Act of May 20, 1861, Cal. Stat., ch. DXXI, p. 588 (1861)	13, 25
Act of Feb. 14, 1872, codified at Cal. Pen. Code, § 275, p. 69 (1872)	23
Colorado: Colo. (Terr.) Laws, div. 4, § 42, pp. 296-97 (1861)	14
Colo. (Terr.) Rev. Stat., ch. XXII, § 42, p. 202 (1868)	14, 25

TABLE OF AUTHORITIES—Continued

	Page
Connecticut: Conn. Pub. Stat., tit. 22, § 14, p. 152 (1821)	12
Conn. Pub. Acts, ch. LXXI, §§ 1-4, pp. 65-66 (1860), codified at Conn. Gen. Stat., tit. XII, ch. II, §§ 22-25, pp. 248-49 (1866)	12, 23, 25
Delaware: Act of Feb. 13, 1883, ch. 226, §§ 1, 2 Del. Laws, p. 522 (1883), codified at Del. Rev. Stat., p. 930 (1893)	23, 25
Act of July 6, 1972, § 1, Del. Laws, ch. 497, pp. 1611, 1664 (1972), Del. Code Ann., tit. 11, § 652 (1974 Rev.)	23
Florida: Act of Aug. 6, 1868, Fla. Acts, 1st Sess., ch. 1637 [No. 13], sub. ch. III, § 11, and sub. ch. VIII, § 9 (1868), pp. 64, 97 (1868)	14, 26
Georgia: Act of Feb. 25, 1876, ch. CXXX, §§ II, III, Ga. Laws, p. 113 (1876), codified at Ga. Code, § 4337 (a)-(c), p. 1143 (1882)	25
Idaho: Act of Feb. 4, 1864, ch. IV, § 42, Idaho (Terr.) Laws, p. 443 (1863-64), repealed and re-enacted by an Act of Dec. 21, 1864, ch. III, pt. IV, § 42, Idaho (Terr.) Laws, p. 305 (1864)	14
Idaho Rev. Stat., § 6795 (1887)	23
Illinois: Act of Jan. 30, 1827, § 46, Ill. Rev. Laws, p. 131 (1827), repealed and replaced by an Act of Feb. 26, 1833, § 46, Ill. Rev. Laws, p. 179 (1833)	12
Act of Feb. 28, 1867, §§ 1-3, Ill. Pub. Laws, p. 89 (1867)	12, 25
Indiana: Act of Feb. 7, 1835, ch. XLVII, § 3, Ind. Gen. Laws, p. 66 (1835), codified at Ind. Rev. Stat., ch. XXVI, p. 224 (1838)	12
Ind. Gen. Laws, ch. LXXXI, pp. 130-31 (1859)	12, 25
Ind. Laws, ch. XXXVII, § 23, p. 177 (1881), codified at Ind. Rev. Stat., § 1924, p. 358 (1881)	23
Ind. Rev. Stat. § 1923, p. 358 (1881)	23, 26
Iowa: Act of Jan. 25, 1839, § 18, Iowa (Terr.) Stat., 1st Legis., 1st Sess., p. 145 (1838), superseded by an Act of Mar. 15, 1858, Iowa Laws, ch. 58, § 1, p. 93 (1858), codified at Iowa Rev. Laws, pt. 4, tit. XXIII, ch. 165, art. 2, § 4221, pp. 723-24 (1860)	12, 25

TABLE OF AUTHORITIES—Continued

	Page
Act of Feb. 16, 1843, codified at Iowa (Terr.) Rev. Stat., ch. 49, § 10, p. 167 (1843)	12
Kansas: Kan. (Terr.) Stat., ch. 48, §§ 10, 39, pp. 238, 243 (1855)	13
Kan. (Terr.) Laws, ch. XXVIII, §§ 10, 37, pp. 232, 237 (Acts of 1859), codified at Kan. Comp. Laws, ch. XXXIII, §§ 10, 37, pp. 288, 293 (1862)	13
Louisiana: La. Acts, Act. 120, § 24, pp. 132-33 (1855), codified at La. Rev. Stat., Crimes & Offenses, § 24, p. 138 (1856)	13, 25
Maine: Me. Rev. Stat., ch. 160, §§ 13-14, p. 686 (1840)	12
Me. Rev. Stat., tit. 11, ch. 124, § 8, p. 685 (1857)	12, 25
Maryland: Act of Mar. 20, 1867, Md. Laws, ch. 185, § 11, pp. 342-43 (1867)	14
Act of Mar. 28, 1868, Md. Laws, ch. 179, § 2, p. 315 (1868), codified at Md. Code, art. XXX, § 1, pp. 105-06 (1868 Supp.)	14, 25
Massachusetts: Mass. Acts & Resolves, ch. 27, p. 406 (1845)	12
Mass. Gen. Stat., ch. 165, § 9, p. 818 (1860)	12, 25
Michigan: Mich. Rev. Stat., ch. 153, §§ 33-34, p. 662 (1846)	12, 26
Minnesota: Minn. (Terr.) Rev. Stat. ch. 100, § 11, p. 493 (1851)	13
Act of Mar. 10, 1873, Minn. Laws, ch. IX, §§ 1-3, pp. 117-18 (1873), codified at Minn. Gen. Stat., ch. 94, §§ 16-18, pp. 884-85 (1878), recodified at Minn. Gen. Stat., § 6546, p. 1751 (1894)	23, 25
Mississippi: Act of Feb. 15, 1839, tit. III, art. 1, § 9, Miss. Laws, p. 113 (1839), codified at Miss. Code, ch. LXIV, tit. III, § 9, p. 958 (1848), recodified at Miss. Rev. Code, ch. LXIV, art. 173, p. 601 (1857)	12
Missouri: Mo. Rev. Stat., art. II, §§ 10, 36, pp. 168-69, 172 (1835)	12
Mo. Gen. Stat., pt. IV, tit. XLV, ch. 200, §§ 10, 34, pp. 778-79, 781 (1866)	12, 26

TABLE OF AUTHORITIES—Continued

	Page
Montana: Mont. (Terr.) Laws, Criminal Practice Acts, ch. IV, § 41, p. 184 (1864)	14
Mont. Pen. Code, § 481 (1895), re-enacted and recodified at Mont. Rev. Code, § 94-402 (1947)	23
Nebraska: Act of Feb. 12, 1866, Neb. (Terr.) Stat., pt. III, ch. IV, § 42, pp. 598-99 (1866-67)	14, 25
Neb. Gen. Stat., ch. 58, §§ 6, 39, pp. 720, 727-28 (1873)	26
Nevada: Nev. (Terr.) Laws, ch. XXVIII, div. IV, § 42, p. 63 (1861)	13, 25
Act of Feb. 16, 1869, ch. XXII, § 1, Nev. Laws, pp. 64-65 (1869), superseded by an Act of Mar. 17, 1911, ch. 13, § 140 (Senate Bill 124, p. 43), codified at Nev. R.L. 6405, p. 1836 (1912), recodified at Nev. Rev. Stat., § 200.220 (1963)	23
New Hampshire: Act of Jan. 4, 1849, N.H. Laws, ch. 743, §§ 1-4, pp. 708-09 (1848), codified at N.H. Comp. Stat., tit. XXVI, ch. 227, §§ 11-14, pp. 544-45 (1853)	12, 23
New Jersey: Act of Mar. 1, 1849, N.J. Laws, pp. 266-27 (1849)	12, 25
Act of Mar. 25, 1881, N.J. Laws, ch. CXCI, p. 240 (1881)	26
New Mexico: N.M. (Terr.) Laws, No. 28, ch. 3, § 11, p. 88 (1854), codified at N.M. Rev. Stat., art. XXIII, ch. LI, § 11, p. 320 (1865)	14
New York: Act of Dec. 10, 1828, ch. 20, § 4, N.Y. Laws, 51st Legis., 2nd Sess., p. 19 (1828), codified at N.Y. Rev. Stat., pt. IV, ch. I, tit. II, art. I, § 9, p. 661, and tit. VI, § 21, p. 694 (1828-29), as amended by an Act of Apr. 30, 1830, ch. 320, § 58, N.Y. Laws, p. 401 (1830), codified at N.Y. Rev. Stat., pt. IV, ch. I, tit. II, art. I, § 9, pp. 550-51, and pt. IV, ch. I, tit. VI, § 21, pp. 578-79 (1828-35), repealed and replaced by N.Y. Laws, ch. 260, §§ 1-3, 6, pp. 285-86 (1845), codified at N.Y. Rev. Stat., pt. IV, ch. I, tit. VI, §§ 20-21, p. 779 (1846), and N.Y. Laws, ch. 22, § 1, p. 19 (1846), codified at N.Y. Rev. Stat., pt. IV, ch. I, tit. II, art. I, § 9, p. 750 (1846)	12

TABLE OF AUTHORITIES—Continued

Page

N.Y. Laws, ch. 260, § 3, p. 286 (1845), codified at N.Y. Rev. Stat., pt. IV, ch. I, tit. VI, § 21, p. 779 (1846), superseded by N.Y. Laws, ch. 181, § 2, p. 509 (1872), codified at N.Y. Rev. Stat. pt. IV, ch. I, tit. II, art. I, sec. 10, p. 933 (1875) 23

Act of July 26, 1881, N.Y. Laws, ch. 676 (N.Y. Pen. Code), §§ 191, 194, 294, 295, pp. 45-46, 72-73 (1881), 3 N.Y. Rev. Stat. at 2478-80 (1881).. 26

North Carolina: Act of Mar. 12, 1881, ch. 351, N.C. Laws, pp. 584-85 (1881), codified at N.C. Code, §§ 975, 976, p. 399 (1883) 25

North Dakota: Dak. Pen. Code, § 338, p. 459 (1877), recodified at N.D. Rev. Codes, § 7178, p. 1272 (1895) 23

Ohio: Act of Feb. 27, 1834, §§ 1, 2, Ohio Laws, pp. 20-21 (1834), codified at Ohio Gen. Stat., ch. 35, §§ 111, 112, p. 252 (1841) 13

Act of Apr. 13, 1867, Ohio Laws, pp. 135-36 (1867) 13, 25

Oklahoma: Okla. Stat., § 2188 (1890), codified at Okla. Rev. Laws, § 2437, p. 604 (1910) 23

Oregon: Act of Dec. 22, 1853, ch. III, § 13, Or. (Terr.) Stat., p. 187 (1853-54) 13

Act of Oct. 19, 1864, Or. Gen. Laws, Crim. Code, ch. 43, § 509, p. 528 (1845-1864) 13, 25

Pennsylvania: Pa. Laws, No. 374, tit. VI, §§ 87, 88, pp. 404-05 (1860) 13, 26

South Carolina: Act of Dec. 24, 1883, No. 354, §§ 1-3, S.C. Acts, pp. 547-48 (1883), codified at S.C. Rev. Stat., Crim. Stat., §§ 122, 137, 138, pp. 305, 309-10 (1893) 23, 25

South Dakota: Dak. Pen. Code., § 338, p. 459 (1877), recodified at S.D. Ann. Stat., § 7798, p. 1919 (1899) 23

Tennessee: Act of Mar. 26, 1883, ch. CXL, Tenn. Acts, pp. 188-89 (1883), codified at Tenn. Code, §§ 5371, 5372, p. 1031 (Milliken & Vertree's 1884) 25

Texas: Act of Feb. 9, 1854, § 1, Tex. Gen. Laws, ch. XLIX, § 1, p. 58 (1854) 13

TABLE OF AUTHORITIES—Continued

Page

Act of Aug. 28, 1856, codified at Tex. Pen. Code of 1857, arts. 531-36, pp. 103-04, as amended by an Act of Feb. 12, 1858, ch. 121, pt. I, tit. 17, ch. 7, Tex. Laws, p. 172 (1858), codified at Tex. Gen. Stat. Dig., ch. VII, articles 531-536, p. 524 (Oldham & White 1859) 14, 26

Utah: Utah Rev. Stat., § 4227, p. 903 (1898), recodified at Utah Code Ann., § 76-2-2 (1953).... 23

Vermont: Vt. Acts, No. 33, § 1, pp. 34-35 (1846), codified at Vt. Comp. Stat., tit. XXVIII, ch. 108, § 8, pp. 560-61 (1839-1850) 13

Act of Nov. 21, 1867, Vt. Acts, No. 57, §§ 1, 3, pp. 64-66 (1867) 13, 26

Virginia: Act of Mar. 14, 1848, ch. 120, tit. II, ch. III, § 9, Va. Acts, p. 96 (1847-48), codified, as modified, at Va. Code, tit. 54, ch. CXCI, § 8, p. 724 (1849), recodified, Va. Code, tit. 54, ch. CXCI, § 8, p. 784 (1860) 13, 26

Act of Mar. 14, 1878, Va. Acts, ch. 311, (sub.) ch. II, § 8, pp. 281-82 (1878), codified at Va. Code, § 3670, p. 879 (1887) 26

Washington: Wash. (Terr.) Stat., ch. II, §§ 37, 38, p. 81 (1854) 14

Wash. Laws, ch. 249, § 197, p. 948 (1909), codified at Rev. Code Wash., § 9.02.020 (1961) 23

West Virginia: Act of Mar. 14, 1848, ch. 120, tit. II, ch. III, § 9, Va. Acts, p. 96 (1847-48), codified, as modified, at Va. Code, tit. 54, ch. CXCI, § 8, p. 724 (1849), recodified, Va. Code, tit. 54, ch. CXCI, § 8, p. 784 (1860), and W. Va. Const., art. XI, ¶ 8 (1863) 14, 26

W. Va. Acts, ch. CXVIII, § 8, p. 335 (1882), codified at W. Va. Code, ch. CXLIV, § 8, p. 677 (1890) 26

Wisconsin: Wis. Rev. Stat., pt. IV, tit. XXX, ch. 133, § 11, pp. 683-84 (1849) 13

Wis. Rev. Stat., pt. IV, tit. XXVII, ch. CLXIV, § 11, p. 930, and ch. CLXIX, §§ 58, 59, p. 969 (1858) 13, 23, 26

Wyoming: Wyo. Laws, ch. 73, § 32, p. 131 (1890), codified as Wyo. Stat., § 6-78 (1957) 23

TABLE OF AUTHORITIES—Continued

Other Authorities: Page

Annot., *Woman Upon Whom Abortion Is Committed As Accomplice For Purposes Of Rule Requiring Corroboration Of Accomplice Testimony*, 34 A.L.R.3d 858 (1970) 24

Bishop on Statutory Crimes (2d ed.) (1883) 10

W. Blackstone, *Commentaries On The Laws Of England* (1765-69) 8

2 H. de Bracton (c. 1250), *On the Laws and Customs of England* (S. Thorne ed. 1968) 8

Wm. Burdick, *Law of Crime* (1946) 10

Byrn, *An American Tragedy: The Supreme Court On Abortion*, 44 Fordham L. Rev. 807 (1973) 9

E. Coke, *Third Institute of the Laws of England* (1644) 8

Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. Pitt. L. Rev. 359 (1979) 28

1 E. East, *A Treatise on the Pleas of the Crown* (1803) 8

Fleta (c. 1290), Bk. I, ch. XXIII, "Of Homicide," which appears in Vol. II of the translated works of Fleta, *Publications of the Selden Society*, Vol. 72 (1955) 8

M. Hale, *Summary of the Pleas of the Crown* (1678) 8

1 W. Hawkins, *A Treatise of the Pleas of the Crown* (1716) 8

Hearings on S. 158 Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 97th Cong., 1st Sess. 27

J. Keown, *Abortion, doctors and the law* (Cambridge University Press 1988) 8

L. Koehler, *A Search For Power: The "Weaker Sex" in Seventeenth-Century New England* (1980) 11

Linton, *Enforcement of State Abortion Statutes After Roe: A State-by-State Analysis*, 67 U. Det. L. Rev. 157 (Winter 1990) 28, 30

J. Mohr, *Abortion in America* (1978) 11

TABLE OF AUTHORITIES—Continued

Page

1 Wm. Russell, *A Treatise on Crimes and Misdemeanors* (1819) 8

C. Scholten, *Childbearing In American Society 1650-1850* (1985) 11

J. Spruill, *Women's Life and Work in the Southern Colonies* (1938) 11

F. Wharton, *American Criminal Law* (6th rev. ed.) (1868) 10

Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes And The Fourteenth Amendment*, 17 St. Mary's L.J. 29 (1985) 12

INTEREST OF THE AMICI *

Amici Curiae are a bipartisan group of more than 600 senators and representatives—men and women—from all fifty States. *Amici* also include the Governor of the Territory of Guam, the Honorable Joseph F. Ada, who is a defendant in the challenge to the Guam abortion law now pending in the United States Court of Appeals for the Ninth Circuit, Lt. Gov. Frank F. Blas, and legislators from Guam and Puerto Rico. *Amici* do not all share the same convictions regarding the manner and extent to which abortion should be regulated or prohibited. But all are in agreement that abortion is properly a matter for the legislative, not the judicial, branch of government, and that States have the constitutional authority to protect unborn human life throughout pregnancy. Because of this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), that authority can no longer be exercised.

The issue of abortion poses difficult and complex legal, moral, social, medical and political problems which the judiciary is uniquely ill-suited to resolve. From 1787 until 1973, these questions were raised, freely debated and answered in the public forums of the state legislatures, where the will of the people could be expressed through their popularly elected representatives. That debate has been silenced and those forums have been closed for almost twenty years. The voice of the people will not be heard again until *Roe* is overruled and legislative authority over abortion is restored to the States.

SUMMARY OF ARGUMENT

In *Roe v. Wade*, 410 U.S. 113 (1973), this Court held that "[the] right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153. The

* The names of the *amici* appear in the appendix to this brief, which is filed with the consent of the parties.

Court acknowledged that "[t]he Constitution does not explicitly mention any right of privacy." *Id.* at 152. Nevertheless, "a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." *Id.* However, "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' . . . are included in this guarantee of personal privacy." *Id.*

In finding that there is a "fundamental right" to choose abortion, the Court in *Roe* reviewed the treatment of abortion in English and American law (410 U.S. at 129, 132-41, 147-52), and came to the following conclusions:

> [A]t common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the 19th century. Even later, the law continued for some time to treat less punitively an abortion procured in early pregnancy.

Id. at 140-41.

Amici curiae respectfully submit that these conclusions, central to the Court's decision in *Roe*, are erroneous. The Court's examination of the history of abortion regulation was seriously flawed and failed to take into account the state of medical technology in which the law of abortion evolved. As this brief attempts to demonstrate, both the English common law, as received by the American colonies, and the abortion statutes enacted by state legislatures in the nineteenth century, sought to protect unborn human life to the extent that contemporary medical science could establish the existence of that life. This evidence undermines the critical factual assumptions on which *Roe* was erected and suggests that English and American law never recognized a right to choose abortion. Accordingly, *Roe v. Wade* should be overruled.[1]

ARGUMENT

> Abortion is a hotly contested moral and political issue. Such issues, in our society, are to be resolved by the will of the people, either as expressed through legislation or through the general principles they have already incorporated into the Constitution they have adopted. *Roe v. Wade* implies that the people have already resolved the debate by weaving into the Constitution the values and principles that answer the issue. As I have argued, I believe it is clear that the people have never—not in 1787, 1791, 1868, or at any time since—done any such thing. I would return the issue to the people by overruling *Roe v. Wade.*

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 796-97 (1986) (White, J., dissenting).

In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court, without support in the text, structure or history of the Constitution, reached out and struck down the abortion laws of all fifty States. The Court thereby established as a constitutional right what had long been viewed in English and American law as a serious crime—the intentional destruction of unborn human life. Contrary to the Court's reading of English and American legal traditions in *Roe*, there is no historical basis for concluding that the Due Process Clause of the Fourteenth Amendment, or the right of privacy that has been derived therefrom, embraces a right to choose abortion. Since nothing

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[1] The issue of whether *Roe* should be overruled is properly before this Court. The questions certified for review—whether the challenged provisions of the Pennsylvania Abortion Control Act of 1982, as amended, are constitutional—cannot be answered without first determining the appropriate standard of review applicable to the regulation of abortion. The selection of that standard directly implicates *Roe*. *See Webster v. Reproductive Health Services, Inc.*, 492 U.S. 490, 532-33 (1989) (Scalia, J., concurring in part and concurring in the judgment).

in the Constitution was intended to deprive the people of their rightful authority, acting through their state legislatures, to protect human life by restricting abortion, that authority should be restored to its legitimate source—the American people. *Roe v. Wade* should be overruled.

I. ONLY FUNDAMENTAL RIGHTS, IMPLICIT IN THE CONCEPT OF ORDERED LIBERTY AND HISTORICALLY AND TRADITIONALLY CONSIDERED BEYOND THE PROPER SCOPE OF GOVERNMENT REGULATION, ARE PROTECTED BY THE RIGHT OF PRIVACY.

This Court has recognized that certain fundamental rights are protected by the Due Process Clause of the Fourteenth Amendment. Due process of law protects those rights which are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), or which are "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). For any right to be considered fundamental, it must be grounded in the history and traditions of our society and be basic to our civil and political institutions. *See Palko v. Connecticut*, 302 U.S. 319, 328 (1937), and *Meyer v. Nebraska*, 262 U.S. 390, 400-02 (1923).

In *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Court forcefully reiterated these principles of constitutional analysis in rejecting the claim that the Constitution confers a fundamental right upon homosexuals to engage in sodomy. The Court noted that "the Due Process Clauses of the Fifth and Fourteenth Amendments . . . have been interpreted to have substantive content, subsuming rights that to a great extent are immune from federal or state regulation or proscription." *Id.* at 191. Some of these cases recognized "rights that have little or no textual support in the constitutional language." *Id.* To guard against the danger of "the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the

nature of the rights qualifying for heightened judicial protection." *Id.*

Thus, in *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937), the Court stated that this category of rights includes those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed." A broader formulation of fundamental liberties was set forth in Justice Powell's opinion in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition." *Id.* at 503 (opinion of Powell, J.). In *Roe*, this Court acknowledged that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' . . . are included in this guarantee of personal privacy." 410 U.S. at 152.

In rejecting the argument that homosexuals have a fundamental right to engage in acts of consensual sodomy, the Court in *Bowers* noted that "[s]odomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights." 478 U.S. at 192. The Court noted further that in 1868, when the Fourteenth Amendment was ratified, "all but 5 of the 37 States in the Union had criminal sodomy laws." *Id.* at 192-93. Finally, the Court pointed out that until 1961, "all 50 States outlawed sodomy, and today, 25 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults." *Id.* at 193-94. In light of the law's longstanding prohibition of sodomy, "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious." 478 U.S. at 194.[2]

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[2] The Court has continued to rely upon historical traditions in evaluating asserted claims of constitutional right not based upon an explicit constitutional text. *See, e.g., Michael H. v. Gerald D.*, 491

In *Bowers*, the Court declined to take a more expansive view of its authority "to discover new fundamental rights imbedded in the Due Process Clause." 478 U.S. at 194.

> The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be . . . great resistance to expand the substantive reach of those Clauses, particularly if it requires the category of rights deemed to be fundamental. Otherwise, the Judiciary takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.

Id. at 194-95.

When these principles are applied to the issue of abortion, it becomes clear that *Roe* was wrongly decided. Contrary to the Court's conclusions, there was no right to choose abortion at common law or under the statutes enacted by state legislatures in the nineteenth century. The uniform and consistent condemnation of abortion as a crime in English and American law contradicts the critical historical findings on which *Roe* was based.

Although petitioners attempt to defend the legitimacy of *Roe* on general privacy grounds (Br. at 22-27),[3] their brief is curiously silent regarding the history of abortion

U.S. 110, 122 n.2, 120-29 (1989) (natural father of child conceived in adulterous relationship lacked protected liberty interest in asserting parental rights over the child).

[3] This effort ultimately fails because, as this Court noted in *Roe*, abortion is "inherently different" from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt v. Baird*, 405 U.S. 438 (1972) and *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Stanley v. Georgia*, 394 U.S. 557 (1969), *Loving v. Virginia*, 388 U.S. 1 (1967), *Skinner v. Oklahoma*, 316 U.S. 535 (1942), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) and *Meyer v. Nebraska*, 262 U.S. 390 (1923), were respectively concerned. 410 U.S. at 159. Abortion is different because it involves the intentional destruction of unborn human life.

regulation. Petitioners do not discuss whether abortion was a crime at common law, or when American legislatures enacted statutes prohibiting abortion or how those statutes were interpreted by state reviewing courts. This silence is all the more remarkable given the need to ground an asserted privacy right (in this case, the right to choose abortion) "in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. at 503 (opinion of Powell, J.). Only the "Historians' Brief" in support of petitioners even attempts to remedy these deficiencies. It fails to do so, however, because as both this brief and the brief *amicus curiae* of the American Academy of Medical Ethics demonstrate, it seriously distorts both the common law record and the pattern of nineteenth century legislative activity restricting abortion. Moreover, the "Historians' Brief," in asserting that "emphasis on the fetus became central to cultural and legal debate over abortion only in the late twentieth century," Br. at 26, simply ignores scores of judicial opinions from state courts which recognized that their nineteenth century abortion laws were enacted with the intention of protecting unborn human life.

II. THE COMMON LAW OF ENGLAND, AS RECEIVED BY THE AMERICAN COLONIES AND STATES, PROHIBITED AND PUNISHED ABORTION AFTER QUICKENING AS A CRIMINAL OFFENSE.

An understanding of the development of the common law crime of abortion in England is essential to any analysis of the status of abortion in American law prior to the gradual replacement of common law crimes by statutory crimes in the nineteenth century. Although a comprehensive review of this history is beyond the scope of this brief,[4] the following is offered as a summary.

The thirteenth century commentators Bracton and Fleta classified abortion of a "formed and animated"

[4] The court is referred to the brief *amicus curiae* of the American Academy of Medical Ethics in support of Respondents in No. 91-744, and Petitioners in 91-902, and J. Keown, *Abortion, doctors*

fetus as homicide.[5] The sixteenth and seventeenth century jurist, Sir Edward Coke, declared that, while not "murder", abortion of a woman "quick with childe" was a "great misprision." E. Coke, *Third Institute of the Laws of England* at 50 (1644).[6] If, however, "the childe be born alive, and dieth of the Potion, battery, or other cause, this is murder: for in law it is accounted a reasonable creature, *in rerum natura*, when it is born alive." *Id.*[7] In his classic *Commentaries On The Laws Of England*, William Blackstone closely followed Coke:

> [T]he person killed must be *"a reasonable creature in being, and under the king's peace,"* at the time of the killing . . . To kill a child in its mother's womb, is now no murder, but a great misprision: but if the child be born alive, and dieth by reason of the potion or bruises it received in the womb, it is murder in such as administered or gave them.

4 W. Blackstone, *Commentaries On The Laws Of England* 198 (1769) (emphasis in original). Blackstone held that the killing of a child in the womb was "a very heinous misdemeanor." 1 W. Blackstone, *Commentaries*, at 126 (1765).

"Quickening" (the point in a pregnancy at which the mother begins to detect fetal movement) was used in the common law as a practical evidentiary test to determine whether the abortion had been performed upon a live

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and the law at 3-12 (Cambridge University Press 1988), for a fuller presentation of this history.

[5] 2 H. de Bracton (c. 1250), *On the Laws and Customs of England* 341 (S. Thorne ed. 1968); Fleta (c. 1290), Bk. I, ch. XXIII, "Of Homicide," which appears in Vol. II of the translated works of Fleta, *Publications of the Selden Society*, Vol. 72, pp. 60-61 (1955).

[6] A "misprision," according to Coke, was "a heinous offense under the degree of felony." *Id.* at 139.

[7] Other leading authorities accepted Coke's declaration regarding the criminality of abortion at common law. *See* M. Hale, *Summary of the Pleas of the Crown* 53 (1678); 1 W. Hawkins, *A Treatise of the Pleas of the Crown* 80 (1716); 1 E. East, *A Treatise on the Pleas of the Crown* 227-30 (1803); 1 Wm. Russell, *A Treatise on Crimes and Misdemeanors* 617-18, 796 (1819).

human being in the womb, and whether the abortion had caused the child's death. Byrn, *An American Tragedy: The Supreme Court On Abortion*, 44 Fordham L.Rev. 807, 815-16 (1973). This test "was never intended as a judgment that before quickening the child was not a live human being." *Id.* at 816.[8]

The views of Coke and Blackstone were accepted by American courts in the nineteenth century as accurate statements of the criminality of abortion at common law. *See, e.g., Abrams v. Foshee*, 3 Iowa 273, 278-80 (1856); *Smith v. State*, 33 Me. 48, 55 (1851); *Commonwealth v. Parker*, 50 Mass. (9 Met.) 263, 264-68 (1845); *People v. Sessions*, 58 Mich. 594, 596, 26 N.W. 291, 293 (1886); *State v. Cooper*, 22 N.J.L. 52, 53-58 (1849). In conformity with those views, state courts uniformly recognized abortion after quickening as a common law crime.[9] The courts of at least three States went

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[8] In *R. v. Bourne*, 1 K.B. 687 (1939), Judge Macnaghten observed that "long before then [the enactment of the first English abortion statute in 1803], before even Parliament came into existence, the killing of an unborn child was by the common law of England a grave crime . . . . The protection which the common law afforded to human life extended to the unborn child in the womb of its mother." *Id.* at 690. English cases recognizing the criminality of abortion at common law are collected in the Brief *Amicus Curiae* of the American Academy of Medical Ethics.

[9] *Smith v. Gaffard*, 31 Ala. 45, 51 (1857) (*dictum* in slander case); *Eggart v. State*, 40 Fla. 527, 532, 25 So. 144, 145 (1898) (*dictum* in case decided under statute abolishing quickening distinction); *Abrams v. Foshee*, 3 Iowa 273, 278-80 (1856) (*dictum* in slander case); *Mitchell v. Commonwealth*, 78 Ky. 204, 205-10 (1879) (reversing conviction where indictment failed to allege that "the woman was quick with child"); *Smith v. State*, 33 Me. 48, 55 (1851) (*dictum* in case decided under statute abolishing quickening distinction); *Commonwealth v. Parker*, 50 Mass. (9 Met.) 263, 264-68 (1845) (reversing conviction where indictment failed to allege that "the woman was quick with child"); *Commonwealth v. Bangs*, 9 Mass. 387, 387-88 (1812) (arresting judgment where indictment failed to allege that "the woman was quick with child"); *State v. Emerich*, 13 Mo. App. 492, 495-98 (1883) (*dictum* in case decided under statute), *aff'd*, 87 Mo. 110 (1885); *State v. Cooper*, 22 N.J.L. 52, 54-58 (1849) (*dictum* in case upholding indictment charging

further, holding that abortion at any stage of pregnancy was a common law crime. *State v. Reed*, 45 Ark. 333, 334 (1885); *State v. Slagle*, 82 N.C. 630, 632 ((1880); *Mills v. Commonwealth*, 13 Pa. 630, 632-33 (1850). The Maryland Court of Appeals may have had these cases in mind when it reported widespread judicial abandonment of the medically obsolete quickening distinction:

> [A]s the life of an infant was not supposed to begin until it stirred in the mother's womb, it was not regarded as a criminal offence to commit an abortion in the early stages of pregnancy. A considerable change in the law has taken place in many jurisdictions by the silent and steady progress of judicial opinion; and it has been frequently held by Courts of high character that *abortion is a crime at common law without regard to the stage of pregnancy.*

Lamb v. State, 67 Md. 524, 533, 10 A. 208 (1887) (emphasis supplied). *See also Marmaduke v. People*, 45 Colo. 357, 361-62, 101 P. 337, 338 (1909).[10]

These decisions, together with the dozens of abortion prosecutions reported in the digests, lay to rest the doubt expressed in *Roe* that "abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus." 410 U.S. 113, 136 (1973). No American court ever held that abortion after quickening was not a criminal offense.

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defendant with assault); *Evans v. People*, 49 N.Y. 86, 88 (1872) (*dictum* in case reversing conviction under manslaughter statute); *Arnold v. Gaylord*, 16 R.I. 573, 576, 18 A. 177, 178-79 (1889) (*dictum* in loss of services case).

[10] Leading nineteenth-century commentators were in accord. *See Bishop on Statutory Crimes* (2d ed.), § 744, p. 447 (1883); F. Wharton, *American Criminal Law* (6th rev. ed.), §§ 1220-30, pp. 210-18 (1868) (criticizing quickening distinction and concluding that abortion was a crime at common law, regardless of the stage of pregnancy). *See R. v. Wycherly*, 8 Car. & P. 262, 173 Eng. Rep. 486 (N.P. 1838). Bishop and Wharton were "the two most frequently cited American writers" on substantive criminal law. Wm. Burdick, *Law of Crime*, Foreword at v (1946).

Moreover, there is evidence that abortion was prosecuted as a common law crime in the colonial period. Julia Cherry Spruill, in her study of women in the South, cites the 1652 case of Captain Mitchell, who "was accused of a number of crimes, among which was attempted abortion," and of Elizabeth Robins, who was accused of "taking medicine to destroy her child." J. Spruill, *Women's Life and Work in the Southern Colonies* at 325-26 (1938). Another historian, Lyle Koehler, records the Rhode Island case of Deborah Allen, who was convicted and punished in 1683 for fornication and "Indeavoringe the dithuchion [destruction] of the Child in her womb." L. Koehler, *A Search For Power: The "Weaker Sex" in Seventeenth-Century New England* at 329 & n. 132 (1980).

Admittedly, there are few reported abortion prosecutions in America prior to the mid-nineteenth century. This was not because abortion was not regarded as a crime at common law, however, but because "[f]ew [women] tried to limit their pregnancies by birth control or abortion," (C. Scholten, *Childbearing In American Society 1650-1850* at 9 (1985)), and because primitive medical understanding prevented proof of abortion until after quickening and unless there were direct witnesses who would testify. J. Mohr, *Abortion in America* at 72 (1978). Mohr notes that abortion after quickening, "late in the fourth or early in the fifth month," was a common law crime in the United States. *Id.* at 3. The decision to choose abortion was not a right at common law, in England or America. Abortion was a crime and was punished accordingly.

III. THE NINETEENTH CENTURY ABORTION STATUTES, WHICH ABOLISHED THE COMMON LAW QUICKENING DISTINCTION AND PROHIBITED ABORTION THROUGHOUT PREGNANCY EXCEPT TO SAVE THE LIFE OF THE MOTHER, WERE ENACTED WITH AN INTENT TO PROTECT UNBORN HUMAN LIFE.

The Court's assertions in *Roe* that "the pre-existing English common law" of abortion remained in effect in

this country "in all but a few States until [the] mid-19th century" and that "[i]t was not until after the War Between the States that legislation began generally to replace the common law" are simply wrong. 410 U.S. at 138-139. By the end of 1849, eighteen of the thirty States had enacted statutes prohibiting abortion,[11] and by the

[11] *See, generally,* Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes And The Fourteenth Amendment,* 17 St. Mary's L.J. 29, 32 *et seq.* (1985) (hereinafter *Witherspoon*). The following eighteen States adopted abortion statutes before 1850: *Alabama,* Ala. Pen. Code, ch. VI, § 2, p. 238 (Meek Supp. 1841), as amended, Ala. Code, § 3605, p. 690 (1866-67); *Arkansas,* Ark. Rev. Stat., ch. 44, div. III, art. II, § 6 (1838); *Connecticut,* Conn. Pub. Stat., tit. 22, § 14, p. 152 (1821), replaced by Conn. Pub. Acts, ch. LXXI, §§ 1-4, pp. 65-66 (1860), codified at Conn. Gen. Stat., tit. XII, ch. II, §§ 22-25, pp. 248-49 (1866), which made abortion at any stage of pregnancy a crime; *Illinois,* Act of Jan. 30, 1827, § 46, Ill. Rev. Laws, p. 131 (1827), repealed and replaced by an Act of Feb. 26, 1833, § 46, Ill. Rev. Laws, p. 179 (1833), which was replaced by an Act of Feb. 28, 1867, §§ 1-3, Ill. Pub. Laws, p. 89 (1867); *Indiana,* Act of Feb. 7, 1835, ch. XLVII, § 3, Ind. Gen. Laws, p. 66 (1835), codified at Ind. Rev. Stat. ch. XXVI, p. 224 (1838), superseded by Ind. Gen. Laws, ch. LXXXI, § 2, pp. 130-31 (1859); *Iowa* (admitted to statehood Dec. 28, 1846), Act of Jan. 25, 1839, § 18, Iowa (Terr.) Stat., 1st Legis., 1st Sess., p. 145 (1838), superseded by an Act of Mar. 15, 1858, Iowa Laws, ch. 58, § 1, p. 93 (1858), codified at Iowa Rev. Laws, pt. 4, tit. XXIII, ch. 165, art. 2, § 4221, pp. 723-24 (1860), which made abortion at any stage of pregnancy a crime (an Act of Feb. 16, 1843, penalized the intentional destruction of an unborn quick child as manslaughter, Iowa (Terr.) Rev. Stat., ch. 49, § 10, p. 167 (1843)); *Maine,* Me. Rev. Stat., ch. 160, §§ 13-14, p. 686 (1840), recodified, as amended, at Me. Rev. Stat., tit. 11, ch. 124, § 8, p. 685 (1857); *Massachusetts,* Mass. Acts & Resolves, ch. 27, p. 406 (1845), subsequently codified, as amended, at Mass. Gen. Stat., ch. 165, § 9, p. 818 (1860); *Michigan,* Mich. Rev. Stat., ch. 153, §§ 33-34, p. 662 (1846); *Mississippi,* Act of Feb. 15, 1839, tit. III, art. 1, § 9, Miss. Laws, p. 113 (1839), codified at Miss. Code, ch. LXIV, tit. III, § 9, p. 958 (1848), recodified at Miss. Rev. Code, ch. LXIV, art. 173, p. 601 (1857); *Missouri,* Mo. Rev. Stat., art. II, §§ 10, 36, pp. 168-69, 172 (1835), recodified, as amended, at Mo. Gen. Stat., pt. IV, tit. XLV, ch. 200, §§ 10, 34, pp. 778-79, 781 (1866); *New Hampshire,* Act of Jan. 4, 1849, N.H. Laws, ch. 743, §§ 1-4, pp. 708-09 (1848), codified at N.H. Comp. Stat., tit. XXVI, ch. 227, §§ 11-14, pp. 544-45 (1853); *New Jersey,* Act of Mar. 1, 1849, N.J. Laws, pp. 266-27 (1849); *New York,* Act of Dec. 10, 1828,

end of the Civil War, twenty-seven of the thirty-six States had done so.[12] By the end of 1868, the year in

ch. 20, 4, N.Y. Laws, 51st Legis., 2nd Sess., p. 19 (1828), codified at N.Y. Rev. Stat., pt. IV, ch. I, tit. II, art. I, § 9, p. 661, and tit. VI, § 21, p. 694 (1828-29), as amended by an Act of Apr. 30, 1830, ch. 320, § 58, N.Y. Laws, p. 401 (1830), corified at N.Y. Rev. Stat., pt. IV, ch. I, tit. II, art. I, § 9, pp. 550-51, and pt. IV, ch. I, tit. VI, § 21, pp. 578-79 (1828-35), repealed and replaced by N.Y. Laws, ch. 260, §§ 1-3, 6, pp. 285-86 (1845), codified at N.Y. Rev. Stat., pt. IV, ch. I, tit. VI, §§ 20-21, p. 779 (1846), and N.Y. Laws, ch. 22, § 1, p. 19 (1846), codified at N.Y. Rev. Stat., pt. IV, ch. I, tit. II, art. I, § 9, p. 750 (1846); *Ohio,* Act. of Feb. 27, 1834, §§ 1, 2, Ohio Laws, pp. 20-21 (1834), codified at Ohio Gen. Stat., ch. 35, §§ 111, 112, p. 252 (1841), as amended by an Act of Apr. 13, 1867, Ohio Laws, pp. 135-36 (1867), which made the death of the woman or of her unborn child at any stage of pregnancy a "high misdemeanor"; *Vermont,* Vt. Acts, No. 33, § 1, pp. 34-35 (1846), codified at Vt. Comp. Stat., tit. XXVIII, ch. 108, § 8, pp. 560-61 (1839-1850), as amended by an Act of Nov. 21, 1867, Vt. Acts, No. 57, §§ 1, 3, pp. 64-66 (1867); *Virginia,* Act of Mar. 14, 1848, ch. 120, tit. II, ch. III, § 9, Va. Acts, p. 96 (1847-48), codified, as modified, at Va. Code, tit. 54, ch. CXCI, § 8, p. 724 (1849), recodified, Va. Code, tit. 54, ch. CXCI, § 8, p. 784 (1860); *Wisconsin,* Wis. Rev. Stat., pt. IV, tit. XXX, ch. 133, § 11, pp. 683-84 (1849), superseded by Wis. Rev. Stat., pt. IV, tit. XXVII, ch. CLXIV, § 11, p. 930, and ch. CLXIX, §§ 58, 59, p. 969 (1858).

[12] In addition to the eighteen States listed in note 11, the following nine States adopted abortion statutes between 1850 and 1865: *California* (admitted to statehood Sep. 9, 1850), Cal. Sess. Laws, ch. 99, § 45, p. 233 (1849-1850), as amended by an Act of May 20, 1861, Cal. Stat., ch. DXXI, p. 588 (1861); *Kansas* (admitted to statehood Jan. 29, 1861), Kan. (Terr.) Stat., ch. 48, §§ 10, 39, pp. 238, 243 (1855), superseded by Kan. (Terr.) Laws, ch. XXVIII, §§ 10, 37, pp. 232, 237 (Acts of 1859), codified at Kan. Comp. Laws, ch. XXXIII, §§ 10, 37, pp. 288, 293 (1862); *Louisiana,* La. Acts, Act. 120, § 24, pp. 132-33 (1855), codified at La. Rev. Stat., Crimes & Offenses, § 24, p. 138 (1856); *Minnesota* (admitted to statehood May 11, 1858), Minn. (Terr.) Rev. Stat. ch. 100, § 11, p. 493 (1851); *Nevada* (admitted to statehood Oct. 31, 1864), Nev. (Terr.) Laws, ch. XXVIII, div. IV, § 42, p. 63 (1861); *Oregon* (admitted to statehood Feb. 14, 1859), Act of Dec. 22, 1853, ch. III, § 13, Or. (Terr.) Stat., p. 187 (1853-54), superseded by an Act of Oct. 19, 1864, Or. Gen. Laws, Crim. Code, ch. 43, § 509, p. 528 (1845-1864); *Pennsylvania,* Pa. Laws, No. 374, tit. VI, §§ 87, 88, pp. 404-05 (1860); *Texas,* Act of Feb. 9, 1854, § 1, Tex. Gen. Laws, ch. XLIX,

which the Fourteenth Amendment was ratified, thirty of the then thirty-seven States had enacted such statutes, including twenty-five of the thirty ratifying States,[13] together with six of the ten federal territories.[14]

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§ 1, p. 58 (1854), superseded by an Act of Aug. 28, 1856, codified at Tex. Pen. Code of 1857, arts. 531-36, pp. 103-04, as amended by an Act of Feb. 12, 1858, ch. 121, pt. I, tit. 17, ch. 7, Tex. Gen. Laws, p. 172 (1858), codified at Tex. Gen. Stat. Dig., ch. VII, articles 531-536, p. 524 (Oldham & White 1859); *West Virginia* (admitted to statehood June 20, 1863), *see* Act of Mar. 14, 1848, ch. 120, tit. II, ch. III, § 9, Va. Acts, p. 96 (1847-48), codified, as modified, at Va. Code, tit. 54, ch. CXCI, § 8, p. 724 (1849), recodified, Va. Code, tit. 54, ch. CXCI, § 8, p. 784 (1860), and W. Va. Const., art. XI, ¶ 8 (1863).

[13] In addition to the twenty-seven States listed in notes 11 and 12, the following three States adopted abortion statutes beween 1865 and 1868: *Florida*, Act of Aug. 6, 1868, Fla. Acts, 1st Sess., ch. 1637 [No. 13], sub. ch. III, § 11, and sub. ch. VIII, § 9 (1868), pp. 64, 97 (1868); *Maryland*, Act of Mar. 20, 1867, Md. Laws, ch. 185, § 11, pp. 342-43 (1867), repealed and re-enacted by an Act of Mar. 28, 1868, Md. Laws, ch. 179, § 2, p. 315 (1868), codified at Md. Code, art. XXX, § 1, pp. 105-06 (1868 Supp.); *Nebraska* (admitted to statehood Mar. 1, 1867), Act of Feb. 12, 1866, Neb. (Terr.) Stat., pt. III, ch. IV, § 42, pp. 598-99 (1866-67). Of the thirty States ratifying the Fourteenth Amendment as of July 21, 1868, all but Georgia (1876), North Carolina (1881), Rhode Island (1896), South Carolina (1883) and Tennessee (1883) had enacted such statutes.

[14] The following territories adopted statutes restricting abortion by the end of 1868: *Arizona*, Ariz. (Terr.) Code, ch. X, div. 5, § 45, p. 54 (1865); *Colorado*, Colo. (Terr.) Laws, div. 4, § 42, pp. 296-97 (1861); Colo. (Terr.) Rev. Stat., ch. XXII, § 42, p. 202 (1868); *Idaho*, Act of Feb. 4, 1864, ch. IV, § 42, Idaho (Terr.) Laws, p. 443 (1863-64), repealed and re-enacted by an Act of Dec. 21, 1864, ch. III, pt. IV, § 42, Idaho (Terr.) Laws, p. 305 (1864); *Montana*, Mont. (Terr.) Laws, Criminal Practice Acts, ch. IV, § 41, p. 184 (1864); *New Mexico*, N.M. (Terr.) Laws, No. 28, ch. 3, § 11, p. 88 (1854), codified at N.M. Rev. Stat., art. XXIII, ch. LI, § 11, p. 320 (1865); *Washington*, Wash. (Terr.) Stat., ch. II, §§ 37, 38, p. 81 (1854).

These enactments are significant because laws passed by territorial legislatures were subject to Congressional annulment. U.S. Const., art. IV, § III, cl. 2; *National Bank v. County of Yankton*, 101 U.S. 129, 133 (1880). No territorial abortion statute was ever

The widespread adoption of these laws prior to the ratification of the Fourteenth Amendment in 1868 undermines the Court's conclusion in *Roe* that the "right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty . . . encompass[es] a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153. As Justice Rehnquist observed in dissent, "[t]o reach its result, the Court necessarily . . . had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment." *Id.* at 174 (Rehnquist, J., dissenting). After reciting the statutory history set out above, Justice Rehnquist stated:

> There apparently was no question concerning the validity of this provision [the Texas statute] or of any of the other state statutes when the Fourteenth Amendment was adopted. The only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter.

Id. at 177 (Rehnquist, J., dissenting).

The Court dismissed the importance of this legislation, concluding that the nineteenth century statutory prohibitions of abortion were enacted not to protect prenatal life but to guard maternal health against the dangers of unsafe operations. *Id.* at 151-52. Three reasons were offered in support of this conclusion, none of which withstands scrutiny.

First, the Court stated that "[t]he few state courts called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State's interest in protecting the woman's health rather than in preserving the embryo and fetus." *Id.* at 151 & n.48, citing *State v. Murphy*, 27 N.J.L. 112 (1858). The Court not only misapprehended the holding in the single case cited for

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nullified by Congress, including the 39th Congress which approved the Fourteenth Amendment.

this proposition,[15] but also overlooked twenty-five decisions from sixteen jurisdictions expressly affirming that their nineteenth century statutes were intended to protect unborn human life,[16] and twenty-six other decisions from seventeen additional jurisdictions strongly implying the

[15] The Court's reading of *Murphy* appears to be at odds with the New Jersey Supreme Court's understanding of its earlier opinion. *See State v. Siciliano*, 21 N.J. 249, 257-58, 121 A.2d 490, 495 (1956), and *Gleitman v. Cosgrove*, 49 N.J. 22, 41, 227 A.2d 689, 699 (1967) (Francis, J., concurring).

[16] *Trent v. State*, 15 Ala. App. 485, 488, 73 So. 834, 836 (1916); *Hall v. People*, 119 Colo. 141, 143, 201 P.2d 382, 383 (1948) ("offense described by the statute . . . is the criminal act of destroying the fetus at any time before birth"); *Dougherty v. The People*, 1 Colo. 514, 522-23 (1872); *Passley v. State*, 194 Ga. 327, 329, 21 S.E.2d 230, 232 (1942); *Nash v. Meyer*, 54 Idaho 283, 301, 31 P.2d 273, 280 (1934); *State v. Alcorn*, 7 Idaho 599, 613-14, 64 P. 1014, 1019 (1901); *Joy v. Brown*, 173 Kan. 833, 839-40, 252 P.2d 889, 892 (1953); *State v. Miller*, 90 Kan. 230, 233, 133 P. 878, 879 (1913) (statute "carries the facial evidence of the legislative intent to cover the criminal machinations and devices of the abortionist in order to protect the pregnant woman and the unborn child"); *State v. Watson*, 30 Kan. 281, 284, 1 P. 770, 771-72 (1883); *Rosen v. Louisiana Board of Medical Examiners*, 318 F. Supp. 1217, 1222-32 (E.D. La. 1970) (three-judge court), *vacated and remanded*, 412 U.S. 902 (1973) (interpreting Louisiana law); *State v. Siciliano*, 21 N.J. 249, 257-58, 121 A.2d 490, 495 (1956); *State v. Gedicke*, 43 N.J.L. 86, 89-90, 96 (1881); *People v. Lovell*, 40 Misc. 2d 458, 459, 242 N.Y.S.2d 958, 959 (1963); *State v. Hoover*, 252 N.C. 113, 133, 135, 113 S.E.2d 281, 283 (1960); *State v. Powell*, 181 N.C. 515, 106 S.E. 133 (1921); *but see State v. Jordon*, 227 N.C. 579, 580, 42 S.E.2d 674 (1947) (*contra* regarding pre-quickening abortion); *State v. Tippie*, 89 Ohio Stat. 35, 39-40, 105 N.E. 75, 77 (1913); *Bowlan v. Lunsford*, 176 Okla. 115, 117, 54 P.2d 666, 668 (1936); *State v. Ausplund*, 86 Or. 121, 131-32, 167 P. 1019, 1022-23 (1917); *State v. Farnam*, 82 Or. 211, 217, 161 P. 417, 419 (1916) (pregnant woman could not lawfully consent to the homicide of her unborn child); *State v. Atwood*, 54 Or. 526, 531, 102 P. 295, 297 (1909), *aff'd on reh.*, 54 Or. 526, 104 P. 195 (1909); *State v. Steadman*, 214 S.C. 1, 7-8, 51 S.E.2d 91, 93 (1948) (statute prohibiting pre-quickening abortion was intended to change the common law rule and prevent "the destruction of a child before it has quickened"); *State v. Howard*, 32 Vt. 380, 399-401 (1859); *Anderson v. Commonwealth*, 190 Va. 665, 673, 58 S.E.2d 72, 75 (1950); *Miller v. Bennett*, 190 Va. 162, 169, 56 S.E.2d 217, 221 (1949); *State v. Cox*, 197 Wash. 67, 77, 84 P.2d 357, 361 (1938). *See also People v. Belous*, 71 Cal. 2d 954, 978, 458 P.2d 194, 209, 80 Cal. Rptr. 354, 369 (1969) (Burke, J., dissenting) (abortion statute "was designed to protect not only the mother's life but also that of the child").

same.[17] In every decade since the 1850's, there has been

[17] *McClure v. State*, 214 Ark. 159, 170, 215 S.W.2d 524, 530 (1949); *Scott v. State*, 49 Del. 401, 409-10, 117 A.2d 831, 835-36 (1955); *State v. Magnell*, 19 Del. (3 Penne.) 307, 308, 51 A. 606 (1901); *Urga v. State*, 155 Fla. 86, 90, 20 So.2d 685, 687 (1944) (approving jury instruction that "[t]he gist of the statutory offense is the intent to terminate the creation by nature of a child and the intent to bring about the miscarriage of a woman"); *Weightnovel v. State*, 46 Fla. 1, 7-8, 35 So. 856, 858-59 (1903); *but see Walsingham v. State*, 250 So.2d 857, 861 (Fla. 1971) ("[p]rotection of the mother from unsafe surgical procedures may well have been in the legislators' minds when they enacted the abortion statutes in 1868"); *Territory v. Young*, 37 Haw. 150, 159-60 (1945), *appeal dismissed*, 160 F.2d 289 (9th Cir. 1947); *Earll v. People*, 99 Ill. 123, 132 (1881) (abortion "a grave crime, involving the destruction of an unborn child"); *State v. Moore*, 25 Iowa 128, 131-32, 135-36 (1866); *Abrams v. Foshee*, 3 Iowa 273, 278 (1856); *State v. Rudman*, 126 Me. 177, 180, 136 A. 817, 819 (1927) (abortion law intended "to be an express and absolute prohibition" of "the destruction of unborn life for reasons . . . other than necessity to save the mother's life"); *Smith v. State*, 33 Me. 48, 57-59 (1851); *Worthington v. State*, 92 Md. 222, 237-238, 48 A. 355, 356-57 (1901); *Lamb v. State*, 67 Md. 524, 532-33, 10 A. 208 (1887); *People v. Sessions*, 58 Mich. 594, 595-96, 26 N.W. 291, 293 (1886); *People v. Olmstead*, 30 Mich. 431, 432-33 (1874); *but see People v. Nixon*, 42 Mich. App. 332, 335-40, 201 N.W.2d 635, 639-41 (1972), *on remand*, 50 Mich. App. 39, 212 N.W.2d 607 (1973) (*contra* regarding pre-quickening abortion); *Smith v. State*, 112 Miss. 802, 810, 73 So. 793, 794 (1916), *overruled on other grounds*, *Ladnier v. State*, 155 Miss. 348, 124 So. 432 (1929); *Hans v. State*, 147 Neb. 67, 72, 22 N.W.2d 385, 389 (1946), *on rehearing*, 147 Neb. 73, 25 N.W.2d 35 (1946); *Bennett v. Hymers*, 101 N.H. 483, 484-85, 147 A.2d 108, 109-110 (1958); *but see State v. Millette*, 112 N.H. 458, 464, 299 A.2d 150, 154 (1972) ("[e]arly proscription of the practice of abortion primarily sought to protect pregnant women from risks present in all surgical procedures at that time"); *State v. Bassett*, 26 N.M. 477, 480, 194 P. 867, 868 (1921); *Railing v. Commonwealth*, 110 Pa.St. 100, 104, 1 A. 314, 315 (1885); *Commonwealth v. W.*, 3 Pittbs. R. 462, 470-71 (1871) (charge to jury that abortion is "a crime against nature, closely allied to murder, and . . . deserving of severe and ignominious punishment"); *Sylvia v. Gobeille*, 101 R.I. 76, 77-78, 220 A.2d 222, 223 (1966); *State v. Crook*, 16 Utah 212,

at least one American state court decision recognizing this purpose.

In 1851, the Supreme Court of Maine explained that under its 1840 abortion statute, which abolished the common law quickening distinction, "the unsuccessful attempt to cause the destruction of an unborn child is a crime, whether the child be quick or not." *Smith v. State*, 33 Me. 48, 57 (1851). In 1859, the Supreme Court of Vermont held that "the preservation of the life of the child" was one of the "important considerations" underlying the State's 1846 abortion statute. *State v. Howard*, 32 Vt. 380, 399 (1859).

In 1868, the Supreme Court of Iowa, affirming the defendant's conviction of murder for causing the death of a woman by an illegal abortion under an 1858 statute, condemned abortion as "an act highly dangerous to the mother, and generally fatal, and frequently designed to be fatal, to the child." *State v. Moore*, 25 Iowa 128, 136 (1868). In 1872, the Supreme Court of the Territory of Colorado held that its 1868 abortion statute was "intended specially to protect the mother and her unborn child from operations calculated and directed to the destruction of the one and the inevitable injury of the other." *Dougherty v. The People*, 1 Colo. 514, 522 (1872).

In 1881, the Supreme Court of New Jersey declared that its original 1849 abortion statute had been amended

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216-17, 51 P. 1091, 1093 (1898); *Doe v. Rampton*, No. C-234-70, Slip. Op. at 7-8 (D. Utah 1971) (three-judge court), *vacated and remanded*, 410 U.S. 950 (1973) (interpreting Utah law); *Hatchard v. State*, 79 Wis. 357, 360, 48 N.W. 380, 381 (1891); *State v. Dickinson*, 41 Wis. 299, 309 (1877); *but see Foster v. State*, 182 Wis. 298, 196 N.W. 233 (1923) (*contra* regarding pre-quickening abortion but acknowledging that "[i]n a strictly scientific and physiological sense there is life in an embryo from the time of conception"). *See also Williams v. United States*, 138 F.2d 81 (D.C. Cir. 1943), where the District of Columbia Court of Appeals observed that "abortion is generally regarded as heinous in character," and held that "[t]he performance of an abortion for any of these reasons [*i.e.*, to avoid social disgrace or poverty or illegitimacy] is . . . offensive to our moral conception . . . ." *Id.* at 83.

in 1872 "to protect the life of the child also, and inflict the same punishment, in case of its death, as if the mother should die." *State v. Gedicke*, 43 N.J.L. 86, 89-90 (1881). In 1898, the Supreme Court of Utah characterized abortion under its 1876 statute as "the criminal act of destroying the foetus at any time before birth." *State v. Crook*, 16 Utah 212, 217, 51 P. 1091, 1093 (1898).

In 1901, the Maryland Court of Appeals explained that American abortion statutes had been strengthened and the penalties for their violation increased precisely because the medical procedures for inducing abortions had become safer.

> It is common knowledge that death is not now the usual, nor, indeed, the always probable, consequence of an abortion. The death of the mother . . . more frequently resulted in the days of rude surgery, when the character and properties of powerful drugs were but little known, and the control over their application more limited. But, in these days of advanced surgery and marvelous medical science and skill, operations are performed and powerful drugs administered by skillful and careful men without danger to the life of the patient. Indeed, it is this comparative immunity from danger to the woman which has doubtless led to the great increase of the crime, to the establishment of a class of educated professional abortionists, and to the enactment of the severe statutes almost everywhere found to prevent and punish this offense.

Worthington v. State, 92 Md. 222, 237-38, 48 A. 355, 356-57 (1901). The court characterized abortion as an "abhorrent crime," which "can only be efficiently dealt with by severity in the enactment and administration of the law punishing the attempt upon the life of the unborn child." *Id.* at 38, 48 A. at 357.

In 1916, the Alabama Court of Appeals held that the "manifest purpose" of its abortion statute, first adopted in 1841, was "to restrain after conception an unwarranted interference with the course of nature in the propagation and reproduction of human kind . . . ."

Trent v. State, 15 Ala. App. 485, 488, 73 So. 834, 836 (1916). Quoting from the 1911 Transactions of the Medical Association of Alabama, the court asked, "'[D]oes not the new being, from the first day of its uterine life, acquire a legal and moral status that entitles it to the same protection as that guaranteed to human beings in extrauterine life?'" *Id.* at 488, 73 So. at 836.

In a case decided in 1917, a defendant convicted under Oregon's 1864 abortion statute argued that he could not be prosecuted for performing an abortion on a woman prior to quickening because an abortion at that stage of pregnancy was not a crime at common law. After noting that common law crimes had been abolished in the State, the Oregon Supreme Court rejected this argument, stating:

> The statute refers to "any woman pregnant with a child" without reference to the stage of pregnancy. When a virile spermatozoon unites with a fertile ovum in the uterus, conception is accomplished. Pregnancy at once ensues, and under normal circumstances continues until parturition. During all this time the woman is "pregnant with a child" within the meaning of the statute. She cannot be pregnant with anything else than a child. From the moment of conception a new life has begun, and is protected by the enactment. The product of conception during its entire course is imbued with life, and is capable of being destroyed as contemplated by the law. By such destruction the death of a child is produced and often that of its mother as well.

State v. Ausplund, 86 Or. 121, 131-32, 167 P. 1019, 1022-23 (1917).

In 1921, the New Mexico Supreme Court described the offense of abortion under its statute, first enacted as a territorial law in 1854 and later codified in 1915, as "the *murder* of a quick child, still in its womb, accomplished by means of the use of drugs or instruments upon the

mother." *State v. Bassett*, 26 N.M. 477, 480, 194 P. 867, 868 (1921) (emphasis supplied).[18]

In 1934, the Supreme Court of Idaho determined that the state abortion statute, first adopted in 1864, was designed "not for the protection of the woman, but to discourage abortions because thereby the life of a human being, the unborn child, is taken." *Nash v. Meyer*, 54 Idaho 283, 301, 31 P.2d 273, 280 (1934). In 1936, the Oklahoma Supreme Court expressly held that "the anti-abortion statutes in Oklahoma were enacted and designed for the protection of the unborn child and, through it, society." *Bowlan v. Lunsford*, 176 Okla. 115, 117, 54 P.2d 666, 668 (1936).

In 1942, the Supreme Court of Georgia declared that in enacting its abortion statute in 1876, "the legislature was undertaking to provide by penal law appropriate penalties for the destruction of an unborn child." *Passley v. State*, 194 Ga. 327, 329, 21 S.E.2d 230, 232 (1942). In 1949, the Virginia Supreme Court of Appeals stated that its abortion statute—enacted in 1848 and codified in 1849—"was passed, not for the protection of the woman, but for the protection of the unborn child . . . ." *Miller v. Bennett*, 190 Va. 162, 169, 56 S.E.2d 217, 221 (1949).

In 1953, the Kansas Supreme Court held that the next of kin of a woman who had died as a result of a negligently performed abortion could sue the abortionist for damages. *Joy v. Brown*, 173 Kan. 833, 252 P.2d 889 (1953). Rejecting defendant's argument that the decedent's consent to an illegal act barred recovery, the court said, "[w]e are of the opinion that no person may lawfully and validly consent to any act the very purpose of which is to destroy human life." *Id.* at 839-40, 252 P.2d at 892.

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[18] Seventeen States and the District of Columbia had statutes denominating acts causing the death of an unborn child (an abortion or other criminal act) as "manslaughter," "murder," or "assault with intent to murder." The statutes are collected in *Witherspoon*, 17 St.Mary's L.J. at 44 & n. 47.

In 1960, the Supreme Court of North Carolina declared that its abortion statute, which had remained essentially unchanged since it was first enacted in 1881, was "designed to protect the life of a child *in ventre sa mere*." *State v. Hoover*, 252 N.C. 133, 135, 113 S.E.2d 281, 283 (1960). And in 1963, a New York court observed that the State's abortion legislation was "designed to protect the natural right of unborn children to life." *People v. Lovell*, 40 Misc. 458, 459, 242 N.Y.S.2d 958, 959 (1963).

State court decisions affirming the protection of unborn human life as one purpose of their abortion statutes continued to be handed down until *Roe v. Wade*. In the fifteen months before *Roe* was decided, six state courts upheld the constitutionality of their respective abortion statutes, expressly holding that their laws were intended to protect the lives of unborn children.[19]

In sum, at least fifty-seven decisions from thirty-nine States recognized that their nineteenth century abortion statutes were enacted with an intent to protect unborn human life. Given this wealth of case authority, dating back more than 120 years before *Roe v. Wade* was decided, the Court's conclusion in *Roe* that state court decisions "focus[ed] on the State's interest in protecting the woman's health rather than in preserving the embryo and fetus" is insupportable.

As a second reason offered in support of its conclusion that the nineteenth century abortion statutes were intended solely to promote maternal health and not to protect prenatal life, the Court in *Roe* observed that "[i]n

[19] *See Nelson v. Planned Parenthood Center of Tucson, Inc.*, 19 Ariz. App. 142, 144, 505 P.2d 580, 582 (1973), *modified on rehearing* pursuant to *Roe*; *Cheaney v. State*, 259 Ind. 138, 140-47, 285 N.E. 2d 265, 267-70 (1972); *Sasaki v. Commonwealth*, 485 S.W.2d 897, 901-03 (Ky. 1972), *vacated and remanded*, 410 U.S. 951 (1973); *Rodgers v. Danforth*, 486 S.W.2d 258, 259 (Mo. 1972); *State v. Munson*, 86 S.D. 663, 667-72, 201 N.W.2d 123, 125-26 (1972); *vacated and remanded*, 410 U.S. 950 (1973); *Thompson v. State*, 493 S.W.2d 913, 917-20 (Tex. Crim. App. 1971), *vacated and remanded*, 410 U.S. 950 (1973).

many States . . . by statute or judicial interpretation, the pregnant women herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another." 410 U.S. at 151. The Court, however, failed to note that at least nineteen States enacted statutes which expressly incriminated the woman's participation in her own abortion.[20] Although no prosecutions were reported under any of these statutes, their enact-

[20] *Arizona*, Ariz. Pen. Code, § 455, p. 711 (1887), repealed and re-enacted, Ariz. Pen. Code, § 244, p. 1228 (1901); *California*, Act of May 20, 1861, Cal. Stat., ch. DXXI, p. 588 (1861); Act of Feb. 14, 1872, codified at Cal. Pen. Code, § 275, p. 69 (1872); *Connecticut*, Conn. Pub. Acts, ch. LXXI, § 3, pp. 65-66 (1860), codified at Conn. Gen. Stat., tit. XII, ch. II, § 24, p. 249 (1886); *Delaware*, Act of July 6 1972, § 1, Del. Laws, ch. 497, pp. 1611, 1664 (1972), Del. Code Ann., tit. 11, § 652 (1974 Rev.); *Idaho*, Idaho Rev. Stat., § 6795 (1887); *Indiana*, Ind. Laws, ch. XXXVII, § 23, p. 177 (1881), codified at Ind. Rev. Stat., § 1924, p. 358 (1881); *Minnesota*, Act of Mar. 10, 1873, Minn. Laws, ch. IX, § 3, p. 118 (1873); codified at Minn. Gen. Stat., ch. 94, § 18, p. 885 (1878), recodified at Minn. Gen. Stat., § 6546, p. 1751 (1894); *Montana*, Mont. Pen. Code, § 481 (1895), re-enacted and recodified at Mont. Rev. Code, § 94-402 (1947); *Nevada*, Act of Feb. 16, 1869, ch. XXII, § 1, Nev. Laws, pp. 64-65 (1869), superseded by an Act of Mar. 17, 1911, ch. 13, § 140 (Senate Bill 124, p. 43), codified at Nev. R.L. § 6405, p. 1836 (1912), recodified at Nev. Rev. Stat., § 200.220 (1963); *New Hampshire*, Act of Jan. 4, 1849, N.H. Laws, ch. 743, § 4, p. 709 (1848), codified at N.H. Comp. Stat., tit. XXVI, ch. 227, §§ 11-14, pp. 544-45 (1853); *New York*, N.Y. Laws, ch. 260, § 3, p. 286 (1845), codified at N.Y. Rev. Stat., pt. IV, ch. I, tit. VI, § 21, p. 779 (1846), superseded by N.Y. Laws, ch. 181, § 2, p. 509 (1872), codified at N.Y. Rev. Stat. pt. IV, ch. I, tit. II, art. I, sec. 10, p. 933 (1875); *North Dakota*, Dak. Pen. Code, § 338, p. 459 (1877), recodified at N.D. Rev. Codes, § 7178, p. 1272 (1895); *Oklahoma*, Okla. Stat., § 2188 (1890), codified at Okla. Rev. Laws, § 2437, p. 604 (1910); *South Carolina*, Act of Dec. 24, 1883, No. 354, § 3, S.C. Acts, p. 548 (1883), codified at S.C. Rev. Stat., Crim. Stat., § 138, p. 310 (1893); *South Dakota*, Dak. Pen. Code, § 338, p. 459 (1877), recodified at S.D. Ann. Stat., § 7798, p. 1919 (1899); *Utah*, Utah. Rev. Stat., § 4227, p. 903 (1898), recodified at Utah Code Ann., § 76-2-2 (1953); *Washington*, Wash. Laws, ch. 249, § 197, p. 948 (1909), codified at Rev. Code Wash., § 9.02.020 (1961); *Wisconsin*, Wis. Rev. Stat., pt. IV, tit. XXVII, ch. CLXIX, § 59, p. 969 (1858); *Wyoming*, Wyo. Laws, ch. 73, § 32, p. 131 (1890), codified as Wyo. Stat., § 6-78 (1957).

ment certainly casts doubt on the conclusion that women possessed a legal "right" to choose abortion, or that safeguarding maternal health was the sole intention of the lawmakers.

The majority of States did not criminalize the conduct of a woman who attempted to abort herself or who submitted to an abortion performed upon her by another. Women were exempt from criminal prosecution in these States, not because protection of women was the sole purpose of these laws, but for other reasons.

Traditionally, abortion was viewed as an assault upon the woman because she "was not deemed able to assent to an unlawful act against herself . . . ." *State v. Farnam*, 82 Or. 211, 217, 161 P. 417, 419 (1916). The woman was seen as a second victim of the abortion. *State v. Murphy*, 27 N.J.L. 112, 114-15 (1858); *Dunn v. People*, 29 N.Y. 523, 527 (1864). Moreover, conviction of the abortionist often depended upon the testimony of the woman who underwent the abortion. Absent a grant of immunity, however, her testimony could not be compelled if she were regarded as an accomplice in the offense. And in most States, a criminal conviction cannot be based on the uncorroborated testimony of an accomplice. Thus, for reasons of both principle and practicality, the woman who underwent an abortion was considered a victim of the offense.[21]

Finally, the Court stated that "[most of [the] initial statutes dealt severely with abortion but were lenient with it before quickening." 410 U.S. at 139. From this premise, the Court drew the conclusion that "adoption of the 'quickening' distinction through received common law and state statutes tacitly recognizes the greater health hazards inherent in late abortion and impliedly repudiates the theory that life begins at conception." *Id.* at 151-52. The Court's premise, as well as its conclusion, was flawed.

[21] *See, Annot., Woman Upon Whom Abortion Is Committed As Accomplice For Purposes Of Rule Requiring Corroboration Of Accomplice Testmony*, 34 A.L.R.3d 858 (1970).

As of late 1868, thirty of the then thirty-seven States had enacted statutes restricting statutes. All but three of those States—Arkansas, Minnesota and Mississippi—prohibited abortion at any stage of pregnancy. Although seven of the twenty-seven States that prohibited abortions throughout pregnancy punished post-quickening abortions more severely than pre-quickening abortions, the other twenty States with such laws punished abortion equally, regardless of the stage of pregnancy.[22] By the end of 1883, twenty-seven of the thirty-six States that had enacted abortion statutes had abolished any distinction between pre-quickening and post-quickening abortions in determining the range of possible penalties.[23]

[22] The statutes are set forth in notes 11-13, *supra*.

[23] *Alabama*, Ala. Code, § 3605, p. 690 (1866-67); *California*, Act of May 20, 1861, Cal. Stat., ch. DXXI, p. 588 (1861); *Colorado*, Colo. (Terr.) Rev. Stat., ch. XXII, § 42, p. 202 (1868); *Connecticut*, Conu. Gen. Stat., tit. XII, ch. II, §§ 22-25, pp. 248-49 (1866); *Delaware*, Act of Feb. 13, 1883, ch. 226, §§ 1, 2, Del. Laws, p. 522 (1883), codified at Del. Rev. Stat., p. 930 (1893); *Georgia*, Act of Feb. 25, 1876, ch. CXXX, §§ II, III, Ga. Laws, p. 113 (1876), codified at Ga. Code, § 4337 (a)-(c), p. 1143 (1882); *Illinois*, Act of Feb. 28, 1867, §§ 1-3, Ill. Pub. Laws, p. 89 (1867); *Indiana*, Ind. Gen. Laws, ch. LXXXI, pp. 130-31 (1859); *Iowa*, Act of Mar. 15, 1858, Iowa Laws, ch. 58, § 1, p. 93 (1858), codified at Iowa Rev. Laws, pt. 4, tit. XXIII, ch. 165, art. 2, § 4221, pp. 723-24 (1860); *Louisiana*, La. Rev. Stat., Crimes & Offenses, § 24, p. 138 (1856); *Maine*, Me. Rev. Stat., tit. 11, ch. 124, § 8, 685 (1857); *Maryland*, Act of Mar. 28, 1868, Md. Laws, ch. 179, § 2, p. 315 (1868), codified at Md. Code, art. XXX, § 1, pp. 105-06 (1868 Supp.); *Massachusetts*, Mass. Gen. Stat., ch. 165, § 9, p. 818 (1860); *Minnesota*, Act of Mar. 10, 1873, Minn. Laws, ch. IX, §§ 1-3, pp. 117-18 (1873), codified at Minn. Gen. Stat., ch. 94, §§ 16-18, pp. 884-85 (1878); *Nebraska*, Neb. (Terr.), Stat., pt. III, ch. IV, 42, pp. 598-99 (1866-67); *Nevada*, Nev. (Terr.) Laws, ch. XXVIII, div. IV, § 42, p. 63 (1861); *New Jersey*, Act of Mar. 1, 1849, N.J. Laws, pp. 266-67 (1849); *North Carolina*, Act of Mar. 12, 1881, ch. 351, N.C. Laws, pp. 584-85 (1881), codified at N.C. Code, §§ 975, 976, p. 399 (1883); *Ohio*, Act of Apr. 13, 1867, Ohio Laws, pp. 135-36 (1867); *Oregon*, Or. Gen. Laws, Crim. Code, ch. 43, § 509, p. 528 (1845-1864); *South Carolina*, Act of Dec, 24, 1883, No. 354, §§ 1-3, S.C. Acts, pp. 547-48 (1883), codified at S.C. Rev. Stat., Crim. Law, §§ 122, 137, 138, pp. 305, 309-10 (1893); *Tennessee*, Act of Mar. 26, 1883, ch. CXL,

Rather than the occurrence of quickening, "the crucial factor which determined the range of punishment applicable to an attempted abortion was whether the attempt caused the death of the child." *Witherspoon*, 17 St. Mary's L.J. at 36 (1985). Twenty of the thirty-six States that had enacted abortion statutes by the end of 1883 provided for a higher range of punishment if it were proved that the abortion caused the death of the unborn child.[24] As Witherspoon has observed, "[i]f the

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Tenn. Acts, pp. 188-89 (1883), codified at Tenn. Code, §§ 5371, 5372, p. 1031 (Milliken & Vertee's 1884); *Texas*, Tex. Pen. Code, arts. 531-36, pp. 103-04 (1857), as amended by an Act of Feb. 12, 1858, ch. 121, pt. I, tit. 17, ch. 7, Tex. Gen. Laws, p. 172 (1858), corifigd at Tex. Gen. Stat. Dig., ch. VII, arts. 531-36, p. 524 (Oldham & White 1859); *Vermont*, Act of Nov. 21, 1867, Vt. Acts, No. 57, § 1, pp. 64-65 (1867); *Virginia*, Act of Mar. 14, 1848, ch. 120, tit. II, ch. III, § 9, Va. Acts, p. 96 (1847-48), codified, as modified, at Va. Code, tit. 54, ch. CXCI, § 8, p. 724 (1849), recodified, Va. Code, tit. 54, ch. CXCI, § 8, p. 784 (1860); *West Virginia*, Act of Mar. 14, 1848, ch. 120, tit. II, ch. III, § 9, Va. Acts, p. 96 (1847-48), corified, as modified, at Va. Code, tit. 54, ch. CXCI, § 8, p. 724 (1849), recodified, Va. Code, tit. 54, ch. CXCI, § 8, p. 784 (1860), W. Va. Const., art. XI ¶ 8 (1863); *Wisconsin*, Wis. Rev. Stat., pt. IV, tit. XXVII, ch. CLXIV, § 11, p. 930, and ch. CLXIX, §§ 58, 59, p. 969 (1858).

[24] In addition to the statutes from Georgia, Maine, Minnesota, Ohio, Oregon, South Carolina, Tennessee and Wisconsin listed in n.23 may be added the following: *Arkansas*, Ark. Rev. Stat. ch. 44, div. III, art. 2, § 6 (1838); Act of Nov. 8, 1875, § 1, Ark. Acts., No. IV, p. 5 (1875); *Florida*, Act of Aug. 6, 1868, Fla. Acts, 1st Sess., ch. 1637 [No. 13], sub. ch. III, § 11, sub. ch. VIII, § 9, pp. 64, 97 (1868); *Indiana*, Ind. Rev. Stat. § 1923, p. 358 (1881); *Michigan*, Mich. Rev. Stat., ch. 153, §§ 33-34, p. 662 (1846); *Missouri* Mo. Gen. Stat., pt. IV, tit. XLV, ch. 200, § 10, 34 pp. 778-79, 781 (1866); *Nebraska*, Neb. Gen. Stat., ch. 58, §§ 6, 39, pp. 720, 727-28 (1873); *New Jersey*, Act of Mar. 25, 1881, N.J. Laws, ch. CXCI, p. 240 (1881); *New York*, Act of July 26, 1881, N.Y. Laws, ch. 676 (N.Y. Pen. Code), §§ 191, 194, 294, 295, pp. 45-46, 72-73 (1881), 3 N.Y. Rev. Stat. at 2478-80 (1881); *Pennsylvania*, Pa. Laws, No. 374, tit. VI, §§ 87, 88, p. 404-05 (1860); *Texas*, Tex. Pen. Code, arts. § 531, 535, pp. 103-04 (1857); *Virginia*, Act of Mar. 14, 1878, Va. Acts, ch. 311, (sub.) ch. II, § 8, pp. 281-82 (1878), codified at Va. Code, § 3670, p. 879 (1887); *West Virginia*, W. Va. Acts, ch. CXVIII, § 8, p. 335 (1882), codified at W. Va. Code ch. CXLIV, § 3,

state . . . statutes were intended solely to protect the health of the pregnant woman, there would be no reason whatsoever for the state legislatures to authorize the judge or jury to assess a greater punishment if it were proven that the attempted abortion killed the fetus." *Id.* at 36. "The only explanation of this element of these statues," he concludes, "is that the enacting legislatures attributed value to the life of the unborn child." *Id.*

Abortion *before* quickening may not have been criminal at common law. And some of the early American abortion statutes did distinguish between pre- and post-quickening abortions. But this distinction simply reflected the lack of scientific knowledge regarding the nature of human reproduction, and cannot be regarded as a repudiation of the theory that life begins at conception or an implicit acknowledgment that abortion statutes were enacted *solely* to safeguard women from dangerous surgical procedures:

> Only in the second quarter of the nineteenth century did biological research advance to the point of understanding the actual mechanism of human reproduction and of what truly comprised the onset of gestational development. The nineteenth century saw a gradual but profoundly influential revolution in the scientific understanding of the beginning of individual mammalian life. Although sperm had been discovered in 1677, the mammalian egg was not identified until 1827. The cell was first recognized as the structural unit of organisms in 1839, and the egg and sperm were recognized as cells in the next two decades. These developments were brought to the attention of the American state legislatures and public by those professionals most familiar with their unfolding import—physicians. It was the new research findings which persuaded doctors that the old "quickening" distinction embodied in the common and some statutory law was unscientific and indefensible.[25]

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p. 677 (1890). Of these States, only Arkansas, Florida, Michigan, Missouri, New York and Pennsylvania also required proof of quickening.

[25] *The Human Life Bill: Hearings on S. 158 Before the Subcommittee on Separation of Powers of the Senate Committee on the*

As this Court noted in *Roe*, at 141-42, the newly-formed American Medical Association relied upon this greater understanding of human development in promoting legislation extending the protection of the law to all unborn children.

The foregoing review of the nineteenth century abortion statutes and the scores of cases interpreting them leads to one inescapable conclusion: they were enacted with an intent to protect unborn human life.

IV. IN VIEW OF THE LONG-STANDING CONDEMNATION OF ABORTION IN ENGLISH AND AMERICAN COMMON LAW, AND THE OVERWHELMING EVIDENCE THAT NINETEENTH CENTURY ABORTION STATUTES WERE ENACTED WITH AN INTENT TO PROTECT UNBORN HUMAN LIFE, THERE IS NO HISTORICAL BASIS FOR CONCLUDING THAT EITHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OR THE RIGHT OF PRIVACY WHICH HAS BEEN DERIVED THEREFROM ENCOMPASSES A FUNDAMENTAL RIGHT TO CHOOSE ABORTION.

The decision to choose abortion cannot be regarded as a fundamental right unless it is "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition." Abortion, however, was a crime at common law and under the laws of all fifty States until *Roe v. Wade*, was decided.[26] Justice Rehnquist noted the

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Judiciary, 97th Cong., 1st Sess. 474 (statement of Victor Rosenblum, Professor of Law, Northwestern University). *See also* Dellapenna, *The History of Abortion: Technology, Mortality, and Law*, 40 U. Pitt. L. Rev. 359, 402-04 (1979).

[26] Although, prior to *Roe*, thirteen States had relaxed their restrictions on abortion and had adopted some version of § 230.3 of the Model Penal Code (*Roe v. Wade*, 410 U.S. at 140 & n. 37) and four other States allowed abortion on demand for part of the gestational period, a clear majority of the States continued to prohibit all abortions except those necessary to save the life of the mother. *See* Linton, *Enforcement of State Abortion Statutes After Roe: A State-by-State Analysis*, 67 U. Det. L. Rev. 157, 158-61, 255-59 (Winter 1990). And no State allowed unrestricted abortion throughout pregnancy, which the Court, because of its expansive definition of "health" in *Doe v. Bolton*, 410 U.S. 179, 192 (1973), effectively mandated for every State. *See, e.g., Margaret S. v. Edwards*, 488 F.Supp. 181, 196 (E.D. La. 1980), and *Schulte v. Douglas*, 567 F.Supp. 522 (D. Neb. 1981), *aff'd per curiam, sub nom. Women's Servs., P.C. v. Douglas*, 710 F.2d 465 (8th Cir. 1983), striking down statutes intended to limit post-viability abortions. In *American College of Obstetricians & Gynecologists v. Thornburgh*, 737 F.2d 283 (3rd Cir. 1984), *aff'd*, 476 U.S. 747 (1986), the Third Circuit, noting that "no Supreme Court case has upheld a criminal statute prohibiting abortion of a viable fetus," stated in *dicta* that had Pennsylvania attempted to prohibit post-viability abortions performed for psychological or emotional reasons, such a limitation would have violated *Doe v. Bolton*, 410 U.S. 179, 192 (1973). *Id.* at 298-99.

significance of this consistent and widespread condemnation of abortion in his dissent in *Roe*:

> The fact that a majority of the States reflecting, after all, the majority sentiment in those States, have had restrictions on abortion for at least a century is a strong indication . . . that the asserted right to an abortion is not "so rooted in the traditions and conscience of our people as to be ranged as fundamental," *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

410 U.S. at 174 (Rehnquist, J., dissenting.).

Abortion is not mentioned in the Constitution and there is no evidence that either the framers or ratifiers of the Fourteenth Amendment thought that they were incorporating a right to choose abortion into the Constitution. Under this Court's analysis in the Due Process Clause cases, culminating in *Bowers v. Hardwick* and *Michael H. v. Gerald D.*, the decision to choose abortion cannot be considered a "fundamental right." Accordingly, *Roe v. Wade* should be overruled and legislative authority over abortion should be returned to the States.[27]

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[27] Although the overruling of *Roe* would allow States to regulate or prohibit abortion, it would not restore the *status quo ante* of January 22, 1973. Thirty States have expressly repealed their pre-*Roe* laws, and several others may have repealed them by implication. None of these laws would be revived by an overruling decision. New laws would have to be enacted, as they have been

CONCLUSION

For the foregoing reasons, the judgment in No. 91-744 should be affirmed, and the judgment in No. 91-902 should be reversed.

Respectfully submitted,

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April 6, 1992

APPENDIX

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in Louisiana and Utah. Moreover, many of the unrepealed pre-*Roe* laws allow abortion on demand throughout at least some stage of pregnancy (Alaska, Hawaii, New York) or under a very broad range of circumstances, including mental health (California, Colorado, Delaware, Kansas, Massachusetts (by judicial decision) and New Mexico). Furthermore, several States have recognized a right to abortion (or public funding) on state constitutional grounds. *See, e.g., Committee to Defend Reproductive Rights v. Myers*, 29 Cal.3d 252, 172 Cal.Rptr. 866, 625 P.2d 779 (1981); *In re T.W.*, 551 So.2d 1186 (Fla. 1989); *Moe v. Secretary of Admin. and Finance*, 382 Mass. 629, 417 N.E.2d 387 (1981); *Right to Choose v. Byrne*, 91 N.J. 287, 450 A.2d 925 (1982); *Beecham v. Leahy*, 130 Vt. 164, 287 A.2d 836 (1972). Thus, the immediate impact of an overruling decision upon abortion practice in the overwhelming majority of the States would be modest and readily ascertainable. *See* Linton, *Enforcement of State Abortion Statutes after Roe: A State-by-State Analysis*, 67 U. Det. L. Rev. 157 (1990).

APPENDIX

List of Amici

(More than 600 legislators from all fifty States, the Commonwealth of Puerto Rico and the Territory of Guam)

Alabama

Sen. Jim Preuitt (D)	11th District
Sen. John E. Amari (R)	15th District
Rep. Ronald G. Johnson (D)	33rd District
Rep. Gerald Willis (D)	34th District
Rep. Bobby C. Crow (D)	35th District
Rep. Bob McKee (R)	74th District
Rep. Claud L. Walker (D)	75th District

Alaska

Lt. Gov. J.B. Jack Coghill (I)	
Rep. Loren Leman (R)	9th District
Rep. Terry H. Martin (R)	13th District
Rep. John C. Gonzalez (R)	17th District
Rep. Michael W. Miller (R)	18th District

Arizona

Sen. Jim Buster (R)	5th District
Sen. Matt Salmon (R)	21st District
Sen. Manuel Pena, Jr. (D)	22nd District
Sen. Lester N. Pearce (R)	29th District
Rep. Ben Benton (R)	2nd District
Rep. Henry Evans (D)	6th District
Rep. Dave McCarroll (R)	16th District
Rep. Karen R. Mills (R)	16th District
Rep. Robert L. Burns (R)	17th District
Rep. Leslie Whiting Johnson (R)	21st District
Rep. Stan Barnes (R)	21st District
Rep. Tom Smith (R)	26th District
Rep. Lela Steffey (R)	29th District
Rep. Pat Blake (R)	29th District

Arkansas

Rep. H. Lacy Landers (D)	47th District
Rep. Keith N. Wood (D)	87th District

California

Sen. Tim Leslie (R)	1st District
Sen. Don Rogers (R)	16th District
Sen. Bill Leonard (R)	25th District
Assemblyman David Knowles (R)	7th District
Assemblyman Phillip D. Wyman (R)	34th District
Assemblyman Paul Woodruff (R)	61st District
Assemblyman Nolan Frizzelle (R)	69th District
Assemblyman David G. Kelley (R)	73rd District
Assemblywoman Carol Bentley (R)	77th District

Colorado

Sen. MaryAnne Tebedo (R)	12th District
Sen. Jim Roberts (R)	15th District

Connecticut

Sen. Stephen R. Somma (R)	16th District

Delaware

Rep. J. Benj. Ewing (R)	35th District

Florida

Rep. Tom Feeney (R)	37th District

Georgia

Rep. B. Joseph Brush, Jr. (R)	83rd District

Hawaii

Sen. Stanley T. Koki (R)	9th District

Idaho

Sen. Claire Wetherell (D)	12th District
Sen. Mark G. Ricks (R)	31st District
Rep. Harold W. Reid (D)	7B District
Rep. Dolores J. Crow (R)	11E District
Rep. Robert E. Schaefer (R)	11A District
Rep. Horace B. Pomeroy (R)	16B District
Rep. Pattie Lois Nafziger (D)	22B District
Rep. John H. Tippets (R)	28B District
Rep. Jo An E. Wood (R)	30B District

Illinois

Sen. Jeremiah Joyce (D)	14th District
Sen. Forest Etheredge (R)	21st District
Sen. Ted Leverenz (D)	26th District
Sen. Richard F. Kelly, Jr. (D)	39th District
Sen. George Ray Hudson (R)	41st District
Rep. John J. McNamara (D)	27th District
Rep. Dan Cronin (R)	40th District
Rep. James R. Stange (R)	44th District
Rep. Terry Parke (R)	49th District
Rep. Donald N. Hensel (R)	50th District
Rep. Bernard Petersen (R)	54th District
Rep. Penny Pullen (R)	55th District
Rep. Tom Walsh (D)	75th District
Rep. Robert P. Regan (R)	80th District
Rep. Thomas J. McCracken (R)	81st District
Rep. Ed Petka (R)	82nd District
Rep. Phil Novak (D)	86th District
Rep. Art Tenhouse (R)	96th District
Rep. Michael Curran (D)	99th District
Rep. Monroe L. Flinn (D)	114th District
Rep. Terry Deering (D)	115th District
Rep. David D. Phelps (D)	118th District

Indiana

Sen. Richard A. Thompson (R)	24th District
Sen. Joseph V. Corcoran (R)	44th District
Rep. Paul J. Hric (D)	1st District
Rep. John S. Matonovich (D)	11th District
Rep. Kent Adams (R)	22nd District
Rep. Robert J. Bischoff (D)	68th District
Rep. David G. Cheatham (D)	69th District
Rep. Donald T. Nelson (R)	86th District

Iowa

Sen. Wilmer Rensink (R)	3rd District
Sen. Richard Vande Hoef (R)	4th District
Sen. Ray Taylor (R)	9th District
Sen. John W. Jensen (R)	11th District
Sen. Allen Borlaug (R)	15th District
Sen. William W. Dieleman (D)	35th District

Iowa—continued

Rep. Brad Banks (R)	5th District
Rep. Merlin E. Bartz (R)	19th District
Rep. Joseph M. Kremer (R)	27th District
Rep. Charles Hurley (R)	28th District
Rep. Phil Tyrrell (R)	53rd District
Rep. Jane Svoboda (D)	75th District
Rep. Teresa A. Garman (R)	87th District

Kansas

Sen. Dan Thiessen (R)	1st District
Sen. Don Sallee (R)	1st District
Sen. Edward F. Reilly, Jr. (R)	3rd District
Sen. Dave Webb (R)	11th District
Sen. Donald L. Montgomery (R)	21st District
Sen. Ross Doyen (R)	23rd District
Sen. Norma L. Daniels (D)	31st District
Sen. Roy Ehrlich (R)	35th District
Rep. Kerry Patrick (R)	28th District
Rep. Darlene Cornfield (R)	90th District
Rep. Melvin Neufeld (R)	115th District
Rep. Gayle Mollenkamp (R)	118th District

Kentucky

Sen. Richard L. Roeding (R)	24th District
Rep. Kenneth F. Harper (R)	63rd District
Rep. Thomas Kerr (D)	64th District
Rep. William Donnermeyer (D)	68th District
Rep. Louis Johnson (D)	13th District

Louisiana

Sen. Armand J. Brinkhaus (D)	26th District
Rep. Sam H. Theriot (D)	47th District
Rep. Warren J. Triche, Jr. (D)	55th District
Rep. John C. Diez (D)	59th District
Rep. E. Bernard Carrier (D)	71st District
Rep. Shirley D. Bowler (R)	78th District
Rep. Charles D. Lancaster, Jr. (R)	80th District
Rep. James J. Donelon (R)	88th District

Maine

Rep. Walter W. Hichens (R)	3rd District
Rep. Judy Paradis (D)	150th District

Maryland

Sen. Thomas P. O'Reilly (D)	22nd District
Sen. John A. Cade (R) Republican Minority Leader	33rd District
Del. John P. Donoghue (D)	2C District
Del. Charles W. Kolodziejski (D)	31st District
Del. John G. Gary (R)	33rd District
Del. Elizabeth S. Smith (R)	33rd District
Del. J. Lowell Stoltzfus (R)	38th District
Del. Gerald J. Curran (D)	43rd District

Massachusetts

Sen. William M. Bulger (D) Senate President	First Suffolk District
Rep. Philip Travis (D)	4th District
Rep. Thomas M. Finneran (D)	13th District
Rep. James Miceli (R)	20th District

Michigan

Sen. Mat Dunaskiss (R)	8th District
Sen. Doug Carl (R)	9th District
Sen. William Faust (D)	12th District
Sen. Jack Welborn (R)	13th District
Sen. Paul Wartner (R)	21st District
Sen. William Van Regenmorter (R)	23rd District
Sen. Gilbert J. DiAello (D)	26th District
Sen. Fred Dillingham (R)	30th District
Sen. Dick Posthumus (R) Senate Majority Leader	31st District
Sen. James A. Barcia (D)	34th District
Sen. Joanne G. Emmons (R)	35th District
Sen. John Pridnia (R)	36th District
Sen. George McManus (R)	37th District
Sen. Don Koivisto (D)	38th District
Rep. Stanley Stopczynski (D)	11th District
Rep. David Jaye (R)	26th District
Rep. Timothy Walberg (R)	40th District

Michigan—continued

Rep. Dale L. Shugars (R)	47th District
Rep. Margaret O'Connor (R)	52nd District
Rep. Paul Hillegonds (R)	54th District
Rep. Nick Ciaramitaro (D)	73rd District
Rep. David Robertson (R)	83rd District
Rep. W. Todd Akin (R)	85th District
Rep. Jack Horton (R)	90th District
Rep. Jim McBryde (R)	99th District

Minnesota

Sen. Florian W. Chmielewski (DFL) President Pro Tem	14th District
Sen. Thomas M. Neuville (R)	25th District
Sen. Gene Waldorf (DFL)	66th District
Rep. Terry Dempsey (R) Minority Leader	23A District

Mississippi

Sen. Travis Little (D)	4th District
Sen. John White (R)	5th District
Sen. Roger Wicker (R)	6th District
Sen. Ronnie Musgrove (D)	10th District
Sen. Robert G. (Bunky) Huggins (D)	14th District
Sen. Robert Monty (D)	23rd District
Sen. F. Michael Gunn (R)	26th District
Sen. Richard G. White (R)	29th District
Sen. Dean Kirby (R)	30th District
Sen. Billy H. Thames (D)	34th District
Sen. Robert H. (Rob) Smith (D)	35th District
Sen. Pat Welch (D)	38th District
Sen. Thomas A. Gollott (D)	50th District
Rep. Harvey Moss (D)	2nd District
Rep. Charles B. (Charlie) Smith (D)	35th District
Rep. Bennett Malone (D)	45th District
Rep. Hugh Ellard (R)	46th District
Rep. George Flaggs, Jr. (D)	55th District
Rep. Jim Ellington (R)	73rd District
Rep. Clifford C. Britt (D)	76th District
Rep. Eric Clark (D)	79th District
Rep. Roy Dabbs (D)	84th District
Rep. Clem M. Nettles (D)	98th District

Mississippi—continued

Rep. Herb Frierson (D)	106th District
Rep. Larry Elliott Watkins (D)	108th District
Rep. Curt Hebert (R)	111th District
Rep. Robert C. (Bob) Short (D)	118th District

Missouri

Sen. Irene Treppler (R)	1st District
Sen. Fred Dyer (R)	2nd District
Sen. John E. Scott (D)	3rd District
Sen. Larry Rohrback (R)	6th District
Sen. Francis E. Flotron (R)	7th District
Sen. Harry Wiggins (D)	10th District
Sen. John D. Schneider (D)	14th District
Sen. Walt Mueller (R)	15th District
Sen. Emory Melton (R)	29th District
Rep. Edward Schellhorn (D)	8th District
Rep. Dale Whiteside (R)	11th District
Rep. Sam D. Leake (D)	14th District
Rep. George P. Dames (D)	17th District
Rep. Joe Ortwerth (R)	18th District
Rep. Ted House (D)	20th District
Rep. Bonnie Sue Cooper (R)	32nd District
Rep. Pat Kelley (R)	48th District
Rep. Jim Barnes (D)	50th District
Rep. Matt O'Neill (D)	66th District
Rep. Ronald C. Auer (D)	68th District
Rep. Laurie B. Donovan (R)	72nd District
Rep. Richard Dorsey (D)	73rd District
Rep. Michael J. Reid (R)	75th District
Rep. David C. Hale (R)	77th District
Rep. Mark Holloway (R)	84th District
Rep. John Hancock (R)	86th District
Rep. William C. Linton (R)	91st District
Rep. David J. Klarich (R)	94th District
Rep. Francis M. Barnes (R)	96th District
Rep. Jonathan S. Selsor (R)	103rd District
Rep. George Engelbach (R)	106th District
Rep. Carl M. Vogel (R)	112th District
Rep. Don Steen (R)	113th District
Rep. Todd Smith (R)	117th District
Rep. Delbert L. Scott (R)	118th District
Rep. David A. Oetting (R)	121st District

Missouri—continued

Rep. Martin "Bubs" Hohulin (R)	124th District
Rep. T. Mark Elliott (R)	126th District
Rep. Gary L. Burton (R)	127th District
Rep. Ollie Amick (D)	160th District

Montana

Sen. John "Ed" Kennedy, Jr. (D)	3rd District
Sen. Betty Bruski-Maus (D)	12th District
Sen. Francis Koehnke (D)	16th District
Sen. Jerry Noble (R)	21st District
Sen. R.J. "Dick" Pinsoneault (R)	27th District
Sen. Lawrence G. Stimatz (D)	35th District
Sen. Lorents Grosfield (R)	41st District
Sen. James H. Burnett (R)	42nd District
Sen. Thomas F. Keating (R)	44th District
Sen. David Rye (R)	47th District
Rep. Harriet Hayne (R)	10th District
Rep. Ray Peck (D)	15th District
Rep. Dorothy A. Cody (D)	20th District
Rep. Don Steppler (D)	21st District
Rep. Tom Zook (R)	25th District
Rep. Thomas N. Lee (R)	49th District
Rep. Steve Benedict (R)	64th District
Rep. Norm Wallin (D)	78th District
Rep. Orval S. Ellison (R)	81st District
Rep. Timothy J. Whalen (D)	93rd District
Rep. Thomas E. Nelson (R)	95th District

Nebraska

Sen. Bernice Labedz (D)	5th District
Sen. John Lindsay (D)	9th District
Sen. Carol McBride Pirsch (R)	10th District
Sen. Merton L. Dierks (D)	40th District

Nevada

Assemblyman Phil Stout (R)	22nd District
Assemblyman Gaylyn J. Spriggs (R)	36th District

New Hampshire

Sen. Roger C. Heath (R)	3rd District
Sen. Thomas P. Colantuono (R) Senate Assistant Majority Whip	14th District
Sen. Eleanor Podles (R)	16th District

New Hampshire—continued

Rep. Harry Accornero (R)	Belknap–10
Rep. Peter J. Zaharchuk, Jr. (R)	Belknap–10
Rep. Robert J. Daly, Jr. (R)	Carroll—3
Rep. John J. Laurent (R)	Cheshire—2
Rep. David O. Dow (R)	Grafton—8
Rep. Niels F. Nielson, Jr. (R)	Grafton—8
Rep. Ralph Shackett (R)	Grafton–10
Rep. David Hultgren (R)	Hillsborough—1
Rep. Karen Carpenter (R)	Hillsborough–10
Rep. David Wheeler (R)	Hillsborough–10
Rep. Finley C. Rothhaus (R)	Hillsborough–13
Rep. Shawn N. Jasper (R)	Hillsborough–19
Rep. Norman B. Lawrence (R)	Hillsborough–20
Rep. Alan B. Greenglass (R)	Hillsborough–22
Rep. Roland J. Lefebvre (D)	Hillsborough–29
Rep. A. Theresa Drabinowicz (D)	Hillsborough–32
Rep. Leo P. Pepino (R)	Hillsborough–37
Rep. Daniel J. Healy (D)	Hillsborough–38
Rep. Francis J. Laughlin (D)	Hillsborough—38
Rep. Robert O. Ouellette (R)	Hillsborough–48
Rep. Richard Barberia (R)	Merrimack—6
Rep. Henry F. Stapleton (R)	Merrimack—6
Rep. Gabriel V. Daneault (D)	Merrimack—8
Rep. Thomas J. Christie (R)	Merrimack—9
Rep. Mary C. Holmes (R)	Merrimack–13
Rep. David Connell (R)	Rockingham—4
Rep. Kathleen M. Hoelzel (R)	Rockingham—6
Rep. Calvin Warburton (R)	Rockingham—6
Rep. David A. Welch (R)	Rockingham–10
Rep. Thaddeus E. Klemarzcyk (R)	Rockingham–13
Rep. Annette M. Cooke (R)	Rockingham–20
Rep. Bernard J. Raynowska (R)	Rockingham–20
Rep. Arthur W. Smith (R)	Rockingham–20
Rep. Donna P. Sytek (R)	Rockingham—20
Rep. Fredrik Peyron (R)	Sullivan—2
Rep. Beverly T. Rodeschin (R)	Sullivan—2
Rep. Irene C. Domini (R)	Sullivan—5

New Jersey

Sen. Bradford S. Smith (R)	7th District
Sen. Randy Corman (R)	19th District

New Jersey—continued

Sen. Thomas F. Cowan (D)	32nd District
Sen. Gerald Cardinale (R)	39th District
Assemblywoman Clare M. Farragher (R)	12th District
Assemblyman Walter J. Kavanaugh (R)	16th District
Assemblyman Tom Dunn (D)	20th District
Assemblyman John E. Rooney (R)	39th District

New Mexico

Rep. Leonard Lee Rawson (R)	37th District

New York

Sen. Owen H. Johnson (R)	4th District
Sen. Frank Padavan (R) Majority Whip	11th District
Sen. Serphin R. Maltese (R & C)	15th District
Sen. Joseph Holland (R & C)	38th District
Sen. Howard C. Nolan, Jr. (D)	42nd District
Assemblyman Robert C. Wertz (R) Assistant Minority Leader	6th District
Assemblyman Thomas F. Barraga (R)	7th District
Assemblyman Denis J. Butler (D)	36th District
Assemblywoman Elizabeth A. Connelly (D)	58th District
Assemblyman Neil W. Kelleher (R)	100th District
Assemblyman Richard J. Conners (D)	104th District

North Carolina

Sen. Robert C. Carpenter (R)	29th District
Rep. Coy C. Privette (R)	34th District
Rep. Theresa H. Esposito (R) Minority Whip	39th District
Rep. Bradford V. Ligon (R)	83rd District

North Dakota

Sen. Ken Solberg (R)	7th District
Sen. Dan Jerome (D-NPL)	9th District
Sen. Dale Marks (D-NPL)	29th District
Sen. Pete Naaden (R)	30th District
Sen. Aaron Krauter (D)	35th District
Sen. Ray David (R)	36th District
Sen. Tim Mathern (D-NPL)	51st District

North Dakota—continued

Rep. Orville Schindler (R)	14th District
Rep. William E. Gorder (R)	16th District
Rep. James Kerzman (D)	35th District
Rep. Francis J. Wald (R)	37th District
Rep. Rich Wardner (R)	37th District
Rep. Audrey Cleary (D)	49th District
Rep. James Boehm (R)	53rd District

Ohio

Sen. Ben Gaeth (R)	1st District
Sen. Robert R. Cupp (R)	12th District
Sen. Dick Shafrath (R)	19th District
Sen. Gary C. Suhadolnik (R)	24th District
Sen. Steven O. Williams (R)	31st District
Rep. Sean D. Logan (D)	3rd District
Rep. Randy Gardner (R)	5th District
Rep. Edward Kasputis (R)	6th District
Rep. Ronald Suster (R)	19th District
Rep. Cheryl Winkler (R)	20th District
Rep. Jerome F. Luebbers (D)	21st District
Rep. Louis W. Blessing, Jr. (R)	22nd District
Rep. Jacquelyn O'Brien (R)	26th District
Rep. Dale Van Vyven (R)	27th District
Rep. Robert E. Hickey (D)	39th District
Rep. Dave Johnson (R)	51st District
Rep. John V. Bara (D)	54th District
Rep. Daniel J. Troy (D)	60th District
Rep. Raymond E. Sines (R)	61st District
Rep. Sam Bateman (R)	66th District
Rep. Robert Netzley (R)	68th District
Rep. Jim Buchy (R)	73rd District
Rep. Joseph Haines (R)	75th District
Rep. Doug White (R)	77th District
Rep. Jon Myers (R)	78th District
Rep. Larry Manahan (R)	79th District
Rep. Randy Weston (D)	86th District
Rep. Lynn R. Wachtmann (R)	80th District
Rep. Jim Davis (R)	81st District
Rep. Charles R. Brading (R)	82nd District
Rep. Ed Core (R)	83rd District
Rep. Corwin M. Nixon (R)	84th District

Ohio—continued

Rep. Richard E. Rench (R)	90th District
Rep. Paul Mechling (D)	91st District
Rep. Ron Amstutz (R)	93rd District
Rep. Tom Johnson (R)	96th District
Rep. Jerry W. Krupinski (D)	98th District

Oklahoma

Sen. Trish Weedn (D)	15th District
Sen. Donald Jay Rubottom (R)	35th District
Sen. Helen Cole (R)	45th District
Sen. Mike Fair (R)	47th District
Sen. Howard H. Hendrick (R)	52nd District
Rep. Larry Ferguson (R)	35th District
Rep. Tony Kouba (R)	43rd District
Rep. Carolyn Coleman (R)	53rd District
Rep. Joan Greenwood (R)	54th District
Rep. Grover R. Campbell (R)	75th District
Rep. Raymond L. Vaughn, Jr. (R)	81st District
Rep. Tony Caldwell (R)	83rd District
Rep. William D. Graves (R)	84th District
Rep. Mary Fallin (R)	85th District
Rep. Robert Worthen (R)	87th District
Rep. Charles Key (R)	90th District
Rep. Dan Webb (R)	91st District
Rep. Tim Pope (R)	98th District
Rep. Ernest Istook (R)	100th District

Oregon

Rep. Walt Schroeder (R)	48th District

Pennsylvania

Sen. Edward W. Helfrick (R)	27th District
Sen. Noah W. Wenger (R)	36th District
Rep. Teresa E. Brown (R)	6th District
Rep. Thomas J. Fee (D)	9th District
Rep. David O. King (R)	17th District
Rep. Anthony M. DeLuca (D)	32nd District
Rep. Christopher K. McNally (D)	36th District
Rep. Richard D. Olasz (D)	38th District
Rep. Anthony L. Colaizzo (D)	48th District
Rep. Thomas A. Tangretti (D)	57th District

Pennsylvania—continued

Rep. Samuel H. Smith (R)	66th District
Rep. Leona Telek (R)	70th District
Rep. Andrew Billow, Jr. (D)	72nd District
Rep. Edwin G. Johnson (R)	80th District
Rep. Thomas Dempsey (R)	83rd District
Rep. Fred C. Noye (R)	86th District
Rep. Patrick E. Fleagle (R)	90th District
Rep. A. Carville Foster, Jr. (R)	93rd District
Rep. Thomas E. Armstrong (R)	98th District
Rep. John E. Barley (R)	100th District
Rep. Ronald S. Marsico (R)	105th District
Rep. Gaynor Cawley (D)	113th District
Rep. Edward Staback (D)	115th District
Rep. Thomas B. Stish (D)	116th District
Rep. Thomas M. Tigue (D)	118th District
Rep. Kevin Blaum (D)	121st District
Rep. Thomas R. Caltagirone (D)	127th District
Rep. Dennis E. Leh (R)	130th District
Rep. Jerry Birmelin (R)	139th District
Rep. Paul I. Clymer (R)	145th District
Rep. Peter R. Vroon (R)	157th District
Rep. Steve Friend (R)	166th District
Rep. Dennis M. O'Brien (R)	169th District
Rep. Gerard A. Kosinski (D)	175th District
Rep. John J. Taylor (R)	177th District
Rep. Connie McHugh (R)	184th District

Rhode Island

Sen. Maryellen Goodwin (D)	1st District
Sen. John R. O'Leary (D)	12th District
Sen. Michael J. Flynn (R)	29th District
Sen. Joseph A. Montalbano (D)	37th District
Sen. Helen M. Mathieu (D)	46th District
Rep. Thomas J. Rossi (D)	6th District
Rep. Charles F. Gould (D)	66th District
Rep. Frank J. Anzeveno (D)	70th District
Rep. Gaetano Parella (R)	90th District

South Carolina

Rep. Daniel T. Cooper (R)	10th District
Rep. Lewis Vaughn (R)	18th District
Rep. Mike Fair (R)	19th District

South Carolina—continued

Rep. H. Howell Clyborne (R)	20th District
Rep. Terry E. Haskins (R)	22nd District
Rep. Carole Wells (R)	34th District
Rep. Steve Lanford (R)	35th District
Rep. David Beasley (R)	56th District
Speaker *Pro Tempore*	
Rep. John W. Riser (R)	69th District
Rep. Richard M. Quinn, Jr. (R)	71st District
Rep. Roland Corning (R)	79th District
Rep. David Wright (R)	85th District
Rep. C. Lenoir Sturkie (R)	88th District
Rep. Henry Brown (R)	99th District
Rep. Ken Corbett (R)	107th District
Rep. Tom Keegan (R)	116th District
Rep. Roger M. Young (R)	117th District

South Dakota

Sen. Henry A. Poppen (R)	8th District
Sen. Gerald Lange (D)	10th District
Sen. Richard G. Belatti, M.D. (R)	13th District
Sen. Roger A. Porch (R)	27th District
Sen. Bob Haskell (R)	34th District
Sen. William J. Johnson (R)	35th District
Rep. Alfred A. Waltman (D)	2nd District
Rep. Howard L. Kennedy (R)	16th District
Rep. J.E. "Jim" Putnam (R)	19th District
Rep. Lola Schreiber (R)	24th District
Rep. Mike Shaw (R)	24th District
Rep. Kenneth McNenny (R)	26th District
Rep. Gary Lucas (D)	28th District
Rep. Harvey Krautschun (R)	31st District
Rep. Della M. Wishard (R)	35th District

Tennessee

Sen. Gene Elsea (R)	13th District
Sen. Douglas Henry (D)	21st District
Rep. Edna H. Tullos (R)	88th District
Rep. Richard H. Nuber (R)	94th District
Rep. Ed Haley (R)	95th District
Rep. Dan Byrd (D)	99th District

Texas

Sen. John N. Leedom (R)	16th District
Rep. Jerry Yost (R)	7th District
Rep. Chris Harris (R)	10th District
Rep. Dan Kubiak (D)	13th District
Rep. Ken Armbrister (D)	18th District
Rep. Tim Von Dohlen (D)	31st District
Rep. Jim Horn (R)	59th District
Rep. Warren Chisum (D)	84th District
Rep. Kim Brimer (R)	96th District
Rep. Ken Marchant (R)	99th District
Rep. Will Hartnett (R)	102nd District
Rep. Bill Blackwood (R)	105th District
Rep. Glenn Repp (R)	111st District
Rep. Gwyn Shea (R)	114th District
Rep. Talmadge Heflin (R)	149th District

Utah

Sen. LeRay L. McAllister (R)	15th District
Sen. C.E. "Chuck" Peterson (R)	16th District
Rep. Lee Allen (R)	1st District
Rep. Stephen M. Bodily (R)	3rd District
Rep. Evan L. Olsen (R)	5th District
Rep. Kevin Garn (R)	16th District
Rep. Irby N. Arrington (R)	39th District
Rep. Lloyd W. Frandsen (R)	45th District
Rep. Donald R. LeBaron (R)	58th District
Rep. Norman L. Nielsen (R)	60th District
Rep. Jeff Alexander (R)	62nd District
Rep. Bradley Johnson (R)	71st District
Rep. James F. Yardley (R)	73rd District
Rep. Robert A. Slack (R)	75th District

Vermont

Rep. Kittredge R. Haven (R)	Addison—1
Rep. Madeline Harwood (R)	Bennington—Rutland—2
Rep. Thomas J. McCormick (R)	Chittenden—8
Rep. Joan Conant (R)	Colchester 9–1
Rep. Betty M. Ferraro (R)	Rutland 6–1
Rep. Oreste V. Valsangiacomo, Sr. (D)	Washington 4–2

Virginia

Sen. Robert E. Russell, Jr. (R)	11th District
Sen. Charles T. Colgan (D)	29th District
Del. Stephen H. Martin (R)	67th District
Del. Robert F. McDonnell (R)	84th District

Washington

Sen. Linda A. Smith (R)	11th District
Sen. Ellen Craswell (R)	23rd District
Sen. Bob Oke (R)	26th District
Sen. Pam Roach (R)	31st District
Rep. Mike Padden (R)	4th District
Rep. Duane Sommers (R)	6th District

West Virginia

Sen. Charles V. Felton, Jr. (D)	15th District
Del. Joseph D. Parriott (R)	4th District
Del. Otis A. Leggett (R)	7th District
Del. Larry Border (R)	8th District
Del. Evelyn E. Richards (R)	16th District
Del. Kenny E. Partlow (D)	18th District
Del. Ann Calvert (R)	23rd District
Del. William H. Wallace (R)	25th District
Del. Eugene T. Wilson (D)	26th District
Del. Randy Schoonover (D)	33rd District
Del. Robert A. Schadler (R)	34th District

Wisconsin

Sen. Marvin J. Roshell (D)	23rd District
Rep. Wilfrid J. Turba (R)	27th District
Rep. William D. Lorge (R)	40th District
Rep. Susan B. Vergeront (R)	60th District
Rep. Leo R. Hamilton (D)	67th District
Rep. Marc C. Duff (R)	84th District

Wyoming

Sen. Allan D. Howard (R)	Big Horn County
Sen. James L. Applegate (D)	Laramie County
Sen. Michael J. Burke (R)	Natrona County
Rep. Samuel R. Dunnuck III (R)	Albany County
Rep. Sylvia Gams (R)	Big Horn County
Rep. Fred Harrison (D)	Carbon County
Rep. William M. Tibbs (R)	Converse County

Wyoming—continued

Rep. Gene Call (R)	Lincoln County
Rep. Richard Honaker (D)	Sweetwater County
Rep. Ron Micheli (R)	Uinta County
Rep. Ray Harrison (R)	Washakie County

Commonwealth of Puerto Rico

Sen. Jose Izquierdo-Stella (PDP)	At Large
Sen. Roberto Rexach-Benitez (NPP)	At Large
Sen. Nicolas Nogueras-Rivera (NPP)	At Large
Sen. Enrique Rodriguez-Negron (NPP)	At Large
Sen. Oreste Ramos (NPP)	1st District
Sen. Anibal Marrero-Perez (NPP)	2nd District
Rep. Angel Cintron (NPP)	At Large
Rep. Rosa Ramirez (NPP)	3rd District
Rep. Edison Misla-Aldarondo (NPP)	4th District
Rep. Carlos Lopez-Nieves (NPP)	7th District
Rep. Manuel Marrero-Hueca (NPP)	9th District
Rep. Arcadio Concepcion (PDP)	11th District
Rep. Jose Guillermo Rodriguez (PDP)	18th District
Rep. Benjamin Soto (PDP)	19th District
Rep. Harry Luis Perez (PDP)	20th District
Rep. Jose Varela (PDP)	29th District
Rep. Miguel Diaz-Tirado (PDP)	30th District
Rep. Gilberto Moreno-Rodriguez (R)	39th District

Territory of Guam

Hon. Joseph F. Ada (R), Governor
Hon. Frank F. Blas (R), Lt. Governor

Speaker Joe T. San Agustin (D)
Legislative Secretary Pilar C. Lujan (D)

Sen. Elizabeth P. Arriola (D)
Sen. Joseph George Bamba (R)
Sen. Anthony C. Blaz (R)
Sen. Madeline Z. Bordallo (D)
Sen. Herminia D. Dierking (D)
Sen. Edward R. Duenas (R)
Sen. Ernesto M. Espaldon, M.D. (R)
Sen. Marilyn D.A. Manibusan (R)
Sen. Martha Cruz Ruth (R)
Sen. Francisco R. Santos (D)
Sen. Thomas V.C. Tanaka (R)
Sen. Antonio R. Unpingco (R)

Additional *Amici*

Alabama

Sen. James T. Waggoner (R)	16th District
Sen. Chip Bailey (D)	29th District
Sen. Albert Lipscomb (R)	32nd District
Rep. Al Knight (R)	40th District
Rep. Jack Biddle III (R)	43rd District
Rep. Jim Carns (R)	46th District
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Nos. 91-744 and 91-902

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *et al.*,
Petitioners and Cross-Respondents,

v.

ROBERT P. CASEY, *et al.*,
Respondents and Cross-Petitioners.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR FOCUS ON THE FAMILY, FAMILY RESEARCH COUNCIL, THE LUTHERAN CHURCH—MISSOURI SYNOD, AND AMERICAN FAMILY ASSOCIATION LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS AND CROSS-PETTTIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. PENNSYLVANIA'S SPOUSAL NOTICE REQUIREMENT PROTECTS A PARENT'S FUNDAMENTAL INTEREST IN DEVELOPING AND MAINTAINING A RELATIONSHIP WITH HIS CHILD	6
A. The parental interest has long been protected by constitutional law	7
B. The parental interest is consistently protected in various contexts by the family law of the states	10
II. THE SPOUSAL NOTICE REQUIREMENT FURTHERS THE STATE'S INTEREST IN MARITAL INTEGRITY AND LOYALTY	14
III. THE SPOUSAL NOTICE REQUIREMENT FURTHERS THE STATE'S INTEREST IN PROTECTING POTENTIAL HUMAN LIFE	18
IV. PENNSYLVANIA'S PARENTAL CONSENT REQUIREMENT IS CONSTITUTIONAL	21
CONCLUSION	25

TABLE OF AUTHORITIES

Cases	Page
Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983)	8
Armstrong v. Manzo, 380 U.S. 545 (1965)	12
Baldwin v. Butcher, 155 W.Va. 431, 184 S.E.2d 428 (1971)	20
Bellotti v. Baird, 443 U.S. 622 (1979)	21-22
Bennett v. Northcutt, 544 S.W.2d 703 (Tex. Civ. App. 1976)	12
Bowen v. American Hospital Association, 476 U.S. 610 (1986)	24
Britt v. Sears, 150 Ind.App. 487, 277 N.E.2d 20 (1971)	19
Cassidy v. Cassidy, 68 Haw. 383, 716 P.2d 1133 (1986), *modified on other grounds*, 716 P.2d 1133 (1986)	14
Chrisafogeorgis v. Brandenberg, 55 Ill.2d 368, 304 N.E.2d 88 (1973)	19
Clement v. Clement, 436 Pa. 466, 260 A.2d 728 (1970)	15
Conway v. Dana, 456 Pa. 536, 318 A.2d 324 (1974)	7, 15
Cosper v. Valley Bank, 28 Ariz. 373, 237 P. 175 (1928)	14
Danos v. St. Pierre, 402 So.2d 633 (La. 1981)	20
De Vorkin v. Foster, 66 N.Y.S.2d 54 (1946)	12
Drumheller v. Marcello, 516 Pa. 428, 532 A.2d 807 (1987)	14
Dunbar v. Dunbar, 190 U.S. 340 (1903)	12
Dunn v. Rose Way, Inc., 333 N.W.2d 830 (Iowa 1983)	19
Eich v. Town of Gulf Shores, 293 Ala. 95, 300 So.2d 354 (1974)	19
Evans v. Olson, 550 P.2d 924 (Okla. 1976)	20
Fowler v. Woodward, 244 S.C. 608, 138 S.E.2d 42 (1964)	20
Galanter v. Galanter, 133 N.Y.S.2d 266 (1954)	12
Ginsberg v. New York, 390 U.S. 629 (1968)	23
Grimditch v. Grimditch, 71 Ariz. 198, 225 P.2d 489 (1950) (per curiam), *modified on other grounds*, 71 Ariz. 237 (1951)	14
H.L. v. Matheson, 450 U.S. 398 (1981)	24

TABLE OF AUTHORITIES—Continued

	Page
Hale v. Manion, 189 Kan. 143, 368 P.2d 1 (1962)	19
Hall v. Hall, 30 Md. App. 214, 351 A.2d 917 (1976)	12
Hatala v. Markiewicz, 26 Conn. Supp. 358, 224 A.2d 406 (1966)	19
Hodgson v. Minnesota, 110 S.Ct. 2926 (1990)	6-7, 12, 22
Hopkins v. McBane, 359 N.W.2d 862 (N.D. 1984)	20
In re Marriage of Presson, 102 Ill.2d 303, 465 N.E.2d 85 (1984)	12
In re Matter of Adoption of Doe, 543 So.2d 741 (Fla. 1989)	8-9
Justus v. Atchison, 19 Cal.3d 564, 565 P.2d 122, 139 Cal.Rptr. 97 (1977)	20
Kwaterski v. State Farm Mutual Auto Ins. Co., 34 Wis.2d 14, 148 N.W.2d 107 (1967)	20
Lehr v. Robertson, 463 U.S. 248 (1983)	9, 14
Libbee v. Permanente Clinic, 268 Or. 258, 518 P.2d 636 (1974)	20
Maynard v. Hill, 125 U.S. 190 (1888)	14
Meyer v. Nebraska, 262 U.S. 390 (1923)	24
Michael H. v. Gerald D., 491 U.S. 110 (1989)	9, 24
Mitchell v. Couch, 285 S.W.2d 901 (Ky. 1955)	19-20
Moen v. Hanson, 85 Wash.2d 597, 537 P.2d 266 (1975)	20
Mone v. Greyhound Lines, Inc., 368 Mass. 354, 331 N.E.2d 916 (1975)	20
Nelson v. Peterson, 542 P.2d 1075 (Utah 1975)	20
Norton v. Norton, 268 Ark. 791, 595 S.W.2d 709 (1980)	12
O'Grady v. Brown, 654 S.W.2d 904 (Mo. 1983)	20
O'Neill v. Morse, 385 Mich. 130, 188 N.W.2d 785 (1971)	20
Ohio v. Akron Center for Reproductive Health, 110 S.Ct. 2972 (1990)	22
Parham v. J.R., 442 U.S. 584 (1979)	23
Pasley v. State, 215 Ga. 768, 113 S.E.2d 454 (1960)	12
Peralta v. Heights Medical Center, Inc., 485 U.S. 80 (1988)	13

TABLE OF AUTHORITIES—Continued

	Page
Pierce v. Society of Sisters, 268 U.S. 510 (1925)	23
Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976)	7, 13
Planned Parenthood of Southeastern Pennsylvania v. Casey, 947 F.2d 682 (3d Cir. 1991)	22
Poliquin v. MacDonald, 101 N.H. 104, 135 A.2d 249 (1957)	20
Porter v. Lassiter, 91 Ga.App. 712, 87 S.E.2d 100 (1955)	19
Presley v. Newport Hospital, 117 R.I. 177, 365 A.2d 748 (1976)	20
Prince v. Massachusetts, 321 U.S. 158 (1944)	24
Rainey v. Horn, 221 Miss. 269, 72 So.2d 434 (1954)	20
Roe v. Wade, 410 U.S. 113 (1973)	5, 6, 13
Salazar v. St. Vincent Hosp., 95 N.M. 150, 619 P.2d 826 (1980)	20
Santosky v. Kramer, 455 U.S. 745 (1982)	7, 10, 23-24
Scheinberg v. Smith, 659 F.2d 476 (5th Cir. 1981), *on remand*, 550 F. Supp. 1112 (S.D. Fla. 1982)	14
Simmons v. Howard University, 323 F. Supp. 529 (D.D.C. 1971)	19
Skinner v. Oklahoma, 316 U.S. 535 (1942)	8
Stanford v. Kentucky, 109 S.Ct. 2969 (1989)	23, 24
Stanley v. Illinois, 405 U.S. 645 (1972)	7, 8
State ex rel. Odham v. Sherman, 234 Md. 179, 198 A.2d 71 (1964)	20
State v. Yocum, 182 Ind. 478, 106 N.E. 705 (1914)	12
Stidam v. Ashmore, 109 Ohio App. 431, 167 N.E.2d 106 (1959)	20
Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986)	8, 9
United States v. Green, 26 F. Cas. 30 (C.C.D.R.I. 1824) (No. 15,256)	19
Vaillancourt v. Medical Center Hosp., 139 Vt. 138, 425 A.2d 92 (1980)	20
Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949)	19

TABLE OF AUTHORITIES—Continued

	Page
Volk v. Baldazo, 103 Idaho 570, 651 P.2d 11 (1982)	19
Webster v. Reproductive Health Services, 492 U.S. 490 (1989)	16
White v. Yup, 85 Nev. 527, 458 P.2d 617 (1969)	20
Wisconsin v. Yoder, 406 U.S. 205 (1972)	24
Worgan v. Greggo & Ferrara, Inc., 50 Del. 258, 128 A.2d 557 (1956)	19
Zablocki v. Redhail, 434 U.S. 374 (1978)	14
State Constitution	
Okla. Const. Art. XII, § 2	16
Statutes	
Ala. Code § 26-10A-7 (Supp. 1991)	10
Ala. Code § 26-10A-17(a) (10) (Supp. 1991)	11
Ala. Code § 26-17-21 (1986)	17
Alaska Stat. § 13.06.120(4) (1985)	21
Alaska Stat. § 25.23.040 (1991)	10
Ariz. Rev. Stat. Ann. § 6-624(B) (Supp. 1991)	16
Ariz. Rev. Stat. Ann. § 8-106 (1989)	10, 11
Ariz. Rev. Stat. Ann. § 14-1403 (1975)	21
Ark. Code Ann. § 9-9-206 (Michie 1991)	10
Ark. Code Ann. § 9-9-220 (Michie Supp. 1991)	21
Ark. Code Ann. § 9-10-201 (Michie 1991)	17
Ark. Code Ann. § 9-10-202 (Michie 1991)	17
Cal. Civ. Code § 226.1 (Deering 1990)	10
Cal. Civ. Code § 226.9 (Deering 1990)	10
Cal. Civ. Code § 7005 (Deering 1991)	17
Cal. Lab. Code § 300 (Deering 1991)	16
Cal. Pen. Code § 270 (Deering 1985)	8, 20
Cal. Prob. Code § 1003 (Deering 1991)	21
Cal. Prob. Code § 15405 (Deering 1991)	21
Colo. Rev. Stat. § 15-10-403 (1987)	21
Colo. Rev. Stat. § 19-4-106 (Supp. 1991)	17
Colo. Rev. Stat. § 19-5-203 (Supp. 1991)	10
Conn. Gen. Stat. Ann. § 45a-132 (West Supp. 1991)	21

TABLE OF AUTHORITIES—Continued

	Page
Conn. Gen. Stat. Ann. § 45a-717 (West Supp. 1991)	10
Conn. Gen. Stat. Ann. § 45a-732 (West Supp. 1991)	10, 16
Conn. Gen. Stat. Ann. § 45a-772 (West Supp. 1991)	17
Conn. Gen. Stat. Ann. § 45a-774 (West Supp. 1991)	17
D.C. Code Ann. § 16-302 (1989)	16
D.C. Code Ann. § 16-304 (1981)	10
D.C. Code Ann. § 16-306 (1989)	11
Del. Code Ann. tit. 12, § 2905(e) (1987)	21
Del. Code Ann. tit. 13, § 908 (1981)	10
Del. Code Ann. tit. 13, § 951 (1981)	16
Del. Code Ann. tit. 13, § 1106 (1981)	11
Fla. Stat. Ann. § 63.042 (West 1985)	16
Fla. Stat. Ann. § 63.062 (West 1985)	10
Ga. Code Ann. § 19-7-21 (Michie 1991)	17
Ga. Code Ann. § 19-8-12 (Michie 1991)	11
Idaho Code § 16-1504 (Supp. 1991)	10
Idaho Code § 39-5403 (Supp. 1991) (Effective July 1, 1993)	17
Idaho Code § 39-5405 (1985)	17
Ill. Ann. Stat. ch. 40, para. 1452 (Smith-Hurd Supp. 1991)	17
Ill. Ann. Stat. ch. 40, para. 1453 (Smith-Hurd Supp. 1991)	17
Ill. Ann. Stat. ch. 40, para. 1510 (Smith-Hurd Supp. 1991)	10
Ill. Ann. Stat. ch. 40, para. 1515 (Smith-Hurd Supp. 1991)	11
Ind. Code Ann. § 22-2-7-4(a) (Burns 1992)	16
Ind. Code Ann. § 29-1-1-20 (Burns 1989)	21
Ind. Code Ann. § 31-3-1-6 (Burns Supp. 1991)	10-11
Ind. Code Ann. § 31-3-1-6.1 (Burns Supp. 1991)	11
Iowa Code Ann. § 600.7 (West 1981)	10
Iowa Code Ann. § 600.11 (West 1981)	11
Iowa Code Ann. § 675.25 (West Supp. 1991)	8
Kan. Stat. Ann. § 23-128 (1988)	17

TABLE OF AUTHORITIES—Continued

	Page
Kan. Stat. Ann. § 23-128–130 (1988)	17
Ky. Rev. Stat. Ann. § 199.500 (Baldwin 1991)	11
Ky. Rev. Stat. Ann. § 389A.053 (Michie 1984)	21
La. Rev. Stat. Ann. § 9:422.3 (West 1991)	11
Mass. Ann. Laws ch. 79, § 30 (Law. Co-op. 1991)	20, 21
Mass. Gen. Laws Ann. ch. 46, § 4B (West 1991)	17
Mass. Gen. Laws Ann. ch. 210, § 2 (West 1987)	11
Md. Fam. Law Code Ann. § 5-311 (1991)	11
Me. Rev. Stat. Ann. tit. 18-A, § 1-403(3) (West 1981)	21
Me. Rev. Stat. Ann. tit. 19, § 532 (West 1990)	11
Me. Rev. Stat. Ann. tit. 19, § 532-C (West 1990)	11
Mich. Comp. Laws Ann. § 600.2045 (West 1981)	20, 21
Mich. Comp. Laws Ann. § 710.31 (West Supp. 1991)	11
Mich. Comp. Laws Ann. § 710.34 (West Supp. 1991)	11
Minn. Stat. Ann. § 257.56 (West Supp. 1992)	17
Minn. Stat. Ann. § 257.74 (West 1982)	11
Minn. Stat. Ann. § 501B.19 (West 1990)	20, 21
Minn. Stat. Ann. § 525.63 (West Supp. 1992)	16
Miss. Code Ann. § 93-13-7 (Supp. 1991)	20, 21
Miss. Code Ann. § 93-17-5 (1972)	11
Mo. Ann. Stat. § 210.824 (Vernons 1992)	17
Mo. Ann. Stat. § 453.030 (Vernons 1986)	11
Mont. Code Ann. § 31-1-306 (1991)	16
Mont. Code Ann. § 40-6-106 (1991)	17
Mont. Code Ann. § 40-6-129 (1991)	11
Mont. Code Ann. § 40-8-111 (1991)	11
Mont. Code Ann. § 72-35-313 (1991)	21
N.C. Gen. Stat. § 48-7 (1991)	11
N.C. Gen. Stat. § 49A-1 (1984)	17
N.D. Cent. Code § 14-15-03 (1991)	16
N.D. Cent. Code § 14-15-05 (1991)	11
N.D. Cent. Code § 14-17-23 (1991)	11
N.D. Cent. Code § 14-18-01 (1991)	17
N.D. Cent. Code § 14-18-03 (1991)	17
N.H. Rev. Stat. Ann. § 170-B:5 (1990)	11
N.H. Rev. Stat. Ann. § 170-B:5-a (1990)	11

TABLE OF AUTHORITIES—Continued

	Page
N.J. Stat. Ann. § 9:3-45 (West 1991)	11
N.J. Stat. Ann. § 9:17-44 (West 1991)	17
N.M. Stat. Ann. § 40-7-35 (Michie 1989)	11
N.M. Stat. Ann. § 40-11-6 (Michie 1989)	17
N.Y. Dom. Rel. Law § 111 (McKinney 1988 & Supp. 1992)	11
Neb. Rev. Stat. § 43-104 (1988)	11
Neb. Rev. Stat. § 45-144 (1988)	16
Nev. Rev. Stat. § 126.061 (1986)	17
Nev. Rev. Stat. § 127.040 (1986)	11
Ohio Rev. Code Ann. § 2307.13.1 (Anderson 1991)	21
Ohio Rev. Code Ann. § 3107.03 (Anderson 1980)	16
Ohio Rev. Code Ann. § 3107.06 (Anderson 1980)	11
Ohio Rev. Code Ann. § 3111.34 (Anderson Supp. 1991)	17
Okla. Stat. Ann. tit. 10, § 60.5 (West 1987)	11
Okla. Stat. Ann. tit. 10, § 551-554 (West 1987 & Supp. 1992)	17
Okla. Stat. Ann. tit. 10, § 553 (West 1987)	17
Okla. Stat. Ann. tit. 12, § 1147.3 (West 1988)	21
Or. Rev. Stat. § 109.096 (1991)	11
Or. Rev. Stat. § 109.125 (1991)	21
Or. Rev. Stat. § 109.155(4) (1989)	8
Or. Rev. Stat. § 109.239 (1991)	17
Or. Rev. Stat. § 109.312 (1991)	11
18 Pa. Cons. Stat. Ann. § 3206 (1991)	4
18 Pa. Cons. Stat. Ann. § 3209 (1991)	3, 4
23 Pa. Cons. Stat. Ann. § 2711 (1991)	11
23 Pa. Cons. Stat. Ann. § 3102(3) (1991)	15
Pa. Laws No. 374, tit. VI, §§ 87, 88 (1860)	13
P.R. Laws Ann. tit. 31, § 532 (1967)	16
R.I. Gen. Laws § 15-7-5 (1988)	11
S.C. Code Ann. § 20-7-1710 (Law. Co-op. 1985 & Supp. 1991)	11
S.D. Codified Laws Ann. § 25-1-2 (1984)	20-21
S.D. Codified Laws Ann. § 25-6-1.1 (1984)	11
S.D. Codified Laws Ann. § 25-6-3 (1984)	16
S.D. Codified Laws Ann. § 25-6-4 (1984)	11
Tenn. Code Ann. § 26-2-301(b) (1980)	16

TABLE OF AUTHORITIES—Continued

	Page
Tenn. Code Ann. § 36-1-108 (1984)	11
Tenn. Code Ann. § 36-1-111 (1991)	11
Tenn. Code Ann. § 68-3-306 (1987)	17
Tex. Fam. Code Ann. § 12.03 (West Supp. 1992)	17
Tex. Fam. Code Ann. § 15.03 (West 1981 & Supp. 1992)	11
Utah Code Ann. § 78-30-3 (1992)	16
Utah Code Ann. § 78-30-4.1 (1992)	11
Va. Code Ann. § 20-156 (Michie Supp. 1991)	17
Va. Code Ann. § 63.1-225 (Michie 1991)	11
V.I. Code Ann. tit. 16, § 342 (1964)	8
Vt. Stat. Ann. tit. 15, § 441 (1989)	11
W. Va. Code § 48-4-2 (1986)	16
W. Va. Code § 48-4-3 (1986)	11
W. Va. Code § 48-4-8 (1986)	11
Wash. Rev. Code Ann. § 26.26.050 (West 1986)	17
Wash. Rev. Code Ann. § 26.33.160 (West Supp. 1992)	11
Wash. Rev. Code Ann. § 26.33.310 (West Supp. 1992)	11
Wis. Stat. Ann. § 882.02 (West 1991)	16
Wis. Stat. Ann. § 891.40 (West Supp. 1991)	17
Wyo. Stat. § 1-22-109 (1988)	11
Wyo. Stat. § 14-2-103 (1986)	17
Wyo. Stat. § 34-2-121 (1990)	16

Other

1 A. Corbin, *Corbin on Contracts* 29 (1963)	18-19
1 W. Blackstone, *Commentaries* *452-53	7
Dorlands Illustrated Medical Dictionary (24th ed. 1965)	8
Foster & Freed, *Life with Father: 1978*, 11 Fam. L.Q. 321 (1978)	19
Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 B.Y.U.L. Rev. 605	23
W. Keeton, *Prosser and Keeton on the Law of Torts* (5th ed. 1984)	24

TABLE OF AUTHORITIES—Continued

	Page
L. Nolan, *The Legal Status of Parent and Child 1986* (1987)	24
Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 Law & Contemp. Probs. 226 (1975)	19
W. Prosser, *Law of Torts*, 336 (4th ed. 1971)	19
Recent Development, Minor's Right to Medical Care, 14 J. Fam. L. 581 (1975)	23
1 *A Treatise on the Laws of Contracts* 10 (R. Lord ed., 4th ed. 1990)	18
Wardle, *Rethinking Roe v. Wade*, 1985 B.Y.U.L. Rev. 231	19
1 S. Williston, *Williston on Contracts* 1 (1st ed. 1920)	18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

Nos. 91-744 and 91-902

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *et al.*,
Petitioners and Cross-Respondents,

v.

ROBERT P. CASEY, *et al.*,
Respondents and Cross-Petitioners.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR FOCUS ON THE FAMILY, FAMILY RESEARCH COUNCIL, THE LUTHERAN CHURCH—MISSOURI SYNOD, AND AMERICAN FAMILY ASSOCIATION LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS AND CROSS-PETITIONERS

INTEREST OF *AMICI CURIAE*

Amicus Curiae Focus on the Family is a nonprofit organization committed to strengthening the family in the United States and abroad. Focus on the Family's daily radio broadcasts about family issues reach approximately 1.7 million listeners each day in the United States, Canada, and other Western countries via 1,600 radio

stations. These programs are broadcast in 40 foreign countries, including (as of early 1992) 2,500 state-owned stations in the former Soviet Union. Focus on the Family Magazine is received by 2 million households each month.

During the past fifteen years, Focus on the Family has accumulated a wealth of experience and knowledge concerning the effects of abortion on the family unit. From its widespread network of listeners and subscribers, Focus on the Family receives an average of over 33,000 letters each week, many of which describe family traumas. A significant proportion of these letters have borne witness to the traumatic effects of abortion on many American families.

Amicus Family Research Council, a division of Focus on the Family, conducts research and policy analysis related to the family, including the effects of abortion on the family unit and its members: mothers and wives, fathers and husbands, and children.

Amicus The Lutheran Church-Missouri Synod is the second largest Lutheran denomination in North America and the ninth largest Protestant body in the United States. It is composed of approximately 5,900 member congregations which, in turn, have approximately 2,600,000 individual members. The Lutheran Church-Missouri Synod holds as a profound belief that human life begins at conception and opposes willful abortion, except as tragically necessitated to prevent the death of the mother. The Lutheran Church-Missouri Synod believes that compassionate alternatives to abortion should be offered to all persons confronted with unwanted pregnancies.

Amicus American Family Association Law Center ("Law Center") is a non-profit legal organization founded in 1989. The Law Center engages in litigation promoting Judeo-Christian pro-family values, including the protection of unborn children from abortion. The Law Center also serves as the legal arm for the American Family Association representing its 450,000 members and 650

chapters. The Law Center is profoundly concerned with the irreparable harm inflicted upon young women who abort their unborn children without proper counseling, without parental or spousal notification, and without comprehensive information on abortion.

Amici share a longstanding concern, based on detailed observation of human behavior, that the abortion floodgate opened in 1973 by this Court has imperiled the traditional strength of American families. Because of their longstanding and proven commitment to the American family, *amici* have a strong interest in legislative measures that seek to limit the harm abortion causes to the family.

Amici accordingly submit this brief concerning Pennsylvania's attempt to protect important family relationships by requiring spousal notice and parental consent prior to certain abortions.

STATEMENT OF THE CASE

This brief treats two parts of the Pennsylvania law challenged by Petitioners Planned Parenthood, *et al.*, the spousal notice requirement and the parental consent requirement.

Section 3209 of the Pennsylvania Abortion Control Act, as amended, requires that in certain circumstances a married woman must notify her husband before she has an abortion. Specifically, the section provides that a married woman, before she has an abortion in a non-emergency situation, must certify either that she has notified her husband that she intends to have an abortion, or that she is exempt from the notice requirement because: (1) her husband is not the father of the child, or (2) her husband could not be located through diligent effort, or (3) the pregnancy is the result of a spousal sexual assault which has been timely reported to authorities, or (4) she has reasons to believe that giving notice to her spouse is likely to result in physical injury to her.

The Pennsylvania legislature enacted this provision for the expressed purposes of promoting the integrity of the marital relationship, protecting a spouse's interest in having children within marriage, and protecting a spouse's interest in protecting the prenatal life of his jointly-conceived child. 18 Pa. Cons. Stat. Ann. § 3209 (Supp. 1991).

For women under the age of 18 who seek an abortion, § 3206 of the Act requires the informed consent of at least one of her parents, but provides an option for the minor woman to seek judicial approval for her abortion in lieu of securing parental consent. *Id.* § 3206.

SUMMARY OF ARGUMENT

Pennsylvania's requirement of notice to spouses prior to certain abortions is a legitimate effort to protect parental rights and familial relationships of a fundamental and compelling nature. The issue of spousal notice intimately concerns (1) the interest of a parent in preserving the opportunity to develop a relationship with his or her offspring; (2) the state's interest in promoting the integrity of marriage; and (3) the interest of an unborn child in having others with interests similar to his or hers be notified of impending action that imperils his or her vital interests.

The spousal notice provision presents this Court with an unavoidable clear-cut choice among multiple "fundamental rights." The interest of a parent in developing a relationship with his or her offspring has long been held to be a fundamental right. Preservation of the integrity of the family has likewise been held to be an interest of utmost importance. State law has consistently, throughout American history, protected the right of *both* spouses to participate in decisions that are central to the destiny of the family. States have also consistently recognized that unborn children, whether termed "potential

human life" or "persons," have judicially enforceable interests.

Against these interests stands the "right to abortion" posited by the majority in *Roe v. Wade*, 410 U.S. 113 (1973). When judged by any of the criteria of fundamental rights—longstanding and consistent recognition in American law and society; rights inherent in the concept of ordered liberty; or rights historically rooted in the conscience of our people—the liberty interest in abortion has far less support than any of the other rights and interests concerned in the spousal notice issue.

Moreover, the modern trend in state law, when the interests and desires of two parents diverge, is to accommodate so far as possible the interests of both mother and father, while promoting above all the best interests of the child. The position of Petitioners goes counter to the overwhelming historic trend of state law by ignoring the interests of one parent of the child. Petitioners further ignore the modern trend in family law by trying to make the mother's interests an absolute and the father's interests a nullity.

Pennsylvania's requirement of parental consent with option of judicial bypass for a minor before she can get an abortion is constitutional. Again, the tradition of state law respecting the role of parents as guardians of their minor children has greater standing in the traditions of the American people and our fundamental rights than the recently decreed "right" to abortion and should prevail over that "right" in this case.

ARGUMENT

The issue of spousal notice presents a direct conflict between different rights that this Court has termed "fundamental." In striking down Pennsylvania's spousal notice requirement, the courts below exalted the "right" to abortion over other rights and interests that have a far stronger claim to be termed fundamental: (1) the right of both parents to an opportunity to develop a relationship with their jointly-conceived children, (2) the state's interest in promoting the integrity of marriage, and (3) the state's interest in protecting the unborn child—or "potential human life" as this Court has used the term.

Parts I, II, and III of this Brief describe the rights and interests that compete with the "right" to abortion in the context of spousal notice. The Brief summarizes this Court's precedents with respect to each competing right, and further sets forth the complex of state laws which have historically protected those rights and which should not be overridden by the far more recently created "right" to abortion. Part IV of the Brief argues that Pennsylvania's parental consent provision is constitutional.

A proper recognition of these competing rights can allow this Court either to (1) overrule *Roe v. Wade*, 410 U.S. 113 (1973), as creating a novelty at war with long-established fundamental rights and interests, or (2) uphold Pennsylvania's spousal notice provision as a legitimate measure that promotes reasonable, and indeed compelling, state interests.

I. PENNSYLVANIA'S SPOUSAL NOTICE REQUIREMENT PROTECTS A PARENT'S FUNDAMENTAL INTEREST IN DEVELOPING AND MAINTAINING A RELATIONSHIP WITH HIS CHILD.

Constitutional law and state family law recognize a fundamental interest of *both* parents to develop a relationship with their children. *See Hodgson v. Minnesota*,

110 S. Ct. 2926, 2962-63 (1990) (Kennedy, J., concurring in part and dissenting in part). Pre-modern common law vested parental rights solely in fathers and gave them unilateral decision making power without regard to the interests of wives and children. *See, e.g.*, 1 W. Blackstone, *Commentaries* *452-53. Recent judge-made abortion law has similarly sought to vest absolute and autonomous decision-making power in mothers, without regard to the interests of fathers and of children in being but not yet born. *See, e.g., Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 71 (1976) ("We recognize, of course, that when a woman with the approval of her physician but without the approval of her husband, decides to terminate her pregnancy, it could be said that she is acting unilaterally."). The absolutist pre-modern approach and the recent abortion law approach stand equally at odds with the consistent modern trend to accommodate evenhandedly, so far as possible, the interests of both parents in developing and maintaining a relationship with their children.

Pennsylvania has explicitly adopted a rule of equal treatment of fathers and mothers with regard to their responsibilities toward their children. *Conway v. Dana*, 456 Pa. 536, 540, 318 A.2d 324, 326 (1974) ("Support, as every other duty encompassed in the role of parenthood, is the equal responsibility of both mother and father."). Pennsylvania should be allowed to further its policy of equal treatment in this case, by requiring notice to a husband that his wife is seeking an abortion, rather than allowing one parent to act unilaterally with absolute power.

A. The parental interest has long been protected by constitutional law.

Constitutional decisions throughout this century have upheld the "fundamental liberty interest of natural parents in the care, custody, and management of their child." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Stanley v.*

Illinois, 405 U.S. 645, 651 (1972) ("The rights to conceive and to raise one's children have been deemed 'essential'. . . .").

Parental rights attach before birth, to the siring and conceiving of children. *Id.* The right of procreation has been upheld as applied to a potentiality of siring a child, before an individual child had been conceived, *Skinner v. Oklahoma*, 316 U.S. 535 (1942), and logically applies with even greater force once a specific child has been actually conceived.

The right to procreate applies by definition to "the entire process of bringing a new individual into the world." *Dorlands Illustrated Medical Dictionary* (24th ed. 1965). Just as the state has a compelling interest in potential human life before birth, *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 452-59 (1983) (O'Connor, J., dissenting), so both parents have a strong interest in the continued life of the child before birth. *Cf. Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 778 n.7 (1986) (Stevens, J., concurring) ("The responsibility for nurturing the soul of the newly born, as well as the unborn, rests with the individual parents, not with the State.") (emphasis added).[1]

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[1] Under state law, fathers' support obligations to their children can apply before as well as after the birth of the child. *See, e.g.*, Iowa Code Ann. § 675.25 (West Supp. 1991); V.I. Code Ann. tit. 16, § 342 (1964); Or. Rev. Stat. § 109.155(4) (1989) (court can order either parent to pay reasonable and necessary prenatal care). Failure to provide support for an unborn child in California is a crime punishable by up to one year in prison. Cal. Pen. Code § 270 (Deering 1985). In one state, a father has been found to have neglected his child *solely* on the ground that he failed to provide support for prenatal care. *In re Matter of Adoption of Doe*, 543 So.2d 741, 746 (Fla. 1989), *cert. denied*, 110 S.Ct. 405 (1989) ("Because prenatal care of the pregnant mother and unborn child is critical to the well-being of the child and of society, the biological father, wed or unwed, has a responsibility to provide support during the pre-birth period.")

The married father's relationship with his unborn child is defined by an undeniable genetic tie and a legal status flowing from his marriage to the mother.[2] The natural father's biological and genetic tie to his child is as well-established before birth as after. As Justice White has accurately observed, a fetus "is an entity that bears in its cells all the genetic information that characterizes a member of the species *homo sapiens* and distinguishes an individual member of that species from all others." *Thornburgh*, 476 U.S. at 792 (White, J., dissenting).[3] Such unborn children will have an enduring relationship with both parents "if their lives are not ended in the womb." *Id.* at 795. "The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring." *Lehr v. Robertson*, 463 U.S. 248, 262 (1983).

No issue concerning the raising of one's child is more central to this fundamental liberty interest than the question of abortion, *i.e.*, whether a mother will take advantage of the artificially created window of time (con-

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[2] The father's interest in a relationship with his child is strongest when he has participated in bringing the child into being within a marriage. *Michael H. v. Gerald D.*, 491 U.S. 110, 123 & n.3 (1989). *See also Lehr v. Robertson*, 463 U.S. 248, 260 & n.16 (1983) (father's relationship with his natural child is entitled to constitutional protection if he has entered into a traditional marriage with the mother or has otherwise established a relationship with and shouldered responsibility toward the child).

[3] In light of this fact, Petitioners Planned Parenthood *et al.* are far off the mark when they complain that Pennsylvania has not equally required notice for sterilization, prostate operations, and chemotherapy on husbands. Brief at 46-47. These procedures are not comparable to abortions because they do not touch upon a distinct, identifiable, human offspring already conceived.

ception to viability and in many cases to birth) that this Court opened in 1973 for the willful termination of the child's life. Since abortion terminates parental rights and duties toward a specific child, forever, irrevocably, there is no other decision in which the participatory interest of both parents could possibly be stronger. "Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

Pennsylvania's spousal notice requirement furthers the father's interest in joint participation. Pennsylvania can reasonably make the judgment that joint participation will lead some mothers to reconsider and decide not to abort the child, when an abortion would surely have resulted were the father frozen out of the process without receiving even notice of his wife's intended decision.

B. The parental interest is consistently protected in various contexts by the family law of the states.

State family law consistently accords a high degree of protection to the parental rights of both parents. Pennsylvania's spousal notice requirement is a mild protection compared to those typically employed by the various states to protect parental rights from arbitrary termination.

For example, because adoption terminates the rights of the natural parents, states require that both natural parents must consent to the adoption unless their parental rights have been terminated.[4] Because of the supreme

[4] Ala. Code § 26-10A-7 (Supp. 1991); Alaska Stat. § 25.23.040 (1991); Ariz. Rev. Stat. Ann. § 8-106 (1989); Ark. Code Ann. § 9-9-206 (Michie 1991); Cal. Civ. Code §§ 226.1, 226.9 (Deering 1990); Colo. Rev. Stat. § 19-5-203 (Supp. 1991); Conn. Gen. Stat. Ann. §§ 45a-717, 732 (West Supp. 1991); Del. Code Ann. tit. 13, § 908 (1981); D.C. Code Ann. § 16-304 (1981); Fla. Stat. Ann. § 63.062 (West 1985); Idaho Code § 16-1504 (Supp. 1991); Ill. Ann. Stat. ch. 40, para. 1510 (Smith-Hurd Supp. 1991); Ind. Code Ann. § 31-3-1-6 (Burns Supp. 1991); Iowa Code Ann. § 600.7 (West 1981); Ky. Rev. Stat. Ann. § 199.500 (Baldwin 1991); La. Rev. Stat. Ann. § 9:422.3 (West 1991); Me. Rev. Stat. Ann. tit. 19, § 532 (West 1990); Md. Fam. Law Code Ann. § 5-311 (1991); Mass. Gen. Laws Ann. ch. 210, § 2 (West 1987); Mich. Comp. Laws Ann. § 710.31 (West Supp. 1991); Miss. Code Ann. § 93-17-5 (1972); Mo. Ann. Stat. § 453.030 (Vernons 1986); Mont. Code Ann. § 40-8-111 (1991); Neb. Rev. Stat. § 43-104 (1988); Nev. Rev. Stat. § 127.040 (1986); N.H. Rev. Stat. Ann. § 170-B:5 (1990); N.M. Stat. Ann. § 40-7-35 (Michie 1989); N.Y. Dom. Rel. Law § 111 (McKinney 1988 & Supp. 1992); N.C. Gen. Stat. § 48-7 (1991); N.D. Cent. Code § 14-15-05 (1991); Ohio Rev. Code Ann. § 3107.06 (Anderson 1980); Okla. Stat. Ann. tit. 10, § 60.5 (West 1987); Or. Rev. Stat. § 109.312 (1991); 23 Pa. Cons. Stat. Ann. § 2711 (1991); R.I. Gen. Laws § 15-7-5 (1988); S.C. Code Ann. § 20-7-1710 (Law. Co-op. 1985 & Supp. 1991); S.D. Codified Laws Ann. § 25-6-4 (1984); Tenn. Code Ann. 36-1-108 (1984); Tex. Fam. Code Ann. 15.03 (West 1981 & Supp. 1992); Utah Code Ann. § 78-30-4.1 (1992); Va. Code Ann. § 63.1-225 (Michie 1991); Wash. Rev. Code Ann. § 26.33.160 (West Supp. 1992); W. Va. Code § 48-4-3 (1986); Wyo. Stat. § 1-22-109 (1988).

importance of the parental interests, states generally require that any and all persons who *may* be a parent of the child up for adoption (such as a putative but not proven father) be given *notice* of the proceeding.[5]

The rights of parenthood exist concurrently with duties toward the child. States enforce a parental duty to support their children financially, a duty which has long

[5] *See* Ala. Code § 26-10A-17(a)(10) (Supp. 1991); Ariz. Rev. Stat. Ann. § 8-106 (1989); D.C. Code Ann. § 16-306 (1989); Del. Code Ann. tit. 13, § 1106 (1981); Ga. Code Ann. § 19-8-12 (Michie 1991); Ill. Ann. Stat. ch. 40, para. 1515 (Smith-Hurd Supp. 1991); Ind. Code Ann. § 31-3-1-6.1 (Burns Supp. 1991); Iowa Code Ann. § 600.11 (West 1981); Me. Rev. Stat. Ann. tit. 19, § 532-C (West 1990); Mich. Comp. Laws Ann. § 710.34 (West Supp. 1991); Minn. Stat. Ann. § 257.74 (West 1982); Mont. Code Ann. § 40-6-129 (1991); N.H. Rev. Stat. Ann. § 170-B:5(a) (1990); N.J. Stat. Ann. § 9:3-45 (West 1991); N.D. Cent. Code § 14-17-23 (1991); Or. Rev. Stat. § 109.096 (1991); S.D. Codified Laws Ann. § 25-6-1.1 (1984); Tenn. Code Ann. § 36-1-111 (1991); Vt. Stat. Ann. tit. 15, § 441 (1989); Wash. Rev. Code Ann. § 26.33.310 (West Supp. 1992); W. Va. Code § 48-4-8 (1986).

existed for the father under common law. *See Dunbar v. Dunbar*, 190 U.S. 340, 351 (1903). The obligation of support, moreover, is enforced on a parent whether or not that parent has custody of the child. *See, e.g., Pasley v. State*, 215 Ga. 768, 113 S.E.2d 454 (1960); *State v. Yocum*, 182 Ind. 478, 106 N.E. 705 (1914). A parent's rights, like a parental duty of support, do not evaporate because the child is in the custody of the other parent. Even if a child is in the sole custody and control of the mother, the parental relationship of a divorced father cannot be terminated without at least affording him notice. *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965). Custody, whether before or after birth, does not confer absolute rights.

States customarily afford a high degree of protection to parental rights whether the threat to those rights comes from a governmental or private source. For example, states have protected the father's liberty interest in the child's use of his surname from private interference by the mother (even when the mother has custody of the child). *See Norton v. Norton*, 268 Ark. 791, 595 S.W.2d 709 (1980); *In re Marriage of Presson*, 102 Ill. 2d 303, 465 N.E.2d 85 (1984); *Hall v. Hall*, 30 Md. App. 214, 351 A.2d 917 (1976); *Galanter v. Galanter*, 133 N.Y.S. 2d 266 (1954); *De Vorkin v. Foster*, 66 N.Y.S.2d 54 (1946); *Bennett v. Northcutt*, 544 S.W.2d 703 (Tex. Civ. App. 1976).

A state may act to protect a compelling private interest —such as participation by parents in a minor's decision to have an abortion, or participation by a husband in his wife's decision—even if the Constitution does not require that the state provide such protection. *Hodgson v. Minnesota*, 110 S. Ct. 2926, 2963 (1990) (Kennedy, J., concurring in part and dissenting in part).

In this case, moreover, Pennsylvania is protecting a husband and father's fundamental liberty interest from a threat that can lawfully arise *only* because of governmental action by the judicial branch. In Pennsylvania, as in most states, abortion was illegal before *Roe*, with narrow exceptions.[6] In requiring spousal notification, Pennsylvania seeks to protect the father's fundamental rights in the face of a novel intrusion into a settled matrix of family responsibilities.

Faced with this Court's decision in *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976), which effectively delegated to the wife the unilateral power to terminate the husband's interest in their jointly conceived children, Pennsylvania has taken the modest step of providing the married father with the opportunity to participate in the abortion decision, unless he has forfeited his right to participate by sexual assault, abandonment or physical abuse toward his wife. Notice is an effective measure to afford a person an opportunity to present objections and to make his views known. *See, e.g., Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 84 (1988). Notice is the least that a state should be able to require when the interest at stake is the parent's relationship with his child—perhaps the only child he will ever have.

The father's interest in protecting his relationship with his child stands in obvious conflict with *Danforth* and *Roe*. The father's interest, as reflected in longstanding precedents of this Court and a longstanding pattern of state family law, is of fundamental constitutional dimension. The "right" to abortion, by contrast, was created only recently, in conflict with the laws of virtually all states, and in conflict with other familial rights and interests that have long been rooted in American law and social custom. Given this conflict, the Court should reaffirm the parental interest at issue in the spousal notice provision and should overrule decisions decreeing a "right" to abortion.

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[6] Pennsylvania's prohibition of abortion was more than a century old. *See* Pa. Laws No. 374, tit. VI, §§ 87, 88 (1860).

II. THE SPOUSAL NOTICE REQUIREMENT FURTHERS THE STATE'S INTEREST IN MARITAL INTEGRITY AND LOYALTY.

This Court has recognized that the institution of marriage is central to our society, *Zablocki v. Redhail*, 434 U.S. 374, 383-84 (1978), and that states have a profound interest in creating and preserving marriage as "the most important relation in life." *Maynard v. Hill*, 125 U.S. 190, 205 (1888). The state has a strong interest in legislating to further "the relationship of love and duty in a recognized family unit . . . ." *Lehr v. Robertson*, 463 U.S. 248, 258 (1983).

By entering into marriage, a husband and wife agree to be faithful and to have children only through their marital relationship. Were a wife able to abort their jointly-conceived children without notifying her husband, his aspirations for children could be frustrated in secrecy. States have an obvious interest in legislating to prevent such a perversion of the marital relationship. *Scheinberg v. Smith*, 659 F.2d 476, 483-85 (5th Cir. 1981) (state's spousal notice requirement furthers "extremely substantial" interest in integrity of marriage and family life), *on remand*, 550 F. Supp. 1112 (S.D. Fla. 1982).

Modern family law recognizes marriage as a partnership between equals, in contrast to earlier models treating husband-wife as master-servant or guardian-ward. *See, e.g., Grimditch v. Grimditch*, 71 Ariz. 198, 203-04, 225 P.2d 489, 492-93 (1950) (per curiam), *quoting Cosper v. Valley Bank*, 28 Ariz. 373, 237 P. 175, 176 (1928), *modified on other grounds*, 71 Ariz. 237 (1951); *Cassidy v. Cassidy*, 68 Haw. 383, 387, 716 P.2d 1133, 1136 (1986), *modified on other grounds*, 716 P.2d 1145 (1986) ("time honored proposition that marriage is a partnership . . . ."); *Drumheller v. Marcello*, 516 Pa. 428, 439, 532 A.2d 807, 821 (1987) (Hutchinson, J., concurring) ("If marriage is to be treated as a partnership, as I believe the Divorce Code implies . . . .").

Pennsylvania's effort to involve the husband in the abortion decision furthers the state's concept of equality in marriage. The granting of an absolute abortion power in one spouse alone would run contrary to Pennsylvania's policy of equal treatment of mothers and fathers with respect to familial responsibilities for children. *See Conway v. Dana*, 456 Pa. 536, 540, 318 A.2d 324, 326 (1974).

Pennsylvania also has an interest in requiring married parents to act in the best interest of the marriage, just as a state has an interest in requiring partners to act in the best interest of the partnership. Partnership law, of course, imposes a fiduciary duty on partners to act in the interest of the partnership, not in their own self-interest. *Clement v. Clement*, 436 Pa. 466, 468, 260 A.2d 728, 729 (1970). Pennsylvania is well within its authority when it requires married parents to act in the best interest of the marriage by giving notice to the other spouse of such an important decision for the marriage and family as life or death for an unborn child.

The Pennsylvania Divorce Code states a policy that the interests of the family unit are to be placed above the self-interest of each spouse. 23 Pa. Cons. Stat. Ann. § 3102(3) (1991) ("Give primary consideration to the welfare of the family rather than the vindication of private rights . . . .").

Providing for spousal notice of a critical decision by one marriage partner is an effective way to allow for participation by both spouses in making the decision. Were the courts to strike down a spousal notice requirement, the result would be to give one spouse unilateral power to make a decision striking at the heart of the marriage relationship.

The state has an especially strong interest in requiring notice to a spouse when the other spouse's intended action threatens harm to the family. There is ample evidence that abortions harm marriages and families: by

leading to breakup between the parents of the unborn child, by causing psychological damage to the mother in ways that are of vital interest to her spouse, and by causing psychological harm to the siblings of the aborted child. *See* Brief Amici Curiae of Focus on the Family, and Family Research Council of America, in Support of Appellants at 24-28, *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

Moreover, state law has long required some degree of joint participation by spouses in the making of decisions that vitally affect both partners in the marriage. Joint consent is required before a couple can alienate in any way a homestead or homestead exemption,[7] assign wages,[8] or take a mortgage or other lien on household property.[9]

When the issue is the abortion of a child jointly conceived by husband and wife, a state has a far stronger interest in promoting joint decisional participation of the husband and wife than in other situations that merely concern relinquishment of property.

In similar fashion, states generally require joint participation of both spouses before one of them can act to create a parental relationship with a child through adoption.[10] Some states require that, before a wife can re-

[7] *See, e.g.*, Minn. Stat. Ann. § 525.63 (West Supp. 1992); Okla. Const. Art. XII, § 2; Tenn. Code Ann. § 26-2-301(b) (1980); Wyo. Stat. § 34-2-121 (1990).

[8] *See, e.g.*, Cal. Lab. Code § 300 (Deering 1991); Ind. Code Ann. § 22-2-7-4(a) (Burns 1992); Mont. Code Ann. § 31-1-306 (1991); Neb. Rev. Stat. § 45-144 (1988).

[9] *See, e.g.*, Ariz. Rev. Stat. Ann. § 6-624(B) (Supp. 1991).

[10] *See, e.g.*, Conn. Gen. Stat. Ann. § 45a-732 (West Supp. 1991); Del. Code Ann. tit. 13, § 951 (1981); D.C. Code Ann. § 16-302 (1989); Fla. Stat. Ann. § 63.042 (West 1985); N.D. Cent. Code § 14-15-03 (1991); Ohio Rev. Code Ann. § 3107.03 (Anderson 1980); P.R. Laws Ann. tit. 31, § 532 (1967); S.D. Codified Laws Ann. § 25-6-3 (1984); Utah Code Ann. § 78-30-3 (1992); W. Va. Code § 48-4-2 (1986); Wis. Stat. Ann. § 882.02 (West 1991).

ceive artificial insemination, her husband must consent to the procedure.[11] Most states provide that if the husband does not so consent, he is not treated by law as the father of the child and undertakes no parental duties or obligations.[12]

If joint participation is typically required for creation of an adoptive parental relationship, it is only logical for states to require some form of joint participation for the decision to terminate a parental relationship.

The fact, of course, is that parenting is a *joint* activity of husband and wife. Were it not for the intensive effort of the recent pro-abortion movement, it would seem a tautology that the creation of parent-child relationships is a mutual voluntary act of father and mother (Pennsylvania excludes from the spousal notice requirement

[11] *See, e.g.*, Ark. Code Ann. 9-10-202 (Michie 1991); Conn. Gen. Stat. § 45a-772 (West Supp. 1990); Idaho Code § 39-5403 (Supp. 1991) (Effective July 1, 1993); Kan. Stat. Ann. § 23-128 (1988); Ohio Rev. Code Ann. § 3111.34 (Anderson Supp. 1991); Okla. Stat. Ann. tit. 10, § 553 (West 1987).

[12] Ala. Code § 26-17-21 (1986); Ark. Code Ann. § 9-10-201, 202 (1991); Cal. Civ. Code § 7005 (Deering 1991); Colo. Rev. Stat. § 19-4-106 (Supp. 1991); Conn. Gen. Stat. Ann. §§ 45a-772, 774 (West Supp. 1991); Ga. Code Ann. § 19-7-21 (Michie 1991); Idaho Code §§ 39-5403 (Supp. 1991) (Effective July 1, 1993), 39-5405 (1985); Ill. Ann. Stat. ch. 40, para. 1452, 1453 (Smith-Hurd Supp. 1991); Kan. Stat. Ann. §§ 23-128-130 (1988); Mass. Gen. Laws Ann. ch. 46, § 4B (West 1991); Minn. Stat. Ann. § 257.56 (West Supp. 1992); Mo. Ann. Stat. § 210.824 (Vernons 1992); Mont. Code Ann. § 40-6-106 (1991); Nev. Rev. Stat. § 126.061 (1986); N.J. Stat. Ann. § 9:17-44 (West 1991); N.M. Stat. Ann. § 40-11-6 (Michie 1989); N.C. Gen. Stat. § 49A-1 (1984); N.D. Cent. Code §§ 14-18-01, -03 (1991); Ohio Rev. Code Ann. 3111.34 (Anderson Supp. 1991); Okla. Stat. Ann. tit. 10, §§ 551-554 (West 1987 & Supp. 1992); Or. Rev. Stat. § 109.239 (1991); Tenn. Code Ann. § 68-3-306 (1987); Tex. Fam. Code Ann. 12.03 (West Supp. 1992); Va. Code Ann. § 20-156 (Michie Supp. 1991); Wash. Rev. Code Ann. § 26.26.050 (West 1986); Wis. Stat. Ann. § 891.40 (West Supp. 1991); Wyo. Stat. § 14-2-103 (1986).

those exceptional situations in which conception results from other than a voluntary act).

The right to limit one's future options is one that our law has traditionally respected; indeed it is the foundation of the law of contracts.[13] Individuals have long enjoyed the ability to enter voluntarily into relationships, such as partnership and marriage, in which some forms of self-interest are willingly sacrificed to the common good. Nowhere does the state have a stronger interest in holding individuals to such voluntary commitments than when the common good is the good of a family, and the resultant good of the child. Absolute autonomous power to make purely self-interested decisions is something that spouses give up when they enter voluntarily into a legal relationship that presumes a commitment to fidelity and to offspring. Pennsylvania's spousal notice provision, therefore, simply follows logically from the facts of married life.

III. THE SPOUSAL NOTICE REQUIREMENT FURTHERS THE STATE'S INTEREST IN PROTECTING POTENTIAL HUMAN LIFE.

By requiring notice to a married father of the impending abortion of his child, the Pennsylvania law allows participation by a natural advocate of the child's best interests. A parent is the natural guardian of his of her child. When one parent has taken a position hostile to the interests of the child, a state has a particularly strong interest in securing the involvement of the

[13] "A contract is a promise, or a set of promises, to which the law attaches legal obligation." 1 S. Williston, *The Law of Contracts* 1 (1st ed. 1920). "The term promise . . . contemplates action or forbearance in the future . . . ." 1 *A Treatise on the Law of Contracts* 10 (R. Lord ed., 4th ed. 1990). "[A]n apparent promise which makes performance optional with the promisor according to its terms is in fact no promise. . . . Such an expression is often called an illusory promise." *Id.* at 11.

"The fundamental element of promise seems to be an expression of intention by the promisor that his future conduct shall be in accordance with his present expression, irrespective of what his will may be when the time for the performance arrives." 1 A. Corbin, *Corbin on Contracts* 37 (1963).

other parent as a potential advocate of the child's interest in health and safety.

It has long been common ground in all states and all family law contexts that state authorities must look to the best interests of the child. *See, e.g.*, Foster & Freed, *Life with Father: 1978*, 11 Fam. L.Q. 321, 343-63 (1978); Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminancy*, 39 Law & Contemp. Probs. 226, 236-37 & nn. 45-47 (1975); *United States v. Green*, 26 F. Cas. 30 (C.C.D.R.I. 1824) (No. 15,256) (Story, J.) (the court will "look into all the circumstances and ascertain whether it will be for the real, permanent interests of the infant . . . .").

The laws of the several states recognize that unborn children have justiciable interests in property, health, safety and life. *See* Wardle, *Rethinking Roe v. Wade*, 1985 B.Y.U.L. Rev. 231, 252-54. Prenatal injuries to unborn children are actionable and compensable in all jurisdictions. *See* W. Prosser, *Law of Torts* ch. 9, § 55, at 336-37 (4th ed. 1971). At present, the majority of states recognize a cause of action for wrongful death when a viable fetus is stillborn as a result of tortious negligence.[14] Several states allow such an action even for an

[14] The court in *Verkennes v. Corniea*, 229 Minn. 365, 38 N.W.2d 838 (1949) was the first to allow an action for the death of a stillborn, viable fetus. Today, at least thirty-one other jurisdictions recognize such an action. *Eich v. Town of Gulf Shores*, 293 Ala. 95, 300 So. 2d 354 (1974); *Hatala v. Markiewicz*, 26 Conn. Supp. 358, 224 A.2d 406 (1966); *Worgan v. Greggo & Ferrara, Inc.*, 50 Del. 258, 128 A.2d 557 (1956); *Simmons v. Howard University*, 323 F. Supp. 529 (D.D.C. 1971); *Porter v. Lassiter*, 91 Ga.App. 712, 87 S.E.2d 100 (1955); *Volk v. Baldazo*, 103 Idaho 570, 651 P.2d 11 (1982); *Chrisafogeorgis v. Brandenberg*, 55 Ill.2d 368, 304 N.E.2d 88 (1973); *Britt v. Sears*, 150 Ind. App. 487, 277 N.E.2d 20 (1971); *Dunn v. Rose Way, Inc.*, 333 N.W.2d 830 (Iowa 1983); *Hale v. Manion*, 189 Kan. 143, 368 P.2d 1 (1962); *Mitchell v.*

unborn child who was not viable.[15] Moreover, mothers and fathers can be held criminally responsible by a state for failure to provide medical care or other support for their unborn child.[16]

States provide for the appointment of guardians for unborn children to vindicate the various rights described above.[17] The parents are the natural guardians of their

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Couch, 285 S.W.2d 901 (Ky. 1955); *Danos v. St. Pierre*, 402 So.2d 633 (La. 1981); *State ex rel. Odham v. Sherman*, 234 Md. 179, 198 A.2d 71 (1964); *Mone v. Greyhound Lines, Inc.*, 368 Mass. 354, 331 N.E.2d 916 (1975); *O'Neill v. Morse*, 385 Mich. 130, 188 N.W. 2d 785 (1971); *Rainey v. Horn*, 221 Miss. 269, 72 So. 2d 434 (1954); *O'Grady v. Brown*, 654 S.W.2d 904 (Mo. 1983); *White v. Yup*, 85 Nev. 527, 458 P.2d 617 (1969); *Poliquin v. MacDonald*, 101 N.H. 104, 135 A.2d 249 (1957); *Salazar v. St. Vincent Hospital*, 95 N.M. 150, 619 P.2d 826 (1980); *Hopkins v. McBane*, 359 N.W.2d 862 (N.D. 1984); *Stidham v. Ashmore*, 109 Ohio App. 431, 167 N.E.2d 106 (1959); *Evans v. Olson*, 550 P.2d 924 (Okla. 1976); *Libbee v. Permanente Clinic*, 268 Or. 258, 518 P.2d 636 (1974); *Presley v. Newport Hospital*, 117 R.I. 177, 365 A.2d 748 (1976); *Fowler v. Woodward*, 244 S.C. 608, 138 S.E.2d 42 (1964); *Nelson v. Peterson*, 542 P.2d 1075 (Utah 1975); *Vaillancourt v. Medical Center Hosp.*, 139 Vt. 138, 425 A.2d 92 (1980); *Moen v. Hanson*, 85 Wash.2d 597, 537 P.2d 266 (1975); *Baldwin v. Butcher*, 155 W. Va. 431, 184 S.E.2d 428 (1971); *Kwaterski v. State Farm Mutual Automobile Ins. Co.*, 34 Wis. 2d 14, 148 N.W.2d 107 (1967).

[15] *Presley v. Newport Hospital*, 117 R.I. 177, 365 A.2d 748 (1976); *Porter v. Lassiter*, 91 Ga. App. 712, 87 S.E.2d 100 (1955) (Child was "quick" though nonviable).

The majority of states that have addressed the question have held to the contrary. *See, e.g., Justus v. Atchison*, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977).

[16] *See e.g.*, Cal. Pen. Code § 270 (Deering 1985).

[17] Mass. Ann. Laws ch. 79, § 30 (Law. Co-op. 1969); Mich. Comp. Laws Ann. 600.2045 (West 1981) (not limited to probate); Minn. Stat. Ann. § 501B.19 (West 1981); Miss. Code Ann. § 93-13-7 (Supp. 1991) (non-probate situation); S.D. Codified Laws Ann. § 26-1-2 (1984) (conceived unborn child deemed existing person

children, and generally have the right under state law to be appointed as the guardian of their child unless there is a showing that they are unfit or adverse to the child's interests.[18] If one parent is adverse to the child's interests, the natural guardian is logically the other parent.

Pennsylvania has acted consistently with the general structure of state family law by requiring *notice* to a natural guardian of the unborn child when the child faces a life-threatening situation. States generally require notice to representatives of unborn children in other matters that affect the child's interests.[19] The state's interest in requiring notice is strongest when the child's interest at stake is life itself.

IV. PENNSYLVANIA'S PARENTAL CONSENT REQUIREMENT IS CONSTITUTIONAL.

This Court has consistently held that any potential burden caused by a parental notification or consent statute is vitiated if it provides a judicial bypass option that comports with the requirements of *Bellotti v. Baird*, 443

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insofar as necessary to protect all interests that child will have at birth).

[18] *See, e.g.*, Ark. Code Ann. § 9-9-220 (Michie 1991).

[19] Notice must be given to representatives of unborn in estate and other matters. Alaska Stat. § 13.06.120(4) (1985); Ariz. Rev. Stat. Ann. § 14-1403 (1975); Cal. Prob. Code §§ 1003, 15405 (Deering 1991) (consent of unborn); Colo. Rev. Stat. § 15-10-403 (1987) (notice to unborn or representative required); Conn. Gen. Stat. Ann. § 45a-132 (West Supp. 1991); Del. Code Ann. tit. 12, § 2905(e) (1987); Ind. Code Ann. § 29-1-1-20 (Burns 1989); Ky. Rev. Stat. Ann. § 389A.035 (Michie 1984); Me. Rev. Stat. Ann. tit. 18-A, § 1-403(3) (1981) (notice); Mass. Ann. Laws ch. 79, § 30 (Law. Co-op. 1991); Mich. Comp. Laws Ann. § 600.2045 (West 1981) (non-probate); Minn. Stat. Ann. § 501B.19 (West 1980); Miss. Code Ann. § 93-13-7 (Supp. 1991) (domestic relations, wills); Mont. Code Ann. § 72-35-313 (1991); Ohio Rev. Code Ann. § 2307.13.1 (Anderson 1991); Okla. Stat. Ann. tit. 12, § 1147.3 (West 1988); Or. Rev. Stat. § 109.125 (1991) (paternity-related).

U.S. 622, 643-44 (1979) ("*Bellotti II*").[20] *See Hodgson v. Minnesota*, 110 S. Ct. 2926, 2950-51 (1990) (O'Connor, J., concurring); *id.* at 2970 (Kennedy, J., concurring in part and dissenting in part);[21] *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972, 2978-81 (1990). *Bellotti II* sets out the constitutional requirements for a bypass procedure:

> A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained.

Bellotti II, 443 U.S. at 644. The Pennsylvania Act's bypass procedure complies explicitly with each of the above requirements.[22]

Moreover there is no support in our traditions or history for the notion that a minor has a fundamental right to an abortion without her parents' consent. Our legal traditions recognize the right of parents to control their

[20] "We therefore conclude that if the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained." *Bellotti II*, 443 U.S. at 643.

[21] "The simple fact is that our decision in *Bellotti II* stands for the proposition that a two-parent consent law is constitutional if it provides for a sufficient judicial bypass alternative." *Hodgson*, 110 S.Ct. at 2970 (Kennedy, J.).

[22] The court below painstakingly compared each relevant provision with *Bellotti II* requirements. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 947 F.2d 628, 708-09 (3d Cir. 1991).

children's upbringing. *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (Anglo-American law has "historically . . . recognized that natural bonds of affection lead parents to act in the best interests of their children."); *see* Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights"*, 1976 B.Y.U.L. Rev. 605, 615-19. Accordingly, common law courts were extremely reluctant to interfere in the parent-child relationship as long as the parents did not treat their children cruelly or inhumanely. *See, e.g., Recent Development, Minor's Rights to Medical Care*, 14 J. Fam. L. 581, 581-83 (1975). This strong tradition of parental control continues today. Every state limits the participation of minors in a substantial number of activities in which adults may engage, such as marriage, voting, or driving a car.[23]

This Court's decisions, rendered in a variety of constitutional contexts, reflect the same understanding. The Court has long recognized that "the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Ginsberg v. New York*, 390 U.S. 629, 639 (1968). "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). Consequently, this Court has repeatedly acknowledged that "a natural parent's 'desire for and right to the companionship, care, custody, and management of his or her children'" is itself a significant liberty interest. *Santosky v. Kramer*, 455 U.S. 745, 758-

[23] Such restrictions "reflect the simple truth derived from our communal experience, that juveniles as a class have not the level of maturation and responsibility that we presume in adults and consider desirable for full participation in the rights and duties of modern life." *Stanford v. Kentucky*, 109 S. Ct. 2969, 2988 (1989) (Brennan, J., dissenting).

59 (1982) (citations omitted); *see also Michael H. v. Gerald D.*, 491 U.S. 110, 119-22 (1989) (plurality opinion); *H.L. v. Matheson*, 450 U.S. 398, 410 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 231-33 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923). Indeed, if there is a fundamental right implicated by this issue, it is the right of parents to direct the upbringing of their children, not the right of children to evade parental control.

The conclusion drawn from the general historical understanding of parent-child relations is reinforced by more specific considerations of the traditions regarding the provision of medical treatment to children. The rule of common law was that a physician could not treat a minor without parental consent. W. Keeton, *Prosser and Keeton on the Law of Torts* ch. 4, § 18, at 115 (5th ed. 1984). Over time, common law courts developed limited exceptions to this rule for emergencies, emancipated minors, relatively safe operations for mature minors, and necessary lifesaving treatment. *Id.* at 114-18; L. Nolan, *The Legal Status of Parent and Child 1986* 161-172 (1987). But all jurisdictions today still follow the common-law rule unless it has been modified by case law or statute. L. Nolan, *supra*, at 161. See *Stanford*, *supra*, 109 S. Ct. at 2988 (Brennan, J., dissenting) (37 states by statute fix 18 as the age of consent for medical treatment); *Bowen v. American Hospital Association*, 476 U.S. 610, 627-28 & n.13 (1986) (plurality opinion) (summarizing current law).

CONCLUSION

For the reasons stated above the Court should uphold Pennsylvania's spousal notice and parental consent requirements and should overrule recent precedents decreeing a "right" to abortion.

Respectfully submitted,

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MOTION FILED
APR 2 1992

NUMBERS 91-744 AND 91-902

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, REPRODUCTIVE HEALTH AND COUNSELING CENTER, WOMEN'S HEALTH SERVICES, INC., WOMEN'S SUBURBAN CLINIC, ALLENTOWN WOMEN'S CENTER, AND THOMAS ALLEN, M.D., ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Petitioners and Cross-Respondents

versus

ROBERT P. CASEY, ALLAN S. NOONAN, AND ERNEST D. PREATE, JR., PERSONALLY AND IN THEIR OFFICIAL CAPACITIES,

Respondents and Cross-Petitioners

MOTION FOR LEAVE TO SUBMIT A BRIEF *AMICUS CURIAE*

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Respondents and Cross-Petitioners

MOTION FOR LEAVE TO SUBMIT A BRIEF *AMICUS CURIAE*

The United States Justice Foundation hereby moves this Honorable Court to grant it leave to file a brief *amicus curiae* in support of judgment for the respondents and cross-petitioners in the above captioned action pursuant to Rule 37 of the Rules of this Court. There has been no consent by the parties to the filing of this brief.

The organization filing this brief is a public interest legal foundation receiving support from practicing attorneys throughout the United States. Its purpose is to provide legal counsel and support to individuals and organizations which are engaged, or may become engaged in, litigation involving the protection of constitutional rights or other matters of grave public concern. The United States Justice Foundation and the members of the Bar who are its members and directors feel that the case before the Court regarding the Pennsylvania statute involves serious constitutional questions which are of interest to the members of the United States Justice Foundation.

The members of the United States Justice Foundation and in particular the attorney preparing this brief *amicus curiae* have extensive experience in litigation throughout the United States involving issues similar to those before the Court in the instant case and believe that the brief *amicus curiae* filed herein can assist the Court in making its decision.

Mover wishes to address itself in this brief not only to the questions raised by the challenge to the Pennsylvania law but also to the broader question of whether or not the decision of *Roe v. Wade*, 410 U.S. 113 (1973) should be reversed and a constitutional protection for the right to life of unborn citizens of the United States from the date of conception should be found to exist in the Constitution and laws of the United States.

Mover has a strong interest in and knowledge of the important issues raised here. Submission of mover's brief *amicus curiae* will be of substantial assistance to the Court, will not delay resolution of any of the issues raised in this case and will in no way prejudice the rights of any of the parties to this suit.

CONCLUSION

For the above stated reasons the United States Justice Foundation herein requests that this Court grant its motion for leave to file the accompanying brief *amicus curiae* in the present case in support of the position of the Respondents and Cross-petitioners.

Dated: April 2, 1992

RESPECTFULLY SUBMITTED:

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Respondents and Cross-Petitioners

NOTICE OF MOTION

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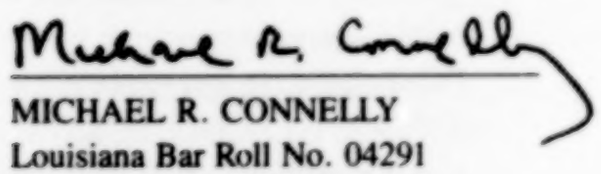
PLEASE TAKE NOTICE that the undersigned have moved the Court for leave to submit a brief *amicus curiae* on behalf of the United States Justice Foundation in support of judgment for respondents and cross-petitioners in the above captioned cause.

BY ATTORNEY:



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BRIEF *AMICUS CURIAE* ON BEHALF OF THE UNITED STATES JUSTICE FOUNDATION

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TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES ix

INTEREST OF AMICUS 1

ARGUMENT 2

Introductory Statement 2

A. Summary of Argument 2

B. Argument 3

CONCLUSION 8

CERTIFICATE OF SERVICE 9

TABLE OF AUTHORITIES

Cases: Pages:

Hodgson v. Minnesota, 648 F. Supp. 756 (D. Minn. 1986) and 110 S.Ct. 2926 (1990) 4

Roe v. Wade, 410 U.S. 113 (1973) 2

Webster v. Reproductive Health Services, 492 U.S. 490 (1989) 2

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BRIEF OF *AMICUS CURIAE*

INTEREST OF *AMICUS CURIAE*

The interest of *amicus* appears from the foregoing motion.

ARGUMENT

Introductory Statement

This brief addresses itself to two questions. First, whether the Pennsylvania law is constitutional under the current framework of the cases decided by this Honorable Court since the rendering of the judgment in *Roe v. Wade*, 410 U.S. 113 (1973) and secondly, whether the Court should at this time expressly overrule the decision of *Roe v. Wade*.

A. Summary of Argument

Amici contends that the decision of this Honorable Court in the case of *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) and holdings in subsequent cases has implicitly overruled or at least modified to a great extent the original decision in *Roe v. Wade*. This modification has provided States with the opportunity to regulate abortions within their borders by altering the original "strict scrutiny" language of *Roe v. Wade* to an analytical approach which seeks to determine if an "undue burden" is imposed on the alleged right to abortion and if no undue burden is found then the Court applies the rational basis test to reviewing the statutes in question.

This was a conclusion reached by the Court of Appeals in this matter and *Amici* joins with the State of Pennsylvania in contending that under this analytical approach the provisions of the Pennsylvania law are in fact constitutional.

Amici however seeks to go one step further and urges the Court in its argument to expressly reverse *Roe v. Wade* and even to go so far as to find that a constitutional right to life exists for unborn children from the moment of conception. This argument is based on the well-known and documented changes in medical technology which have occurred since the original *Roe v. Wade* decision and which have irrevocably altered not only the trimester concept of abortion but also the question of viability itself in favor of the unborn child.

B. Argument

Turning first to the question of the constitutionality of the Pennsylvania law now before the Court, *Amici* points out that this law is similar in approach to laws adopted by the States around the country and seeks not to outlaw abortion in all instances but to provide rational regulation of abortions and abortion clinics to an extent similar in many respects to the regulations placed on other medical procedures and medical practitioners. *Amici* specifically refers here to the informed consent provision of the law.

In recent years both federal courts and state courts around the country have broadened the requirements of informed consent to provide the patients who submit to a medical procedure which potentially threatens their life or well-being are fully apprised of the possible consequences of such a procedure. Abortion clinics have fought for years to maintain a virtual immunity from the provisions of informed consent which govern all other medical practitioners in the United States. It should also be pointed out that other provisions of the law such as the parental consent provisions and the various reporting requirements are similar in nature to requirements which govern virtually every other major medical procedure. With the exception of an emergency, which is provided

for in the statute, medical practitioners are not allowed to perform surgical procedures on minors without the consent of a parent or guardian.

Amici suggests to the Court that the fierce opposition to the various requirements cited above which have been cited in the brief filed by the plaintiffs in this matter are based not on concern for a woman's so-called right to abortion but on the interest of abortion providers and clinics in performing as many abortions as possible without having to overly burden themselves with concern for their patients' well-being.

In any case similar laws have been repeatedly held to be unconstitutional under the "strict scrutiny" approach adopted in *Roe v. Wade*, 410 U.S. 113 (1973). The Court of Appeals correctly concluded that this analytical approach had been abandoned by this Honorable Court in the recent decisions of *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) and *Hodgson v. Minnesota*, 648 F.Supp. 756 (D. Minn. 1986) and 110 S.Ct. 2926 (1990). It concluded instead that the court had adopted what was referred to as an "undue burden" standard and applied a rational basis test to the provisions of the Pennsylvania law. Using that test the Court of Appeals concluded that the majority of the provisions of the law were constitutional. The court basically stated that if no undue burden is shown to be placed on the woman's fundamental right to abortion by the law then the provisions of the law must be reviewed under the rational basis test. Plaintiffs object to the applying of either one or both of these approaches on the grounds that the "undue burden" test is vague and unworkable and that the "rational basis" test opens the door for states to regulate abortions to the point of denying a woman's right to an abortion.

Assuming that there is in fact a constitutional right to abortion, *Amici* again points out that the regulations contained in the Pennsylvania law are not unduly burdensome and meet the state's

compelling interest in protecting life. A life being protected by the state law is twofold, the regulations rationally provide the same safeguards for women seeking abortions as it provided for all other individuals who seek and receive medical treatment from health care providers and further the restrictions provide some protection for the life of the unborn child which *Amici* contends the state has a rational and compelling interest in protecting. The plaintiffs' approach that abortion clinics are somehow unique and should therefore be provided with a latitude that is not provided other health care providers despite the consequences to the patients can no longer be accepted. Abortion is a major medical procedure requiring anesthetic and the use of medical equipment in procedures which have the potential of causing death or great bodily harm to the patient. The later in the pregnancy that the abortion is performed the more likelihood exists that something could go wrong.

Not only is it not an undue burden to require such things as informed consent and parental consent for abortion procedures but it is irrational not to do so. *Amici* therefore contends that the Court should uphold the provisions of the Pennsylvania law as constitutional. Turning now to the second of *Amici's* arguments, the plaintiffs contend that the upholding of the decision of the Court of Appeals of this case would in effect overrule *Roe v. Wade* and deny women their constitutionally protected right to choose abortion. *Amici* contends that in fact the Court should overrule *Roe v. Wade* and find not only that there is not a constitutional right for a woman to choose abortion but also find that there is constitutional right to life of the unborn child from the point of conception.

Amici does not base this argument on religious contentions but on the provisions of the United States Constitution as enunciated in the Fourteenth Amendment.

The original decision of *Roe v. Wade* was based on the concept of viability of the unborn child and established the so-called trimester framework. Viability was described as:

> "That threshold moment prior to which a fetus cannot survive separate from the woman and cannot reasonably and objectively be regarded as a subject of rights or interests existing from or paramount to, those of the pregnant woman."

The Court also referred to the fetus as being potential human life. While these definitions were couched in legal terms they were based to a great extent on the medical definitions of viability which existed at that time. Plaintiffs' arguments notwithstanding there have been rapid advances in medical technology within the last two decades which have significantly altered the concept of viability. *Amici* further contends that the idea of potential human life is no longer valid since it has been scientifically established that human life begins at conception and that the interference with the development of that human life by an outside agency such as a doctor performing an abortion is not terminating potential human life but terminating constitutionally protected life without due process of law.

Amici acknowledges the paramount importance of providing individuals within our society as much freedom of choice as is reasonably and rationally possible under the framework of our Constitution and laws. However, one individual's freedom to choose must be limited when it reaches the point of irrevocably denying someone else a fundamental right. There can be no more final denial of rights than by a woman choosing to have an abortion and terminate the life of an unborn child where that child has no right to choose on its own. The decision then is between a woman's so-called right to choose and a child's right to live.

The denial to a woman of the option to choose abortion and the termination of life does not irrevocably or permanently affect the quality of her life. There are other options available to abortion such as adoption. However there are no other options available to the child whose life has been terminated and it is on that basis that the competing interest should be weighed and the outcome in favor of protecting human life.

CONCLUSION

For the foregoing reasons, *Amici* respectfully requests that the provision of the Pennsylvania law be upheld as constitutional and that further the Court reverse the decision of *Roe v. Wade* in its entirety and find that the constitutional right to life outweighs the right of a woman to seek an abortion under all circumstances.

RESPECTFULLY SUBMITTED;

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Dated: April 2, 1992

CERTIFICATE

Undersigned counsel for the *Amicus Curiae*, United States Justice Foundation, does hereby certify that a copy of the above and foregoing

MOTION FOR LEAVE TO SUBMIT A BRIEF *AMICUS CURIAE*

NOTICE OF MOTION

BRIEF OF *AMICUS CURIAE*

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Nos. 91-744 and 91-902

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, et al.,
Petitioners and Cross-Respondents,

v.

ROBERT P. CASEY, et al.,
Respondents and Cross-Petitioners.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE AMERICAN ASSOCIATION OF PROLIFE OBSTETRICIANS AND GYNECOLOGISTS (AAPLOG) AND THE AMERICAN ASSOCIATION OF PROLIFE PEDIATRICIANS (AAPLP) AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

I. *ROE'S* TRIMESTER FRAMEWORK DID NOT "FAIRLY ACCOMMODATE" THE STATE'S INTERESTS IN PROTECTING UNBORN LIFE OR MATERNAL HEALTH 4

A. The States Have a Compelling Interest in Protecting Unborn Life Throughout Pregnancy and *Roe* Unfairly Denigrated the Value of the State's Interest by Characterizing the Unborn as "Potential Life." 5

B. The States Have a Compelling Interest in Protecting Maternal Health Throughout Pregnancy and *Roe* Unnecessarily Restricts the Ability of the States to Regulate on Behalf of That Interest 12

II. REVERSAL OF *ROE* WOULD NOT RESULT IN ANY SIGNIFICANT INCREASE IN MATERNAL MORTALITY FROM ABORTION 16

A. Pregnancy and Childbirth are Natural Occurrences which Carry with Them Very Little Risk to the Pregnant Woman in Ordinary Circumstances. Pregnancy is not a Disease which Must be Cured by Abortion. 17

B. *Roe* Was Not a Major Cause of Reduced Maternal Mortality from Abortion and Its Overturn Would Not Have a Significant Impact on Mortality 22

Page

C. Reversal of *Roe* Will not Likely Return the States to their Pre-*Roe* Laws. 26

CONCLUSION..... 28

TABLE OF AUTHORITIES

Cases: Page

Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) 5, 12

Doe v. Bolton, 410 U.S. 179 (1973) 26

Northeast Women's Center, Inc. v. Michael McMonagle, et al., No. 85-4845 (E.D. Pa. April 29, 1987)..... 20

Planned Parenthood v. Ashcroft, 462 U.S. 476 (1983) 8

Ragsdale v. Turnock, 841 F.2d 1358 (7th Cir. 1988) 12, 14

Roe v. Wade, 410 U.S. 113 (1973)..... passim

Webster v. Reproductive Health Services, 492 U.S. 490 (1989) 12

Other Sources:

Calderone, *Illegal Abortion as a Public Health Problem* 50 Am.J.Pub. Health 948 (1960) 22, 25

Centers for Disease Control: Abortion Surveillance 1981 (1985) 9, 21, 25, 26, 27

Chicago Tribune, Feb. 18, 1987, Section 2, p. 3... 16

Cunningham, MacDonald & Gant, *Williams Obstetrics* (18th ed. 1989)..... 7, 18, 23, 24

80th General Assembly, *Report to the House Human Resources Committee, Subcommittee on Health,* "State Regulation of Abortion Clinics," December 13, 1978..... 13

Fletcher & Evans, *Maternal Bonding in Early Fetal Ultrasound Examinations,* 308 New Eng. J. Med. 392 (1983) 11

Greenhill & Friedman, *Biological Principles in Modern Practice of Obstetrics* (1974)..... 22

Other Sources: Page

Guttmacher, *Pregnancy & Birth* (1956) 21

Harrigan, et al., *Successful Treatment of Fetal Congestive Heart Failure Secondary to Tachycardia,* 304 New Eng.J. Med. 1527 (1981)..... 11

Hern, *Abortion Practice* (1984)..... 9, 10, 18, 19, 26

Hilgers & O'Hare, "Abortion Related Maternal Mortality: An In-Depth Analysis" in *New Perspectives on Human Abortion* (1981) A-1

Kaunitz, et al., *Causes of Maternal Mortality in the United States,* 65 Obstet. & Gynecol. 605 (1985) 23

Kerenyi & Chitkara, *Selective Birth in Twin Pregnancy With Discordancy for Down's Syndrome,* 304 New Eng. J. Med. 1525 (1981)..... 10

Kolata, *Studying Learning in the Womb,* 225 Science 302 (1984) 11

Longaker, et al., *Maternal Outcome After Open Fetal Surgery,* 265 J.A.M.A. 737 (1991) 11

Nathanson, *Aborting America* (1979) 23

Nilsson, *A Child is Born* (1990) 11

Patient Safety and Consumer Protection Problems Unlicensed or Undersupervised Ambulatory Care Facilities, Hearing Before the Subcommittee on Regulation, Business Opportunities and Energy of the House Committee on Small Businesses, 102nd Congress, 1st Session 102-17 (1991) 14

Pritchard & MacDonald, *Williams Obstetrics* (16th ed. 1980)..... 6

Other Sources: Page

Reid, Ryan & Benirschke, *Principles in Management of Human Reproduction* (1972) 22

"Risky Abortions: Chicago Clinics are exposed," *Time Magazine,* Nov. 27, 1978, 52..... 13

Tietze & Bongaarts, *The Demographic Effect of Induced Abortion,* 31 Obstet. & Gynecol. Survey 699 (1976)..... 23, 25

Tietze & Lewitt, *Abortion,* 220 Scientific America 21 (1969) 23

The New York Times, September 7, 1967, 38 23

The New York Times, November 21, 1991, B.1.... 9

Torres & Forrest, *Why Do Women Have Abortions?,* 20 Fam. Planning Perspectives 169 (1988).... 9

Valman & Pearson, *What the Fetus Feels,* 1980 Brit. Med. J. 233..... 10

Webster's New Collegiate Dictionary, (1979)..... 8

Zeckman & Warrick, "Abortion Profiteers" *Chicago Sun Times,* Dec. 3, 1978 (Special reprint) 13

Statutes:

18 Pa.C.S.A. §3202(a)..... 6

18 Pa.C.S.A. §3202(b)(4)..... 6

INTEREST OF AMICI

Petitioners and the American College of Obstetricians and Gynecologists (ACOG), in its brief *amicus curiae* in support of petitioners, have provided this Court with a radically one-sided view of pregnancy and abortion. They characterize abortion as a simple medical procedure which should be treated no differently from other medical procedures. Next, they portray pregnancy as a disease or disorder which, when it results in childbirth, is ten to twenty times more dangerous than abortion. They then suggest that because abortion on demand is allegedly safer than childbirth, it must remain legally available as a medical treatment or cure for pregnancy and childbirth.

In addition to this radical view of pregnancy, childbirth and abortion, petitioners present the Court with outlandish and unsubstantiated claims regarding: 1) the numbers of pre-*Roe* abortion deaths; 2) the impact of *Roe* on the safety of abortion; and 3) the fate of thousands of women who will "undeniably" be forced to seek "back-alley" and self-induced abortions which could result in their deaths if *Roe* is reversed.

Based on their myopic and outmoded view of the human reproduction process—which view focuses solely on the woman and ignores the unborn child's very existence—petitioners argue that *Roe* should not be reversed and claim that it "fairly accommodates the interests of the woman and the state."

Amici curiae, the American Association of Pro-Life Obstetricians and Gynecologists (AAPLOG) and the Association of Pro-Life Pediatricians (AAPLP), are two national organizations. The former is comprised of obstetricians and gynecologists (all of whom belong to ACOG); the latter of pediatric physicians (all of whom belong to the American Academy of Pediatrics (AAP)). Both are dedicated to reaffirming the unique value and dignity of individual human life at all stages of development. Both are pleased to note that, although the

American Medical Association (AMA) and the American Academy of Pediatrics (AAP) in the past have joined the ACOG in supporting *Roe* and abortion on demand, neither the AMA or the AAP has done so here.

Members of AAPLOG routinely treat the unborn child as a second patient in their obstetrical practices. The efforts that they undertake to care for, diagnose, and even treat the unborn child during the course of his or her development *in utero* underscore the incongruity of this Court's post-*Roe* abortion standards which wholly ignore the existence and rights of the unborn child prior to viability and, as a practical matter, do so to a large extent after viability as well.

Members of the AAPLP often treat premature infants who, under this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), could have been aborted. Thus, they, like members of the AAPLOG, are often confronted in their practices with the inconsistencies of *Roe*.

Amici submit this brief to provide the Court with a better understanding of the true nature and risks of pregnancy, childbirth and abortion as they are viewed in modern obstetrical practice. *Amici* also submit this brief to correct many of the erroneous "medical facts" set forth in petitioners' brief and that of ACOG. It is hoped that this brief will help to persuade the Court of the errors of *Roe* and cause the Court to abandon the rigid trimester framework promulgated in *Roe*.[1] The abandonment of *Roe* would allow the states, once again, to protect the unborn, who cannot speak for themselves.

---

1. *Amici* submit that the question of whether *Roe's* trimester framework should be reversed is properly before the Court. The questions presented ask whether the lower court erred in ruling upon the constitutionality of various abortion regulations. In rendering its decision, the lower court adopted an undue burden standard of review. Whether that standard or some other standard is the correct one to apply in deciding upon the constitutionality of abortion regulations necessarily depends upon whether the standard articulated in *Roe* remains valid.

SUMMARY OF THE ARGUMENT

In modern obstetrical practice, the physician treats two patients—the mother and the unborn child—and strives to maximize and protect the health and well-being of both. Good medical practice requires this. It is rare that the interests of one of these patients, from a medical standpoint, conflicts with the other. Thus, abortion is rarely medically indicated and the vast majority of abortions are performed for socio-economic reasons; not for medical reasons. Even in those instances where the mother's condition may place her physical health at greater risk, the pregnancy can generally be managed satisfactorily with a successful outcome for both the mother and baby.

Every abortion, if successful, results in the death of one patient—the unborn child. Thus, the performance of elective abortion violates the long-standing ethical obligation of physicians to "do no harm."

Roe's trimester framework does not fairly accommodate the state's compelling interests in protecting either unborn human life or maternal health. Rather, it uniformly places the socio-economic concerns of the mother, whether substantial or trivial, above the life of the unborn child. To the detriment of many women, *Roe* also unnecessarily restricts the ability of the states to regulate abortion on behalf of maternal health. For these reasons, *Roe* should be reversed.

The reversal of *Roe* would not result in any significant increase in maternal mortality or morbidity from abortion because *Roe* was not a major cause of reduced maternal mortality and morbidity from abortion. Such reductions correspond more closely with medical advances in areas such as pharmacology and medical technology which are wholly unrelated to the legalization of abortion. Reversal of *Roe* will not affect those advances, nor will it preclude the application of future medical advances to the treatment of women who might seek illegal abortions. Thus, even if, upon a reversal of

Roe, all states were to outlaw abortion except when necessary to preserve the mother's life (an extremely unlikely occurrence), it is unlikely that that event would result in any significant increase in maternal mortality or morbidity from abortion.

ARGUMENT

I. ROE'S TRIMESTER FRAMEWORK DID NOT "FAIRLY ACCOMMODATE" THE STATE'S INTERESTS IN PROTECTING UNBORN LIFE OR MATERNAL HEALTH.

Petitioners claim that *Roe's* trimester framework is workable, Pet. Br. at 27, and assert that "[d]uring the last nineteen years, lower courts . . . have had little difficulty in applying *Roe's* clear mandates." Pet. Br. at 30. Unfortunately, this appears to be true. No matter how reasonable the statute, those courts have determined, with fair consistency, that *Roe* requires that its enforcement be enjoined. Petitioners apparently believe that this "fairly accommodates the interest of the woman and the state." *Id.* at 15.

Amici strongly disagree with petitioners' view. Notably absent from petitioners' brief is any meaningful discussion of the state's legitimate interests in protecting the life of the unborn child and in protecting maternal health. Application of *Roe's* principles does not accommodate the state's interests in protecting either fetal life or maternal health. Indeed, *Roe* has left the unborn child virtually unprotected and unprotectable throughout the full nine months of pregnancy and has prevented the states from dealing effectively with serious public health problems associated with many abortion clinics, to the detriment of many women. Thus, *Roe* has not even served the interests of the women it was designed to protect.

A. The States Have a Compelling Interest in Protecting Unborn Life Throughout Pregnancy and *Roe* Unfairly Denigrated the Value of the State's Interest by Characterizing the Unborn as "Potential Life."

1. The basic facts of fetal development are well-known and were presented to the Court in *Roe v. Wade*, 410 U.S. 113, 156 (1973). The briefs submitted by the State of Texas in *Roe* set forth in great detail the facts of fetal development (with pictures) from conception forward, and we do not repeat them here. *See*, Brief of Appellee in *Roe*, No. 70-18 at pp. 29-54. The majority in *Roe* either disregarded these facts or failed to give them proper weight. As a consequence, the Court undervalued the state's interest in actual unborn life—recognizing it as an interest only in "potential" life. The *Roe* Court compounded this error by presuming that the state's interest in protecting that "potential" life is different at various stages in pregnancy. As Justice O'Connor noted in her dissent in *Akron v. Akron Center for Reproductive Health*, "[t]he difficulty with this analysis is clear: *potential* life is not less potential in the first weeks of pregnancy than it is at viability or afterward." 462 U.S. 416, 461 (1983) (emphasis in original).

What we know now about the unborn has dramatically increased our understanding of the humanity of the unborn child. This Court is urged to reacquaint itself with these facts and to reevaluate the compelling nature of the state's interest in protecting unborn life. For this reason, we take this opportunity to provide the Court with a few updated examples of what we now know of the unborn child within the womb. See this brief, *infra.*, at 6-11. We believe these facts will assist the Court in viewing the practice of obstetrics and abortion, not in the distorted manner presented by petitioners and ACOG, but rather, in the perspective of modern obstetrical medicine. It is also important to do this in order to provide the Court with a proper understanding of the

nature of the Commonwealth's interest in protecting the unborn child's life.

2. In enacting the Abortion Control Act, the Commonwealth of Pennsylvania asserted an interest in protecting "the life and health of the child subject to abortion." 18 Pa.C.S.A. §3202(a). It referred to this interest as "a supreme value in protecting human life." 18 Pa.C.S.A. §3202(b)(4). As such, the Commonwealth asserted a compelling interest in protecting the *actual* life of the unborn child; it did not assert an interest in protecting merely *potential* life.

3. Modern obstetrical medicine recognizes the unborn child as a patient. This recognition supports the compelling nature of the state's interest in protecting actual unborn life.

In focusing solely on the effect of pregnancy and abortion on the woman, petitioners have failed utterly to acknowledge the other patient routinely cared for in present day obstetrical practice—the unborn child. This omission is glaring when contrasted with statements found in *Williams Obstetrics*, traditionally one of the leading medical texts on obstetrical practice. In explaining the need for significant revisions in that text's 1980 edition, its authors stated:

> Happily, we have entered an era in which the fetus can be rightfully considered and treated as our second patient . . . Fetal diagnosis and therapy have now emerged as legitimate tools the obstetrician must possess. Moreover, the number of tools the obstetrician can employ to address the needs of the fetus increases each year . . . who would have dreamed—even a few years ago—that we could serve the fetus as physician? Or, that the well-being and growth of the fetus could be monitored accurately and that the status of fetal health could be addressed?

Pritchard & MacDonald, *Williams Obstetrics*, p.vii (16th Ed. 1980).

Abortion is a highly controversal issue precisely because of the existence of the unborn child who is subject to its destructive forces. If the medical procedure of abortion involved only the removal of a diseased organ of the woman and did not cause the destruction of a new and independent life, there would be no controversy. Thus, it is entirely inappropriate for pregnancy and abortion to be viewed strictly as medical conditions and procedures without reference to the unborn child.

The most current edition of *Williams Obstetrics* makes this clear:

> Obstetrics is *an unusual speciality of medicine.* Practitioners of this art and science must be concerned simultaneously with the lives and well-being of two persons; indeed, the lives of two who are interwoven.

Cunningham, MacDonald & Gant, *Williams Obstetrics*, vii (18th ed. 1989) (emphasis added). In a chapter entitled "Techniques to Evaluate Fetal Health," it is stated:

> Until relatively recently, the intrauterine sanctuary of the fetus was held to be inviolate. The mother was the patient to be cared for; the fetus was but another albeit transient, maternal organ. . . . Indeed, the fetus is no longer regarded as a maternal appendage ultimately to be shed at the whim of biological forces beyond control. Instead, the fetus has achieved the status of the second patient, a patient who usually faces much greater risks of serious morbidity and mortality than does the mother.
>
> * * *
>
> It is now possible not only to identify but to quantify with some precision physical abnormalities and functional derangements that afflict the fetus.

> Moreover, in some instances treatment can be implemented—surgical as well as medical—while the fetus continues to mature in utero.
>
> • • •
>
> The many advances in diagnosis and treatment that now clearly establish the fetus as a patient have also contributed remarkably to legal considerations involving the fetus. Fetal legal rights are emerging; for example, in some courts, the fetus has been allowed to file suit.

Id. at 277.

Roe erroneously viewed the state's interest as an interest in "potential" life; not actual life. Petitioners' and ACOG's continued use of the term "potential life" to describe the unborn child—as though there is no actual life within the womb—is confusing at best. Certainly this is a gross misuse of the English language. A common dictionary definition for "potential" is "existing in possibility: capable of development into actuality." *Webster's New Collegiate Dictionary*, 893 (1979). "Actuality" is defined as "the quality or state of being actual," and "actual" is, in turn, defined as "existing in fact or reality." *Id.* at 12.

There can be no question that the unborn child is actually alive and that abortion causes his or her death. If there were no actual life within the womb, there would be nothing to attempt to destroy through abortion and it would be meaningless to speak of "fetal death." Yet these concepts are routinely discussed in the medical literature.

A common method of abortion, used routinely up until the 24th week of pregnancy, and even thereafter by some,[2] is dilation and evacuation (D&E). This procedure involves the progressive dismemberment of the unborn

2. In *Planned Parenthood v. Ashcroft*, the Court noted that one doctor "supported the use of D&E on 28-week pregnancies, well into the third trimester." 462 U.S. 476, 483 n.7 (1983).

child within the womb followed by the removal of the child's body parts.[3] Although a D&E abortion is almost always fatal to the child, a recent report in *The New York Times* told of a baby girl who had survived an attempted abortion, albeit without one of her arms which was severed during the procedure. *The New York Times*, November 21, 1991, at B.1.

In describing how to perform a D&E procedure on unborn children with gestational ages of between 21 and 24 weeks,[4] Dr. Warren Hern states the following:

3. One advantage of D&E over instillation methods is that the woman does not have to "experience the expulsion of the fetus, which may or may not have signs of life." Hern, *Abortion Practice* at 133.

4. Although late-term abortions constitute only a small percentage of the approximately 1.5 million abortions that are legally performed annually in this country, given the sheer magnitude of the numbers, the actual number of such abortions is quite substantial. The Centers for Disease Control report that 1% of abortions are performed at 20 weeks or more. *Centers for Disease Control: Abortion Surveillance 1981*, p. iv, Summary Table (1985). This translates into approximately 15,000 per year, or about 290 per week.

There is no indication that late-term abortions are performed in large numbers for maternal health or because of fetal abnormalities. Dr. Hern states that the intent of his book is to discuss clinical abortion technique from 6-24 menstrual weeks gestation with emphasis "on outpatient practices in a freestanding clinic or private office setting." Hern, *Abortion Practice* at 102. If this is so, it is unlikely that he is performing such procedures on high-risk patients for whom they are medically indicated. Presumably, such patients would be cared for in a full service hospital. And, as Dr. Bolognese testified in this case, the method of choice for terminating a pregnancy in emergency circumstances is not D&E. Appendix at 613. Likewise, Planned Parenthood's research arm reports that only 2% of the women surveyed who had late-term abortions listed the diagnosis of a fetal problem as the reason for delay. Torres & Forrest, *Why Do Women Have Abortions?*, 20 Fam. Planning Perspectives 169, 174 (Table 4) (1988). We note that the reporting provisions of the Pennsylvania law would facilitate better reporting of such data and urge the Court to uphold that provision.

> The procedure changes significantly at 21 weeks because the fetal tissues become much more cohesive and difficult to dismember.
>
> * * *
>
> A long curved Mayo scissors may be necessary to decapitate and dismember the fetus. . .

W. Hern, *Abortion Practice* at 154. Although an injection of urea is usually given to cause fetal death before dismemberment is begun, the dismemberment apparently may take place when the fetus is still alive. "If fetal death has not occurred and labor has not begun, the operator may elect. . . to proceed with a D&E procedure under direct ultrasound visualization." *Id*. Presumably, the use of ultrasound assists the operator in locating the baby which may be attempting to escape the lethal instruments.[5] *See also,* Kerenyi & Chitkara, *Selective Birth in Twin Pregnancy With Discordancy for Down's Syndrome*, 304 New Eng. J. Med. 1525, 1525-26 (1981)(describing "active fetal movements and fetal heart rates of 140 to 150 beats per minute" in a fetus of 20 weeks gestation before the insertion of a needle into the fetal heart for the express purpose of extracting 25 ml of blood and thereby causing cessation of "cardiac activity").

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5. "Although the fetus starts making spontaneous movements at about seven weeks after conception, mothers do not usually feel their babies moving until about 16-21 weeks. *** The fetus needs to be heavily sedated by sedating the mother before intrauterine manipulations such as transfusions. Otherwise he will move away from the needle." Valman & Pearson, *What the Fetus Feels*, 1980 Brit. Med. J. 233, 234.

Likewise, if there were no "actual life" in the womb there would be no individual upon whom to: perform fetal surgery,[6] provide drug therapy,[7] conduct behavioral studies,[8] or take pictures.[9] Nor would there be any "baby" with whom mothers could bond. *See*, Fletcher & Evans, *Maternal Bonding in Early Fetal Ultrasound Examinations*, 308 New Eng. J. Med. 392 (1983). It has been reported that, when ultrasound examinations were performed on women in the late first or early second trimester of pregnancy, those women "reported feelings and thoughts clearly indicating a bond of loyalty toward the fetus." *Id*. at 392. In that same study, two women who were contemplating abortion were asked how they felt about seeing what was inside them. One stated: "It certainly makes you think twice about abortion! . . . I feel that it is human. . . . I couldn't have an abortion now." *Id*. The other stated: "It really made a difference to see that it was alive. . . . I am going all the way with the baby. I believe it is human." *Id*.

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6. It is now possible to perform surgery on the mother, partially extract the baby and perform surgery on it, and then return the baby to the womb to continue its development. Longaker, et.al., *Maternal Outcome After Open Fetal Surgery*, 265 J.A.M.A. 737, 740 (1991) (reporting on 17 such cases with "no maternal deaths and few serious complications").

7. Various drug therapies are now available to ameliorate fetal problems. *See e.g.*, Harrigan, et al, *Successful Treatment of Fetal Congestive Heart Failure Secondary to Tachycardia*, 304 New Eng. J. Med. 1527 (1981) (the administration of digoxin to the mother "when the fetal heart rate is persistently over 200 beats per minute can reduce the threat of fetal death and make the delivery of an immature infant unnecessary").

8. Kolata, *Studying Learning in the Womb*, 225 Science 302 (1984)(A relatively new body of data indicates that learning begins before birth. For example, the fact that the newborn immediately recognizes his or her mother's voice indicates that the baby can hear before birth. "This idea suggests a whole series of questions about how and when an unborn baby can learn.")

9. *See* L. Nilsson, *A Child is Born* (1990), which uses modern photographic techniques to capture the unborn child in "living color" within the womb.

4. From the foregoing, it is clear that Pennsylvania has asserted a compelling interest in protecting *actual* unborn life. If there were any doubt about the actual existence of the unborn child at the time of *Roe*, there can be none now. Modern obstetrical practice proves the actual existence of the child.

Several members of this Court have previously noted the error of *Roe* in failing to give proper deference to the state's interest in protecting the unborn and have indicated their view that the state's interest in protecting "potential" life should be recognized throughout pregnancy. *See, Akron v. Akron Center for Reproductive Health*, 462 U.S. at 461 (O'Connor, J., dissenting); *Webster v. Reproductive Health Services*, 492 U.S. 490, 519 (1989) (Rehnquist, White, Kennedy, J.J., plurality). However, a majority of the Court has never so held. *Amici* respectfully urge the Court to correct the illogic of *Roe* and hold that the states have a compelling interest in preserving the *actual* lives of unborn children.

B. The States Have a Compelling Interest in Protecting Maternal Health Throughout Pregnancy and *Roe* Unnecessarily Restricts the Ability of the States to Regulate on Behalf of That Interest.

Despite petitioners' claims to the contrary, *Roe* did not "fairly accommodate" the state's interest in preserving maternal health. The Seventh Circuit's decision in *Ragsdale v. Turnock*, 841 F.2d 1358 (7th Cir. 1988), is instructive. That case involved a challenge to the Illinois regulations governing ambulatory surgical facilities, including abortion clinics.

A brief recitation of the historical background surrounding the promulgation of those regulations gives a better understanding of the compelling nature of the state's interest. A five-month undercover investigation of numerous abortion clinics conducted in 1978 by the Better Government Association and the *Chicago Sun Times* had exposed widespread unsafe and unethical

practices in the abortion industry. *See*, Zeckman & Warrick, "The Abortion Profiteers," *Chicago Sun Times*, Dec. 3, 1978 (special reprint) lodged with the Brief *Amicus Curiae of Certain Illinois Senators and Representatives in Support of Appellants* and filed in this Court in *Turnock v. Ragsdale*, No. 88-790. The investigation showed that a number of abortion providers were profiting greatly at the expense of women—performing abortions on women who were not pregnant, operating under unsafe conditions and generally exploiting their patients.[10]

Against this backdrop and in direct response to this investigative series, the Illinois General Assembly conducted extensive hearings on the regulation of abortion clinic practices and of outpatient surgical procedures generally. 80th General Assembly, *Report to the House Human Resources Committee, Subcommittee on Health*, "State Regulation of Abortion Clinics," December 13, 1978.

According to the subcommittee report, stricter enforcement of existing regulations and the promulgation of additional regulations, designed to prevent abuses by requiring minimum licensing standards and on-site inspections, were deemed necessary to ensure that abortions would be performed safely and ethically in the state. Such regulations were deemed necessary because physicians were simply unable or unwilling to police themselves. Moreover, the state Medical Practice Act (MPA), which governed licensure of medical professionals and required that physicians performing abortions do so in licensed clinics, was not preventive in nature;

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10. Pamela Zeckman, who won a Pulitzer Prize for her reporting, concluded:

> In 1973, the Supreme Court legalized abortion. As it turns out, what they legalized in some clinics in Chicago is a highly profitable and very dangerous back-room abortion.

"Risky Abortions: Chicago clinics are exposed," *Time Magazine* (Nov. 27, 1978), 52.

rather, it operated primarily after the fact—once gross misconduct had already occurred.

In 1985, the regulations and MPA were challenged by Dr. Ragsdale as violative of both his right to perform early first and second trimester abortions without state interference and of his patients' rights to obtain such abortions. Dr. Ragsdale argued that a number of the restrictions had to be struck because they belabored the obvious and insulted the physician's integrity. He claimed the other regulations were unconstitutional because the state had not shown that they were "medically necessary."

The state argued that the regulations needed only to be reasonably related to maternal health to withstand constitutional challenge. Over the strong dissent of Judge Coffey, the majority of the Circuit panel rejected the state's argument and determined that the state had failed to meet its burden of proving that the regulations were medically necessary. *Ragsdale v. Turnock*, 841 F.2d 1358 (7th Cir. 1988). Accordingly, the majority held that the state's general regulations governing outpatient surgical centers, insofar as they related to the performance of first and early second trimester abortions, must be enjoined because they violated *Roe's* trimester framework. Thus, abortion clinics were held to be exempt from the minimal safety standards applicable to all ambulatory surgical facilities in the state.[11]

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11. A recent four year study by the Government Accounting Office of ambulatory care facilities noted the dramatic increase in the number of such facilities during the past decade. "Officials in 36 states told the GAO that more regulation was needed to insure patient safety and consumer protection." *Patient Safety and Consumer Protection Problems in Unlicensed or Undersupervised Ambulatory Care Facilities, Hearing Before the Subcommittee on Regulation, Business Opportunities and Energy of the House Committee on Small Businesses,* 102nd Congress, 1st Session 102-17 at p.2 (1991).

> Outpatient facilities can offer patients cheaper care, more convenience and greater privacy. But we have also found that too often, procedures performed in these clinics are conducted in spartan surgical settings with skeleton crews that are never inspected, nor subject to public accountability. Under such conditions, they are a refuge for the unqualified, the unscrupulous and the undertrained.

Id. at 74.

> This state of affairs is an open invitation to bad medicine. It has resulted in thousands of unnecessary or needlessly dangerous surgeries. It is the cause of countless patient injuries and deaths.

Id. at 78

From the earlier investigative series, it is clear that many abortion clinics exhibit these same characteristics; creating a refuge for abortionists who are unskilled and unethical. Regulations requiring that abortion clinics meet minimal safety standards applicable to other ambulatory surgical facilities are clearly reasonable.

Moreover, it should be obvious that a regulation which may not be "medically necessary" as it relates to the practice of one clinic (because that clinic can operate safely without it), may be necessary relative to another. Whatever the practices at the named clinics in this case, there is no assurance that other clinics within the state have similar practices. Indeed, we note that one clinic, Northeast Women's Center, withdrew from the litigation in the course of discovery.

Tragically, had those regulations been upheld by the federal courts, at least one more woman might not have died from a "safe" and "legal" abortion. Section 205.40 of the state regulations (which were held to be unenforceable under *Roe* by the Seventh Circuit) would have prohibited abortion clinics from requiring patients to "leave the center in less than one (1) hour following the procedures."

Dr. Arnold Bickham, one of the doctors exposed in the *Abortion Profiteers* series, was ultimately convicted of medicaid fraud in 1979 and sent to jail for two years. But Dr. Bickham was out and aborting women again by 1986. He was doing so despite the fact that he had lost his medical license for 18 months after the State had charged that he had performed abortions on patients whose pregnancy tests were negative and, in his haste to perform abortions on a high volume of patients (he was

paid per patient), had performed abortions on patients before the anesthesia had time to take effect. *Chicago Tribune*, Feb. 18, 1987, Section 2, p. 3. According to that *Tribune* article, a complaint filed against Dr. Bickham in 1986 charged that he was responsible for the death of a patient who bled to death hours after Dr. Bickham performed an abortion on her and "forced [her] to leave the clinic office while [she] was in shock and/or otherwise unable to care for herself." *Id.*

Thus, it may be true that the lower courts have consistently construed *Roe* to broadly prohibit any interference with the abortion industry. But this fact does not demonstrate that *Roe* should be reaffirmed. Rather, it shows precisely the opposite. Far from fairly accommodating the legitimate and compelling interests of the states in protecting maternal health and unborn life, *Roe* accommodates only the abortion industry.[12]

II. REVERSAL OF ROE WOULD NOT RESULT IN ANY SIGNIFICANT INCREASE IN MATERNAL MORTALITY FROM ABORTION.

In their zeal to defend *Roe* and abortion on demand, petitioners and ACOG present the Court with outmoded claims regarding pregnancy, childbirth and abortion. They portray pregnancy and childbirth as diseases and abortion as the cure. They also make invalid statistical comparisons between abortion and childbirth and claim that childbirth is ten to twenty times more dangerous than abortion. Thus, they misleadingly imply that childbirth is very dangerous. They further suggest that because abortion is "safer" than childbirth at all stages in pregnancy, it must be allowed on demand. Moreover, since they argue that it is impermissible to allow any

12. As is routinely the case, the plaintiffs in this litigation are abortion providers who have a great financial interest in the unfettered operation of their businesses to protect. There are no pregnant women plaintiffs in this action who claim that these provisions burden their individual rights.

"trade-off" of maternal health in an attempt to preserve fetal life, petitioners and ACOG argue in favor of abortion on demand throughout pregnancy.

This one-sided presentation does not accurately depict modern obstetrical practice and it should be disregarded by the Court.

Moreover, petitioners grossly exaggerate the number of maternal deaths from abortion prior to *Roe* and then erroneously suggest that *Roe* was the reason for a dramatic reduction in maternal mortality from abortion. In fact, however, maternal mortality from abortion (legal and illegal) had been decreasing steadily before *Roe* and continued to decrease thereafter. See Appendix to this brief. During those same time periods, maternal mortality from all causes also decreased steadily. *Id.* These decreases were due not to changes in the law, but rather, to medical advances in treating the complications of pregnancy and childbirth as well as those from abortion.

A. Pregnancy and Childbirth are Natural Occurrences which Carry with Them Very Little Risk to the Pregnant Woman in Ordinary Circumstances. Pregnancy is not a Disease which Must be Cured by Abortion.

1. Petitioners portray pregnancy and childbirth as diseases and suggest that abortion is its cure. Petitioners' Brief at 24-25. For example, they state that pregnancy causes a wide range of adverse health consequences for women. "As many as ninety percent of pregnant women develop gastrointestional problems, including nausea and vomiting." Pet. Br. at 24. And, "[o]ther common problems include back pain, varicose veins, hemorrhoids, headaches and water retention." *Id.* at n. 37. They then recount the risks of vaginal delivery in childbirth which entail "substantial risk of infection and laceration." *Id.* at 25. They also note that 25% of

women who deliver by cesarean section are exposed to higher risks of death.[13]

Petitioners' view of pregnancy as a disease rightly has been discredited by those in the mainstream of obstetrical practice. As a standard obstetrics textbook states:

> Pregnancy should be considered a *normal physiological state*. Unfortunately, the complexity of the functional and anatomical changes that accompany gestation tends *in the minds of some* to stigmatize normal pregnancy as a disease process.

Cunningham, et al., *Williams Obstetrics* at 257 (emphasis added).

Moreover, in presenting the Court with only the adverse consequences to the woman from pregnancy, petitioners tell only half the story. Once the woman is pregnant, only one of two outcomes is possible: childbirth or abortion. Abortion, like childbirth, carries with it a low incidence of mortality. However, it is not without risk and the possibility of major complication. In discussing the performance of abortion, Dr. Hern states:

> One of my more experienced colleagues recently commented, 'Abortion is a simple procedure except for the uterus's total intolerance to poor technique.'
>
> * * *
>
> In medical practice, there are few surgical procedures given so little attention and so underrated in its potential hazard as abortion.

W. Hern, *Abortion Practice* at 101.

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13. At the same time, they fail to note the very low rate of maternal mortality from delivery by cesarean section. For example, Boston Hospital for Women recently reported a zero maternal mortality rate in 10,231 cases where a cesarean section was performed. Cunningham, MacDonald & Gant, *Williams Obstetrics* 443 (1989).

In recounting the risks of vaginal delivery, petitioners note that it carries substantial risk of infection and laceration. They fail to mention that all methods of abortion also carry with them a substantial risk of infection and laceration. *See generally*, Hern, *Abortion Practice* 175-206 (1984). (Major complications which are listed include: major unintended surgery such as hysterectomy, hemorrhage requiring transfusion, infection requiring hospitalization of 11 days or more, cardiac arrest, endotoxic shock, convulsion and death. Minor complications include: milder infections, uterine perforation, lacerations of the cervix and heavy bleeding.) Thus, once pregnant, neither abortion or childbirth is absolutely risk free.

Equally radical is petitioners' and ACOG's claim that the *failure* to permit a surgical intrusion into the woman's body through abortion subjects women to "significant intrusions of their bodily integrity." ACOG Br. at 10; Pet. Br. at 24-26. It strains logic to understand their position. Their references to cases involving surgical intrusions into the body to remove bullets and other objects for criminal investigations, Pet. Br. at 25-26; ACOG Br. at 10, are, for obvious reasons, wholly inapposite. Moreover, if they mean to suggest that the existence of the unborn child (or the pregnancy itself) is an "instrusion" into the woman's body, this is surely not something for which the state may be held responsible.

2. Petitioners and the ACOG also frequently discuss the statistical comparisons of risks of abortion and childbirth. *See,* Pet. Br. at 26 n.43, 32-33; ACOG Br. at 10. These comparisons and the resulting conclusion that abortion is statistically safer than childbirth at *all stages* of pregnancy, Pet. Br. at 32-33, appear to cause petitioners and ACOG to argue that abortion must be kept legal on demand throughout pregnancy.

Whatever the comparative risks of abortion and childbirth, such concerns are largely theoretical and irrelevant to a discussion of elective abortion. It is true that abortion is a medical procedure. Equally true,

however, is the fact that abortion is rarely a medical decision. It is almost universally a socio-economic decision.[14]

Since very few women decide to have abortions because they wish to avoid risks to their physical health, it is disingenuous to suggest that abortion must be kept available, on demand, due to the fact that it is statistically safer for women. This simply is not a consideration which informs their decisions.

This is not surprising when one considers the safety of childbirth and the ability of modern obstetrical medicine to satisfactorily manage most medical complications of pregnancy. To demonstrate the safety of childbirth, one need only consider the following. An average

14. This is particularly true of abortions performed in abortion clinics where the vast majority of abortions take place. Indeed, at least one physician has suggested that he would not perform an abortion if it were requested for medical reasons rather than for emotional or social reasons. In testimony before Judge James Kelly in *Northeast Women's Center, Inc. v. Michael McMonagle, et al.*, No. 85-4845 (E.D. Pa. 4/29/87), Dr. Klebanoff, a physician who routinely performed abortions at the clinic, testified as follows:
Q. Now doctor, take us through the procedures in a routine first trimester case. What is the first thing you do?
A. The first thing I do, is introduce myself. I ask the patient if they are having their operation for emotional reasons or not. . . .
Q. . . . Now, this emotional reason or not, what is that? Would you detail that a little bit more for us?
A. I ask the patient if they are having their operation due to emotional reasons.
Q. Is that the standard question that you ask?
A. I ask that in every patient, yes.
Q. What if the response is, "Yes?"
A. Then, I go ahead and proceed with the operation.
Q. That's the only question that you would ask the patient?
A. I ask them how they are and try to put them at ease.
THE COURT: What happens if they say, "No?" What happens if they say, "No, I am not having it for emotional reasons?"
THE WITNESS: If they say, "No," which I haven't run into yet, I expect I wouldn't do the procedure.
THE COURT: You haven't run into that yet?
THE WITNESS: No.

obstetrical practice may involve 180 deliveries per year. The maternal mortality rate for 1985 was 7.8 per 100,000. Centers for Disease Control: Morbidity & Mortality Weekly Report, Vol. 37 at 406 (1988). That means that the risk of death is .000078 per pregnancy, or 1 death per 12,500 deliveries. Given these circumstances, an obstetrician would have to practice roughly 70 years to encounter 1 maternal death. Indeed, as long ago as 1956, when maternal mortality rates were much higher, Dr. Alan F. Guttmacher, a strong supporter of abortion and the namesake of Planned Parenthood's Guttmacher Institute, stated:

> In more than 30 years of obstetrical practice, during which I have delivered something like 6,000 private patients, I have seen 3 of my own patients die, one from a fatal blood disease (leukemia at the 4th month), one from a clotting of a blood vessel in the brain several days after delivery, and one two weeks following birth of a recurrent breast cancer. Pregnancy and labor have little to do with any of the three. I do not recite these personal statistics boastfully, for they can be duplicated or improved upon by hundreds of doctors—probably by your own obstetrician—but their recitation must perforce be reassuring.

A. F. Guttmacher, *Pregnancy and Birth*, 271 (1956).

A number of obstetrical texts have also referred to the safety of childbirth and the lack of need to obtain abortions for medical reasons. For example, one such text states:

> The numbers of induced abortions performed annually in this country have been rising astronomically. Aside from those done 'on demand,' psychiatric indications are diminishing in number, while medical reasons appear to be almost vanishing. The continued decrease in the number performed for medical reasons is perhaps related to improved

> methods of managing the medical conditions indicated. Indeed medical therapy has improved so significantly that it is rare for organic disorders to be aggravated in properly managed pregnancies.

Greenhill and Friedman, *Biological Principles in Modern Practice of Obstetrics*, 385 (1974). *See also*, Reid, Ryan & Benirschke, *Principles in Management of Human Reproduction*, 274 (1972) ("abortion for purely medical reasons, i.e., vascular, renal or heart disease, and so forth, is rarely indicated in current medical practice.")

B. *Roe* Was Not a Major Cause of Reduced Maternal Mortality from Abortion.

In their brief, petitioners state: "In the 1950's and 1960's, an estimated 200,000 to 1.2 million illegal abortions occurred annually in the United States. As a result of these back-alley and self-induced abortions, as many as 5,000 to 10,000 women died each year and many other women suffered severe physical and psychological injury." Pet. Br. at 32. They then note that the maternal mortality rate for abortion is substantially lower today. *Id*. From these "facts," petitioners conclude that *Roe* and legalized abortion on demand are the cause of the dramatic reduction in maternal mortality. *Id*.

It is irreponsible for Petitioners to attempt to perpetuate such false statistics. In an article published in the *American Journal of Public Health* in 1960, Mary Calderone, M.D., then Medical Director of Planned Parenthood Federation of America, stated: "In 1957 there were only 260 deaths in the whole country attributed to abortions of any kind." Calderone, *Illegal Abortion as a Public Health Problem*, 50 Am.J.Pub.Health 948 (1960). Dr. Calderone noted that this number represented deaths attributable to both "therapeutic abortions" and "so-called illegal abortions." *Id*. Dr. Calderone also noted that there had been a dramatic decrease in abortion deaths in the past 30 years. "In New York City in 1921,

there were 144 abortion deaths, in 1951 there were only 15." *Id*. Dr. Calderone attributes the dramatic decrease in the abortion death rate to two corollary factors. "First, chemotherapy and antibiotics have come in, benefiting all surgical procedures as well as abortion. Second, and even more important, the conference estimated that 90% of all illegal abortions are presently being done by physicians." *Id*.

Dr. Calderone is not alone in her assessement of the situation. As long ago as 1967, Dr. Christopher Tietze, who was a medical statistician for the Population Council (a group strongly supporting legalized abortion), was quoted in an article in *The New York Times* as stating that only 247 deaths from illegal abortions were reported in the United States in 1964 and calling the same figures quoted by petitioners, here, "unmitigated nonsense." Graham, "Fetus Defects Pose Abortion Dilemma," *The New York Times*, September 7, 1967, at 38. *See also*, Tietze & Lewitt, *Abortion*, 220 Scientific American 21, 23 (1969) (figures "cannot be anywhere near the true rate"); B. N. Nathanson, M.D., *Aborting America* 193 (1979) (admitting that as co-founder of the National Abortion Rights Action League he and his organization knowingly falsified the number of "back-alley" abortion death statistics that they were claiming had occurred).

Many of the major risks for childbirth-associated maternal mortality are the same as those for abortion-related maternal mortality. These include: infection, hemorrhage, and complications from anesthesia. Tietze & Bongaarts, *The Demographic Effect of Induced Abortion*, 31 Obstet. & Gynecol. Survey 699, 708 (1976) ("Two of the major fatal complications of induced abortions are infection and hemorrhage which are also important causes of non-abortion maternal mortality."); Kaunitz, et al., *Causes of Maternal Mortality in the United States*, 65 Obstet. & Gynecol. 605 (1985). As noted in *Williams Obstetrics*, maternal deaths from all

causes had decreased remarkably in the past half century due to advances in medicine.

> Many factors and agencies are responsible for the dramatic fall in maternal death rate in this country over the past 50 years. Obviously there has been a general improvement in medical practice. The widespread use of blood transfusions and antibiotics and the maintenance of fluid, electrolyte, and acid-base balance in the serious complications of pregnancy and labor have materially changed obstetric practice. Equally important is the development of widespread obstetric training and education programs which have provided more and better qualified specialists.

Id. at 3. Thus, the medical advances in treating these problems necessarily relate to the reduction in mortality from both childbirth and abortion.[15]

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15. *See also, Human Life Federalism Amendment, Report of the Committee on the Judiciary United States Senate on Senate Joint Resolution 3*, 98th Congress, 1st Session, No. 98-149 at p. 40 (1983) (citations omitted) which states:

> As was noted in testimony before the House Judiciary Committee in 1976, maternal mortality from abortion has been decreasing steadily since 1942 at a rate comparable to that of maternal mortality from other causes. This drop in the maternal mortality rate seems due largely to improvements in medicine in general (*e.g.*, the development of antibiotics) as well as to improvements in maternal care in particular.
>
> • • •
>
> In a new study on this matter, Hilgers and O'Hare have concluded that 'the legalization of abortion has had no effect on the already existing downward trend in the maternal mortality rate.'

The Senate report notes, however, that the incidence of non-fatal abortion complications appears to have increased "largely due to the sheer number of abortions performed. One major study of American hospitals reports that 35,000 women received treatment for abortion

Dr. Calderone noted that in 1957, 90% of illegal abortions were performed by physicians and attributes their relative safety to this fact and improvements in medicine generally. Calderone, *Illegal Abortion as a Public Health Problem*, 50 Am.J.Pub.Health at 949. *See also*, Tietze & Bongaarts, *The Demographic Effect of Induced Abortion*, 31 Obstet. & Gynecol. Survey 699, 708 (1976). In effect, then, the procedure, practice and safety of abortion changed little with its legalization. Instead, because of semantics, what were previously "illegal" abortions simply became "legal."

This fact does not suggest that, prior to *Roe*, illegal abortions were occurring at a rate anywhere near the 200,000 to 1.2 million figure claimed by petitioners.[16] Nor does it suggest that the legalization of abortion has had no impact on the number of abortions.[17] Likewise, it cannot be presumed that the prohibition of abortion would have no deterrent effect on the number of abortions. If abortion were made illegal, "couples and individuals would doubtless react by modifying their contra-

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complications at these hospitals in 1979, compared with 11,000 in 1969." *Id.*

16. It is impossible to determine, with any degree of accuracy, the number of illegal abortions which took place prior to *Roe* and petitioners' figures are guesses, at best. These figures must be grossly inaccurate, however, because they suggest that about twice as many women obtained abortions when it was illegal everywhere, than obtained abortions when it was legal on demand throughout the country. *Centers for Disease Control: Abortion Surveillance 1981*, 24, Table 1, (1985) (about 615,000 abortions were reported for 1973; only about 29,000 more than were reported in 1972 when abortion was illegal in 30 states except for life-threatening conditions.)

17. "The rate of increase in the number of legal abortions depends on how liberal the new law is and on its implementation." Tietze & Bongaarts, *supra*, at 704. "To the degree that unwanted births are replaced by legal abortions, the total number of induced abortions, legal and illegal, increases subsequent to legalization." *Id.* at 705.

ceptive and sexual behavior." Tietze & Bongaarts, *supra*, at 704.[18]

C. Reversal of *Roe* Will not Likely Return the States to their Pre-*Roe* Laws.

It should be remembered that prior to January 22, 1973, the 50 states were entitled to regulate or prohibit abortion in accordance with their views of what constituted wise public policy. They were free to weigh the interests of pregnant women against those of the unborn child. By the beginning of 1973, 20 states had liberalized their laws to allow abortion in various circumstances. (Though none had gone so far as required by *Roe*—allowing abortion throughout all nine months of pregnancy for any reason necessary to preserve the woman's emotional health, as broadly defined as in *Doe v. Bolton*, 410 U.S. 179, 192 (1973).) Thirty states continued, at the time of *Roe*, to prohibit abortion in all cases except where necessary to preserve the life of the woman.

The total number of abortions has dramatically increased in this country since *Roe* (an increase from about 615,000 abortions in 1973 to about 1.5 million today).[19] Petitioners assert that this increase indicates

18. The most current statistics from the Centers for Disease Control indicate that fully 40% of all abortions performed today are performed on women who have had at least one prior abortion. *Centers for Disease Control Abortion Surveillance, United States, 1988*, Vol. 40, No SS-1, Table 11. Thus, it would appear that a large percentage of women use abortion as a method of birth control.

19. It should be noted that the vast majority of abortions are performed at the seventh week of pregnancy or beyond; a time when both fetal heartbeat and brain waves are detectable. Although the Centers for Disease Control statistics show that just under 50% of all abortions are performed at eight weeks or less, this reporting scheme appears to be misleading. Approximately 94% of all abortions take place at the seventh week or beyond. Hern, *Abortion Practice* at 31 (Table 1-7). This is apparently true because complication rates for abortion are significantly greater at six weeks or less; particularly that of a continuing pregnancy which requires a repeat procedure. Testimony of Dr. Allen, Appendix at 532; Hern, *Abortion Practice* at 121. For this reason, the clinic personnel at the WHS clinic "discourage people from coming in for abortions before seven and a half weeks," and if the woman has already come to the clinic and is found to be too early in pregnancy, "that woman will be advised, if at all possible for her, to come back in two weeks for her procedure because the complication rate is lower." *Id.* at 533.

that abortion has become ingrained in the social fabric. Pet. Br. at 20. If petitioners are correct, it is exceedingly unlikely that anywhere near 30 states would return to their pre-*Roe* laws. In 1972, just prior to *Roe*, the Centers for Disease Control reported 39 abortion deaths from illegal abortions. *Centers for Disease Control: Abortion Surveillance 1981*, p.51, figure 8. Thus, even if we were to accept the assertion that *Roe* had a meaningful impact on reducing mortality from illegal abortions and that its reversal would put us back to conditions as they were in 1972, no greater number of women could be expected to die from any illegal abortions should *Roe* no longer control. But, given the significant and ongoing advances in treating the medical complications of pregnancy and abortion, and the fact that "legal" abortion will be more widely available than in 1972, the number of "illegal" abortion deaths which can be projected must necessarily be almost negligible. Accordingly, even if *Roe* were reversed there would be little, if any, increase in maternal mortality.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request the Court to uphold the provisions of the Pennsylvania Abortion Control Act and in so doing, to reverse *Roe*.

Respectfully submitted,

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April 6, 1992

APPENDIX

APPENDIX

NUMBER OF MATERNAL DEATHS IN THE UNITED STATES, 1960-1978

Year	Total Number Maternal Deaths	Total Abortion Related Maternal Deaths	Total "Other" Maternal Deaths
1960	1,579	289	1,290
1961	1,573	324	1,249
1962	1,522	305	1,190
1963	1,416	280	1,186
1964	1,343	247	1,096
1965	1,189	235	954
1966	1,049	189	860
1967	987	160	827
1968	859	133	726
1969	801	132	669
1970	803	128	675
1971	668	99	569
1972	612	70	542
1973	477	36	441
1974	462	27	435
1975	403	27	376
1976	390	16	374
1977	373	20	353

Data from: Vital Statistics of the United States; Vol. II, Mortality, Part A, 1960-1977, Reproduced in Hilgers & O'Hare, "Abortion Related Maternal Mortality: An In-Depth Analysis" in *New Perspectives on Human Abortion*, 80, Table 7 (1981).

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Nos. 91-744 and 91-902

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, ET AL.,
Petitioners/Cross-Respondents,

v.

ROBERT P. CASEY, ET AL.,
Respondents/Cross-Petitioners.

On Writs of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF AMICUS CURIAE OF LIFE ISSUES INSTITUTE SUPPORTING RESPONDENTS/CROSS-PETITIONERS

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STATEMENT OF THE QUESTIONS PRESENTED

1. Did the Court of Appeals err in upholding the constitutionality of the following provisions of the Pennsylvania Abortion Control Act:

   a. 18 Pa. Cons. Stat. Ann. § 3203 (definition of medical emergency)

   b. 18 Pa. Cons. Stat. Ann. § 3205 (informed consent)

   c. 18 Pa. Cons. Stat. Ann. § 3206 (parental consent)

   d. 18 Pa. Cons. Stat. Ann. §§ 3207, 3214 (reporting requirements)?

2. Did the Court of Appeals err in holding 18 Pa. Cons. Stat. Ann. § 3209 (spousal notice) unconstitutional?

QUESTIONS DEALT WITH HEREIN

1. Does the equal protection clause protect an abortion right or invalidate the Pennsylvania spousal notice provision?

2. Does the ninth amendment protect an abortion right or prevent overruling of *Roe v. Wade?*

3. Is a remand required to consider the Pennsylvania Abortion Control Act under an altered standard of review or for consideration of asserted alternative constitutional bases for the abortion right?

TABLE OF CONTENTS

Page(s)

STATEMENT OF THE QUESTIONS PRESENTED i

QUESTIONS DEALT WITH HEREIN i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE..... 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT..... 2

I. The Equal Protection Doctrine Neither Provides a Constitutional Shelter for the Right to Abortion Nor Invalidates Pennsylvania's Spousal Notice Statute..... 2

A. The Equal Protection Clause Does Not Provide an Abortion Right 3

1. Equal Protection Analysis..... 3

2. Gender Discrimination 5

B. Equal Protection Does Not Invalidate the Spousal Notice Provision..... 8

II. The Ninth Amendment Neither Provides a Constitutional Shelter for the Right to Abortion Nor Prevents the Overruling of *Roe v. Wade* 9

A. The Ninth Amendment Does Not Provide an Abortion Right 9

1. The Principal Purpose of the Ninth Amendment Was to Avoid an Implied Extension of Federal Power 11

2. The Retained Rights Do Not Prevail Over Powers Delegated to the Federal Government..... 13

B. The Ninth Amendment Does Not Prevent the Overruling of Roe 19

III. No Remand Is Necessary to Decide This Case Under the Rational Basis or Undue Burden Standards of Review or Under Alternative Constitutional Claims 19

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

CASES

Bray v. Alexandria, No. 90-985 (U.S. *cert. granted*, 111 S.Ct. 1070) 7
Buckley v. Valeo, 424 U.S. 1 (1976) 10
Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) 4
Craig v. Boren, 429 U.S. 190 (1976) 5
Flemming v. Nestor, 363 U.S. 603 (1960) 4, 20
Frontiero v. Richardson, 411 U.S. 677 (1973) 5
Geduldig v. Aiello, 417 U.S. 484 (1974) 6
Griswold v. Connecticut, 381 U.S. 479 (1965)..... 10, 15
Harper v. Virginia State, Bd. of Elections, 383 U.S. 663 (1966)..... 4
Harris v. McRae, 448 U.S. 297 (1980) 20
Katzenbach v. Morgan, 384 U.S. 641 (1966) 7
Korematsu v. United States, 323 U.S. 214 (1944)..... 4
Lubin v. Panish, 415 U.S. 709 (1974)..... 10
Maher v. Roe, 432 U.S. 464 (1977) 20
Mills v. Habluetzel, 456 U.S. 91 (1982) 5
Planned Parenthood v. Casey, 744 F. Supp. 1323 (E.D. Pa. 1990) 2
Planned Parenthood v. Casey, 947 F.2d 682 (3d Cir. 1991) 2
Reed v. Reed, 404 U.S. 71 (1971)..... 5
Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)..... 10
Roe v. Wade, 410 U.S. 113 (1973)..... *passim*
Rostker v. Goldberg, 453 U.S. 57 (1981)..... 5
Schlesinger v. Ballard, 419 U.S. 498 (1975) 5
Shapiro v. Thompson, 394 U.S. 618 (1969) 5
Skinner v. Oklahoma, 316 U.S. 535 (1942) 4-5
Strauder v. West Virginia, 100 U.S. 303 (1880) 4
The Slaughter-House Cases, 83 U.S. 57 (1873)..... 3-4
United Public Workers v. Mitchell, 330 U.S. 75 (1947). 15

United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166 (1980)..... 4, 20
Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989)..... 20
Yick Wo v. Hopkins, 118 U.S. 356 (1886)..... 4

CONSTITUTIONAL PROVISIONS, STATUTES & RULES

18 Pa. Cons. Stat. Ann. § 3209 8
U.S. Const. amend. IX..... *passim*
U.S. Const. amend X 16-17
U.S. Const. amend. XIV, § 1..... *passim*
U.S. Const. art VI..... 18

OTHER AUTHORITIES

Berger, *The Ninth Amendment*, 66 Cornell L. Rev. 1 (1980)..... 11
Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1 (1955)..... 4
Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. Pub. L. 181 (1989) 3
Bopp & Coleson, Webster *and the Future of Substantive Due Process*, 28 Duquesne L. Rev. 271 (1990)..... 10
Bopp, *Will There Be a Constitutional Right to Abortion After the Reversal of* Roe v. Wade*?*, 15 J. Contemp. L. 131 (1989)..... 3
R. Bork, *The Tempting of America: The Political Seduction of the Law* (1990) 4, 7
Brief Amicus Curiae of American Victims of Abortion in Support of Petitioners, *Bray v. Alexandria*, No. 90-985 (U.S., *cert. granted*, 111 S. Ct. 1070)..... 7
Caplan, *The History and Meaning of the Ninth Amendment*, 69 Va. L. Rev. 223 (1983) 18
Comment, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. Chi. L. Rev. 814 (1966)..... 18

Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 Harv. L. Rev. 149 (1928) .. 17
The Documentary History of the Constitution (1981).. 12
E. Dumbauld, *The Bill of Rights and What It Means Today* (1957)..... 11, 14-15
Elliot's Debates (1836)..... 12
J. Ely, *Democracy and Distrust* (1980) 16
The Federalist, No. 84 (Hamilton) 12
Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955 (1984)..... 6
Letter from Hardin Burnley to James Madison (November 28, 1789), 12 *Papers of James Madison* 456.... 16
Letter from James Madison to George Washington (December 5, 1789), 12 *Papers of James Madison* 459 17
Papers of James Madison..... 13-14, 16-17
B. Patterson, *The Forgotten Ninth Amendment* (1955) 17
Report to the Attorney General, Wrong Turns on the Road to Judicial Activism: The Ninth Amendment and Privileges or Immunities Clause, U.S. Department of Justice, Sept. 25, 1987 11
Speech of James Wilson (Oct. 6, 1787), 13 *The Documentary History of the Constitution* 339-40 (1981)..... 12
Story, *Commentaries on the Constitution of the United States* (4th ed. 1873) 14
L. Tribe, *American Constitutional Law* (1978)..... 7
G. Wood, *The Creation of the American Republic 1776-1787* (1969)..... 11

BRIEF AMICUS CURIAE OF LIFE ISSUES INSTITUTE SUPPORTING RESPONDENTS/CROSS-PETITIONERS

INTEREST OF AMICUS CURIAE[1]

Life Issues Institute is a non-profit corporation based in Cincinnati, Ohio. Dr. John C. Willke, past president of the National Right to Life Committee and current president of International Right to Life, is president of Life Issues Institute. The goal of Life Issues Institute is to return full protection to all living humans, including the unborn, under the law. Life Issues Institute works to achieve this goal by serving the education needs of those dedicated to restricting abortion on demand throughout pregnancy, as imposed on the American people by the U.S. Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973). Life Issues Institute seeks to return legal protection to the unborn by this brief amicus curiae.

SUMMARY OF THE ARGUMENT

Planned Parenthood of Southeastern Pennsylvania et al. interweave with their fourteenth amendment privacy arguments equal protection arguments. However, equal protection provides no shelter for an abortion right and no provision of the Pennsylvania Abortion Control Act is unconstitutional on equal protection principles. Certain amici curiae in support of Planned Parenthood of Southeastern Pennsylvania et al. also urge that there is a ninth amendment right to abortion. The ninth amendment provides no support for an abortion rights and does not counsel against overruling

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[1]This brief is filed with permission of all the parties. Letters indicating this permission have been filed with the Clerk of this Court. Life Issues Institute gratefully acknowledges funding for this brief by a grant from the Lee Corporation, Indianapolis, Indiana, M. Monroe Lee, President.

Roe v. Wade. Finally, Planned Parenthood of Southeastern Pennsylvania et al. argue that a remand for further fact-finding and application of any lower standard of review is necessary in the event this Court establishes a different standard of review than that of *Roe v. Wade*. This is unnecessary and would be a waste of judicial resources, as would be a remand for consideration of constitutionality under alternative constitutional theories. This Court may and should resolve all such matters before it.

ARGUMENT

I. The Equal Protection Doctrine Neither Provides a Constitutional Shelter for the Right to Abortion Nor Invalidates Pennsylvania's Spousal Notice Statute.

Planned Parenthood of Southeastern Pennsylvania (et al.) (hereinafter Planned Parenthood) asserts repeatedly in its brief that restricting abortion by statute is a violation of the fourteenth amendment guarantee of equal protection.[2] *See, e.g.*, Brief for Petitioners/Cross-Respondents at 15-16, 19 n.27, 33, 39, 40, 46-48. Of course, *Roe v. Wade*, 410 U.S. 113, was decided on a fourteenth amendment privacy theory, *id.* at 153, as was the case at bar in the lower courts. *Planned Parenthood v. Casey*, 947 F.2d 682 (3d Cir. 1991) (Appendix to Petition for a Writ of Certiorari in No. 91-744 at 1a); *Planned Parenthood v. Casey*, 744 F. Supp. 1323 (E.D. Pa. 1990) (Appendix to Petition for a Writ of Certiorari in No. 91-744 at 104a).

However, Planned Parenthood seems concerned that the privacy underpinning of *Roe* cannot stand up under rigorous scrutiny. Therefore, it interweaves notions of equal protection theory with its privacy arguments, perhaps hoping that an

[2]The Fourteenth Amendment states in relevant part: "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

abortion privacy right will be less likely to be abandoned if some other constitutional principle can be shown to support a right to abortion on demand anyway.

The concerns of Planned Parenthood over the moribund privacy analysis of *Roe* are warranted. The scholarly rejection of Roe resulting from its flawed foundation was instantaneous and enduring. *See* Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. Pub. L. 181, 185-92 (1989) (sketching numerous critiques of Roe by constitutional scholars).

As a result, abortion rights advocates have been casting about for an alternative constitutional mooring for the abortion right. *See* Bopp, *Will There Be a Constitutional Right to Abortion After the Reversal of* Roe v. Wade*?*, 15 J. Contemp. L. 131 (1989) (discussing and refuting suggested alternatives to *Roe's* privacy analysis). The equal protection theory has been popular among abortion rights advocates, which indicates why it is interwoven with the *Roe* privacy right in the brief of Planned Parenthood in an effort to strengthen the moribund abortion privacy right. However, as demonstrated below, only a radically altered equal protection analysis would accommodate an abortion right. Indeed, traditional equal protection analysis would need to be altered as drastically to accommodate an abortion right as privacy jurisprudence was altered in *Roe* for the same purpose.

A. *The Equal Protection Clause Does Not Provide an Abortion Right.*

1. *Equal Protection Analysis*

Although the fourteenth amendment and its equal protection guarantee was originally interpreted to have the "pervading purpose" of protecting "the freedom of the slave race, the security and the firm establishment of that freedom, and the protection of the newly made freemen and citizen from the oppressions of those who had formerly exercised unlimited dominion over him," *The Slaughter-House Cases*, 83 U.S. 57,

71 (1873), equal protection was later expanded beyond its original meaning. Scholars have differed concerning the constitutional propriety of extending the equal protection doctrine to gender bias. *Cf.* Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1 (1955), *with* R. Bork, *The Tempting of America: The Political Seduction of the Law* (1990) (It was never contemplated that "racial and sexual groups needed special protection to the same degree," *id.* at 66 n.*.).

This Court has employed three levels of scrutiny in reviewing legislative enactments which classify persons. The lowest level of scrutiny, where no suspect classes or fundamental rights are involved, is the rational basis test. Under this test, this Court's inquiry into the purpose of the classification generally does not go very far. "Where . . . there are plausible reasons for [the legislature's] action, our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision.' " *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) *(quoting Flemming v. Nestor*, 363 U.S. 603, 612 (1960)).

Legislation that classifies on the basis of race or national origin, however, has historically been treated with less deference by the Court. *See, e.g., Strauder v. West Virginia*, 100 U.S. 303 (1880); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). In *Korematsu v. United States*, 323 U.S. 214 (1944), this Court stated that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] courts must subject them to the most rigid scrutiny." *Id.* at 216. As further developed by this Court, the strict scrutiny test requires that a classification be narrowly tailored to further a compelling government interest. *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). This test has come to be applied not only to statutes that classify on the basis of race and national origin, but also those classifications that infringe upon the exercise of a fundamental right by a particular group. *See, e.g., Harper v. Virginia State Bd. of Elections*, 383 U.S. 663

(1966); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

Recently, in the context of discrimination based on gender (and alienage and illegitimacy), this Court has employed an intermediate test requiring that the legislative classification be substantially related to an important government interest. *Craig v. Boren*, 429 U.S. 190, 197 (1976); *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982).

2. *Gender Discrimination*

The intermediate standard of review in the context of gender discrimination requires that "[t]o withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." *Craig*, 429 U.S. at 197.

Some gender discrimination cases, however, have not invalidated the statutory distinctions drawn between men and women. In *Schlesinger v. Ballard*, 419 U.S. 498 (1975), this Court was required to review a promotion policy of the United States Navy which allowed women a longer period of time for promotion prior to mandatory discharge than was allowed men. *Id.* at 500. The *Schlesinger* Court found that, unlike the statutes at issue in *Reed v. Reed*, 404 U.S. 71 (1971), and *Frontiero v. Richardson*, 411 U.S. 677 (1973), "the different treatment of men and women naval officers . . . reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers . . . are not similarly situated." *Id.* at 508. Similarly, in *Rostker v. Goldberg*, 453 U.S. 57 (1981), a case dealing with the Military Selective Service Act that permitted only men to be drafted, the Court found that "[m]en and women . . . are simply not similarly situated for purposes of a draft or registration for a draft." *Id.* at 78. The *Rostker* Court went on to say that "[t]he Constitution requires that Congress treat similarly situated persons similarly, not that it engage in gestures of superficial

equality." *Id.* at 79. In both cases, the statutory classification was upheld based on the differences between the sexes.

Thus, in the area of gender discrimination, there is a distinction between those statutory classifications that bear no relationship to actual differences between men and women, and those classifications that are predicated upon those differences. The former are held to a standard of intermediate scrutiny, while the latter are upheld as long as the distinction is rationally related to a legitimate government interest. Nowhere is this same distinction more apparent than in the context of pregnancy regulation.

Geduldig v. Aiello, 417 U.S. 484 (1974), presented the question of whether a state disability insurance program that excluded from coverage disabilities resulting from pregnancy denied women equal protection. *Id.* at 492. This Court found that there was no denial of equal protection because gender discrimination, as previously defined in *Reed* and *Frontiero*, did not exist with respect to the disability plan. *Id.* at 496 n.20. The *Geduldig* court stated that

> [t]he California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition — pregnancy — from the list of compensable disabilities. While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex based classification . . . . The program divides potential recipients into two groups — pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.

Id.

Logically, if pregnant women are not similarly situated with respect to nonpregnant persons, a law prohibiting abortion would not be a denial of equal protection to all women as a class, and therefore, not gender discrimination. *See* Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955, 985 (1984).

Therefore, the statute would only need to pass the rational basis test for the purposes of equal protection analysis.

However, under either rational basis scrutiny or intermediate scrutiny, a law restricting abortion ought to be upheld because of the existence of the preborn human being involved. Even some who advocate intermediate scrutiny for abortion restrictions recognize that "abortion uniquely threatens potential life, so that its separate treatment serves purposes that the exclusion of pregnancy from insurance coverage plainly does not." L. Tribe, *American Constitutional Law* 1071 n.6 (1978).[3] Equality of the laws simply cannot and should not be perverted to require an equality of results

[3]Strict scrutiny based on the existence of a fundamental right to abortion is no longer a consideration with the erosion of support for *Roe v. Wade* on this Court. Because traditional equal protection analysis does not provide for heightened scrutiny of abortion restrictions — under gender-based or fundamental rights analysis — abortion rights advocates have sought to create alternative equal protection models. *See* Brief Amicus Curiae of American Victims of Abortion in Support of Petitioners, *Bray v. Alexandria*, No. 90-985 (U.S., *cert. granted*, 111 S. Ct. 1070) (discussing and criticizing these alternative "models"). However, proponents of these alternative equal protection models simply cannot escape the fact that not all women are pregnant women. Even though many women have the capacity to become pregnant, it does not follow that laws that draw distinctions on the basis of reproductive biology discriminate on the basis of gender. Such distinctions do not affect the female gender as a whole. A hallmark of this Court's equal protection jurisprudence is the principle that similarly situated persons be treated equally. There is no similar circumstance to a woman bearing a preborn human being which, for a brief time, is entirely dependent on her for survival — a preborn human being which, in the vast majority of cases, she helped create by consensual activity known to carry with it the possibility of creation of just such a dependent preborn human.

It is true that models such as the "special treatment model" of equal protection would certainly benefit women, just as the poor would benefit from a redistribution of wealth, but this benefit would come at the expense of the constitutional concept of equality under the laws. Ultimately, these special models are not really models of equality — in the sense of equal treatment — but instead serve as a "liberal ratchet" to be used to reach what some believe are socially desirably results. R. Bork, *supra*, at 92 (applying the "liberal ratchet" simile to Justice Brennan's view of section 5 of the fourteenth amendment, which can only go one way according to Justice Brennan's opinion in *Katzenbach v. Morgan*, 384 U.S. 641 (1966)).

ensured by the government among persons who are not similarly situated.

B. Equal Protection Does Not Invalidate the Spousal Notice Provision.

Just as there is no underlying equal protection abortion right, the Pennsylvania spousal notice provision, 18 Pa. Cons. Stat. Ann. § 3209, does not violate the fourteenth amendment guarantee of equal protection — as Planned Parenthood insists, Brief for Petitioners/Cross-Respondents at 40, 46-48 — under any traditional application of equal protection doctrine.

Planned Parenthood argues that "the provision imposes duties on women alone, and confers rights solely on men." *Id.* at 46. Of course, women and men are not equally situated with respect to carrying a child which is the biological offspring of both spouses and whose life may be at risk by a contemplated abortion. Petitioner/Cross-Respondents try to argue some equivalence by saying that men may be sterilized, etc. without giving spousal notice. This, of course, is true, and women may be sterilized without giving spousal notice. But nowhere are men given the option of terminating the life of an offspring already in being, albeit in utero. There simply is no equivalent situation to trigger the equal protection doctrine; the existence of the unborn human being changes all equivalence.

Nor does a spousal notice requirement violate the equal protection clause by promoting sexual stereotypes of the man as the "head and master" or the woman as "need[ing] spousal guidance." *Id.* at 47-48. The requirement simply acknowledges that a father has an interest in an unborn child of which he is a biological parent and seeks in a very minimal fashion to give some recognition of that interest. There is no violation of equal protection in that.

II. The Ninth Amendment Neither Provides a Constitutional Shelter for the Right to Abortion Nor Prevents the Overruling of *Roe v. Wade*

Certain amici curiae in support of Planned Parenthood of Southeastern Pennsylvania in the case at bar insist the ninth amendment[4] supports a substantive abortion right and that it protects from overruling an abortion right found elsewhere in the Constitution:

> [t]o accept the invitation to overrule *Roe v. Wade* is to accept an invitation to change the very meaning of the word "rights" in our constitutional tradition — the most profound and dangerous constitutional deviation in the last two centuries. The Court should decline the invitation; *indeed, the Constitution explicitly commands the Court to do so.*

Brief *Amicus Curiae* of 178 Organizations in Support of Planned Parenthood of Southeastern Pennsylvania at 8 (emphasis added).

However, the ninth amendment neither guarantees a right to abortion nor commands that an abortion right once erroneously recognized as a constitutional right be retained.

A. The Ninth Amendment Does Not Provide an Abortion Right.

The ninth amendment's retained rights cannot be a new source of fundamental constitutional rights. This is true because (1) the principle purpose of the ninth amendment was to avoid an implied extension of federal power due to the ratification of the Bill of Rights; (2) retained rights cannot prevail over the delegated powers of the federal government;

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[4]The ninth amendment states in relevant part: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX.

and (3) the federal courts are not empowered to enforce retained rights against the states.

The ninth amendment declares: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX.

The ninth amendment has been cited by certain members of this Court and others in support of the concept that there are other protected rights not enumerated in the Constitution. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring) ("[T]here are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments." *Id.* at 488); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) ("[T]he Constitution's draftsmen . . . were concerned that some important rights might be thought disparaged because not specifically guaranteed." *Id.* at 579); *Lubin v. Panish*, 415 U.S. 709, 721 n. (1974) (Douglas, J., concurring) (right to vote in state elections). *Cf. Roe v. Wade*, 410 U.S. 113, 153 (alluding to a lower court's reliance on the ninth amendment for a right of privacy reserved to the people but finding the right instead in the fourteenth amendment); *Buckley v. Valeo*, 424 U.S. 1, 59 n.67, 84 n.113 (1976) (per curiam) (campaign spending limits may implicate ninth amendment rights).

This *amicus* has no quarrel with the view that there are other protected rights not enumerated in the Constitution. *See generally* Bopp & Coleson, Webster *and the Future of Substantive Due Process*, 28 Duquesne L. Rev. 271 (1990). However, this *amicus* does dispute the concept that the ninth amendment protects unenumerated rights that conflict with the delegated powers of the federal government or that the

ninth amendment limits the people's authority to constitute state governments.[5]

The natural meaning of the ninth amendment is that the Constitution's enumeration of certain rights does not deny, disparage, expand, or restrict the rights, unenumerated in the Constitution, that are retained by the people under state law. The words, history, and purpose of the ninth amendment demonstrate that it is not a "bottomless well in which the judiciary can dip for the formation of undreamed of 'rights' in their limitless discretion." Berger, *The Ninth Amendment*, 66 Cornell L. Rev. 1, 2 (1980) (characterizing Justice Goldberg's concurrence in *Griswold).* It is, instead, a rule of construction that confirms that the federal government is one of limited powers, and that rights not delegated by the people to the federal government are not to be denied or disparaged simply because they are not enumerated in the Constitution. By definition, then, the "rights retained" do not overlap or trump granted federal powers, nor do they override state powers.

1. *The Principal Purpose of the Ninth Amendment Was to Avoid an Implied Extension of Federal Power.*

As sent to the states for ratification, the Constitution did not include a general bill of rights. This omission provoked considerable opposition to the ratification of the Constitution. *See* G. Wood, *The Creation of the American Republic 1776-1787* 536-43 (1969); E. Dumbauld, *The Bill of Rights and What It Means Today* 10-33 (1957). Two principal arguments were made in opposition to the addition of a bill of rights. First, it was argued that a bill of rights was unnecessary because the federal government was a government of limited, delegated powers.

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[5]This section of this Brief draws heavily from the *Report to the Attorney General, Wrong Turns on the Road to Judicial Activism: The Ninth Amendment and Privileges or Immunities Clause*, U.S. Department of Justice, Sept. 25, 1987, at 15-27, which is an excellent discussion of the purpose and intent of the ninth amendment.

James Wilson explained in a widely republished speech that every power

> which is not given, is reserved. This distinction being recognized, will furnish an answer to those who think the omission of a bill of rights, a defect in the proposed constitution: for it would have been superfluous and absurd, to have stipulated with a federal body of our own creation, that we should enjoy those privileges, of which we are not divested either by the intention or the act that has brought that body into existence.

Speech of James Wilson (October 6, 1787), 13 *The Documentary History of the Constitution* 339-40 (1981).

Second, it was argued that the addition of a bill of rights would imply that all other rights and powers had been delegated to the federal government. Such an implication was inconsistent with the concept of a government of limited powers and therefore was to be avoided. James Wilson expressed it this way:

> [I]n a government consisting of enumerated powers, such as is proposed for the United States, a bill of rights would not only be unnecessary, but in my humble judgment, highly imprudent. In all societies, there are many powers and rights which cannot be particularly enumerated. A bill of rights annexed to a constitution is an *enumeration of the powers* reserved. If we attempt an enumeration, every thing that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete.

2 *Elliot's Debates* 436-37 (1836) (emphasis in original). *See also The Federalist*, No. 84, at 579-80 (Hamilton) (referring to a bill of rights as "dangerous" for this reason).

In order to secure its ratification by the states, the federalists agreed to amend the Constitution to include a bill of rights. James Madison proposed the amendments that

eventually became the Bill of Rights. He defended his proposal which became the ninth amendment:

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration, and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the general government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the 4th resolution. . . .

12 *Papers of James Madison* at 206. In this way Madison confirmed his understanding that his proposal operated as a restriction on the implied extension of federal powers.

2. *The Retained Rights Do Not Prevail Over Powers Delegated to the Federal Government.*

In his statement on the House floor introducing the resolutions that, with revisions, became the Bill of Rights, Madison spoke of the role of the courts in enforcing rights:

> It has been said, that it is unnecessary to load the constitution with this provision, because it was not found effectual in the constitution of particular states. It is true, there are a few particular states in which some of the most valuable articles have not, at one time or other, been violated; but does it not follow but they may have, to a certain degree, a salutary effect against the abuse of power. If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights *expressly stipulated* for in the constitution by the declaration of rights.

12 *Papers of James Madison* 206-07 (emphasis added).

This contemporaneous explanation contemplates that courts will serve as an "impenetrable bulwark" against (1) unconstitutional expansions of power and (2) infringement of "expressly stipulated" rights in the Constitution. There is no suggestion that courts are to create and enforce exceptions to granted powers in favor of retained rights. Of course, if, as the traditional interpretation maintains, the retained rights are those not delegated to the federal government, then, to the extent courts are an "impenetrable bulwark" against every "assumption of power" beyond those granted the government, no other specific protection of retained rights is required.

The text, history, and purpose of the ninth amendment all demonstrate that retained rights do not prevail over delegated powers. Thus, the argument that a right to abortion resides within the ninth amendment misinterprets the nature of the ninth amendment. This amendment has been traditionally understood to contradict the concept that the people have abandoned all rights not specifically granted to them in the Bill of Rights. Without the ninth amendment, there was a concern that the Bill of Rights might be misinterpreted to be an implied extension of federal power.

For example, Justice Story explained that the ninth amendment "was manifestly introduced to prevent any perverse or ingenious misapplication of the well-known maxim, that an affirmation in particular cases implies a negation in all others; and, *e converso*, that a negation in particular cases implies an affirmation in all others." J. Story, *Commentaries on the Constitution of the United States* § 1905, at 624-25 (4th ed. 1873).

Edward Dumbauld, in his book, *The Bill of Rights and What It Means Today*, stated the purpose of the ninth amendment:

> The Ninth Amendment was not intended to add anything to the meaning of the remaining articles in the Constitution. It was simply a technical proviso inserted to forestall the possibility of misinterpretation of the rest of the document . . . . It is destitute of substantive effect.

E. Dumbauld, *The Bill of Rights and What It Means Today* 63-64.

Because this is true, then the retained rights referred to in the ninth amendment are simply those rights that remain after subtracting the powers delegated to the federal government from the original sovereignty of the people. Thus, retained rights are subordinate to the delegated powers of the federal government and cannot prevail over those delegated powers when they conflict.

Justice Reed stated this in *United Public Workers v. Mitchell*, 330 U.S. 75 (1947): "[W]hen objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth . . . Amendment[], the inquiry must be directed toward the granted power under which the action of the Union was taken. If the granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth . . . Amendment[], must fail." *Id.* at 95-96.

The purpose of the ninth amendment was not to expand the powers of the courts in determining the nature of these retained rights, the purpose was to limit the federal government to the powers expressly granted in the Constitution. Justice Black, in his dissent in *Griswold v. Connecticut*, 381 U.S. at 520, stated: "as every student of history knows," the ninth "[a]mendment was passed, not to broaden the powers of this Court or any other department of 'the general government' but . . . to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication."

Activists argue that the focus on rights, rather than powers, in the ninth amendment and in Madison's statement introducing his draft (quoted above), implies that the amendment means something more than that federal powers

are limited. Professor Ely, for example, after quoting Madison's explanation, contends "that even here Madison, though he may have linked them in a way that seems unnatural today, made *both* [points] — that he wished to forestall both the implication of unexpressed powers *and* the disparagement of unenumerated rights. What is more important is that just as the tenth amendment clearly expresses the former point, the ninth amendment clearly expresses the latter." J. Ely, *Democracy and Distrust 36* (1980) (emphasis in original). The point appears to be that unless retained rights trump granted powers, the ninth amendment is superfluous.

This argument depends upon the significance assigned to the use of the words "powers" in the tenth amendment and "rights retained" in the ninth amendment. The change in focus from "powers" to "rights retained" was the cause of some opposition to ratification. Hardin Burnley reported in a letter to Madison that what became the ninth and tenth amendments were initially rejected by the Virginia Assembly. Governor Randolph led the opposition, arguing that it was not possible to determine which rights were retained by the people.

> His principal objection was pointed against the word *retained* . . . and his a[r]gument if I understood it was applied in this manner, that as the rights declared in the [first eight amendments] were not all that a free people would require the exercise of; and that as there was no criterion by which it could be determined whether any other particular right was retained or not, it would be more safe, & more consistent with the spirit of the 1st. & 17th. amendments proposed by Virginia [which were predecessors to the Ninth and Tenth Amendments], that this reservation against constructive power, should operate rather as a provision against extending the powers of Congress by their own authority, than as a protection to rights reducible to no definitive certainty.

Letter from Hardin Burnley to James Madison (November 28, 1789), 12 *Papers of James Madison* 456 (original spelling retained) (emphasis in original).

In a letter to George Washington, Madison responded to Randolph's argument, contending that it raised, in essence, a distinction without a difference.

> The difficulty [stated] against the amendments is really unlucky, and the more to be regretted as it springs from a friend to the Constitution. It is still a greater cause of regret, if the distinction be, as it appears to me, altogether fanciful. If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the latter be secured, by declaring that they shall not be abridged, or that the former shall not be extended. If no line can be drawn, a declaration in either form would amount to nothing.

Letter from James Madison to George Washington (December 5, 1789), 12 *Papers of James Madison* 459. Madison thus confirmed his understanding that, notwithstanding the reference to "rights" instead of "powers," the ninth amendment continued to operate as a restriction on the implied extension of federal powers.

Under Madison's and traditional interpretation, the ninth amendment is a companion to the tenth amendment and is not redundant. The tenth amendment affirms that powers not delegated to the federal government are reserved to the states and the people; in other words, it is a statement of *who* possesses undelegated powers. The ninth amendment, on the other hand, concerns the *location* of the line between delegated powers and retained rights, and commands that the line not be moved by virtue of the enumeration of some rights.

Some argue that the "rights retained by the people" refer to "natural rights," theories of which were popular among some at the time of the ratifications of the Constitution and the Bill of Rights, and that those unwritten "natural rights" trump powers. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 Harv. L. Rev. 149, 152 (1928); B. Patterson, *The Forgotten Ninth Amendment* 19-22 (1955);

Comment, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. Chi. L. Rev. 814, 816 (1966).

The Constitution, however, nowhere incorporates natural law or provides that natural, fundamental, or any sort of higher law is superior to it. To the contrary, article VI provides that the "Constitution," not some higher law principles, "shall be the supreme Law of the Land."

Furthermore, the "rights retained" by the people under the ninth amendment may be delegated to or waived as against a state. Thus, whether the right has been retained by the people as against a *state* depends upon the allocation of governmental powers and individual rights under that state's constitutional law. One would not look to the U.S. Constitution or the federal courts for their origin, description, or enforcement. Certainly, the rights retained by the people could be waived, limited or defined by state law and constitutions pursuant to the actions of the people or their constitutionally empowered legislative representatives. To assert that the retained rights are now incorporated by the fourteenth amendment, including a right to abortion, and that federal courts are now under an obligation to protect such retained rights as against the states, transforms the ninth amendment into a restriction on the people's right to create state governments and to empower those states with such authority as they may constitutionally delegate to them.

Russell Caplan reaches a similar conclusion by focusing on the state-law basis of rights at the time of the Constitution's ratification. He argues that the "rights retained" in the ninth amendment refer only to state-based rights, that those state-based rights do not trump federal powers because of the Supremacy Clause, and that it is logically impossible to "incorporate" the ninth amendment through the fourteenth against the states, because the Amendment was intended to protect, not circumscribe, state-based rights and circumstances. Caplan, *The History and Meaning of the Ninth Amendment*, 69 Va. L. Rev. 223, 260-62 (1983).

Therefore, the ninth amendment is not substantive in nature. It does not create rights, neither is it a source from which new rights may be created. It is simply a rule of construction, no more, no less.

B. The Ninth Amendment Does Not Prevent the Overruling of Roe.

Just as the ninth amendment can provide no substantive abortion right, neither does it forbid the overruling of *Roe v. Wade*, as argued by certain amici curiae in support of Planned Parenthood of Southeastern Pennsylvania in the case at bar. Brief *Amicus Curiae* of 178 Organizations in Support of Planned Parenthood of Southeastern Pennsylvania at 8. No amount of argument that rights set forth in the Constitution are supposed to be "permanent," *id.* at 6, can legitimately save a right wrongly found to be in the Constitution. If this Court cannot correct errors in constitutional law made by itself, then there is nor cure for constitutional error except for the cumbersome process of constitutional amendment. Whatever the ninth amendment may be determined to do, it is not designed to make error permanent.

III. No Remand Is Necessary to Decide This Case Under the Rational Basis or Undue Burden Standards of Review or Under Alternative Constitutional Claims.

Planned Parenthood asserts that in the event this Court expressly determines that a strict scrutiny privacy theory no longer governs abortion jurisprudence, then this Court should remand for consideration of the provisions — with detailed fact finding — under any new standard established or under alternative constitutional provisions. *Id.* at 5, 9 n.27. However, such a remand is neither required nor desirable.

First, Pennsylvania put on evidence in the District Court below designed to show that it had compelling state interests supporting its abortion restrictions and that its abortion law

was narrowly tailored to give effect to those interests. Because the evidence shows that Pennsylvania's abortion restrictions survive strict constitutional scrutiny, the evidence will show, if any is needed, that the restrictions are constitutional under either an undue burden or rational basis standard of review.

Second, the undue burden test and especially the rational basis tests do not require judicial fact-finding. Rather, the concepts of "undue" and "rational" are capable of rational, not evidentiary proof. Regarding the rational basis test, this Court has declared: "Where . . . there are plausible reasons for [the legislature's] action, our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision.' " *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (*quoting Flemming v. Nestor*, 363 U.S. 603, 612). Therefore, if any rational basis may be perceived to undergird Pennsylvania's abortion restrictions, then they ought to survive scrutiny. This standard has already been met, in the mind of the appellate court below with regard to all but the spousal notice provision, and even this provision has a basis in rationality, which is recognition in some minimal fashion of the interests of husband in a preborn child which is genetically his as well as his wife's.

Third, where this Court has decided abortion cases under a lower standard in the past, it has not remanded for further consideration by a lower court under the lower standard. For example, in the abortion funding cases, this Court held that a lower standard was applicable than that applied by the lower courts and then proceeded to decide the cases under the lower standard. *Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980). Likewise, in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989), this Court did not remand for consideration of possible mootness the provisions of Missouri's abortion statute which banned the use of public funds for "encouraging or counseling a woman to have an abortion," even though such remand was argued for at length in brief of plaintiffs/appellees, Reproductive Health Services, et al. Brief of Appellees at 31-35, *Webster*, 109 S. Ct. 3040.

Fourth, should this Court choose to do so, it certainly has the authority to hold that there is no constitutional right to abortion under a fourteenth amendment privacy theory *or under any other constitutional theory.* Further fact-finding or remand for review by a lower court on these issues would be a waste of federal judicial resources.

CONCLUSION

Roe v. Wade was an exercise of raw judicial power when it was decided, and the Constitution remains unchanged in its lack of any support for an abortion right — under any constitutional theory. *Roe v. Wade* should be expressly reversed and the statutes herein upheld under the rational basis test. In any event, this Court should affirm the decision in No. 91-744 and reverse the decision in No. 91-902.

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April 6, 1992

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, ET AL.,
Petitioners/Cross-Respondents,

v.

ROBERT P. CASEY, ET AL.,
Respondents/Cross-Petitioners.

On Writs of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF AMICUS CURIAE OF NATIONAL RIGHT TO LIFE, INC. SUPPORTING RESPONDENTS/CROSS-PETITIONERS

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STATEMENT OF THE QUESTIONS PRESENTED

1. Did the Court of Appeals err in upholding the constitutionality of the following provisions of the Pennsylvania Abortion Control Act:

   a. 18 Pa. Cons. Stat. Ann. § 3203 (definition of medical emergency)

   b. 18 Pa. Cons. Stat. Ann. § 3205 (informed consent)

   c. 18 Pa. Cons. Stat. Ann. § 3206 (parental consent)

   d. 18 Pa. Cons. Stat. Ann. §§ 3207, 3214 (reporting requirements)?

2. Did the Court of Appeals err in holding 18 Pa. Cons. Stat. Ann. § 3209 (spousal notice) unconstitutional?

QUESTION DEALT WITH HEREIN

1. Does the undue burden test provide a workable and constitutionally sound standard of review for reviewing abortion legislation?

TABLE OF CONTENTS

Page(s)

STATEMENT OF THE QUESTIONS PRESENTED i

QUESTION DEALT WITH HEREIN i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

I. *Roe v. Wade* is Unworkable 2

A. *Roe* Appeared to Give States Some Latitude to Restrict Abortion But Has Not Done So In Practice 2

B. The Trimester Framework Is Tied to Advances in Medical Technology, Making Legislative Enactment Virtually Impossible 3

C. *Roe* Did Not End the Abortion Controversy, But Has Distorted the Law in Many Areas.. 7

1. *Roe* Has Confused the Law Protecting the Unborn in Non-Abortion Contexts 7

a. Tort Law — Development of Fetal Rights 8

b. Wrongful Death 9

c. Wrongful Birth 10

d. Homicide of the Unborn 10

e. Other Areas 11

2. *Roe* Has Been Used to Argue for an Expansive Interpretation of the Right of Privacy 12

3. *Roe* Has Distorted the Law Regarding Rules of General Application 12

a. Statutory Construction 12

b. Evidentiary Standards Applicable to Preliminary Injunction Hearings 13

II. If the Undue Burden Test Is to Be Used, A Workable Standard Must Be Clearly Articulated 14

A. The Undue Burden Test Is Not Workable as Unterstood and Applied by the Third Circuit 15

1. The Third Circuit Failed to Understand That in Determining Whether the Burden Is Undue the Effect on the Class, Not Some Individuals, Must Be Considered.. 15

2. The Third Circuit Failed to Recognize Compelling State Interests Which It Should Have Recognized 15

a. The Court Erred In Failing to Recognize the Father's Compelling Interests 16

b. The Court Erred in Failing to Recognize the Compelling Interests in Protecting the Unborn Throughout Pregnancy ... 17

3. The Third Circuit Erred in Holding That the Spousal Notice Provision Would Have Been Impermissible Even With a Compelling Interest For Not Being Narrowly Drawn 17

B. Assuming the Continued Existence of Constitutional Protection for Abortion Above the "Rational Basis" Level, the "Undue Burden" Test Might Be Workable if This Court Sets Forth Clear Standards 18

1. Any Statute, Regardless of Whether It Imposes an Undue Burden, Will Be Upheld if It Reasonably Furthers a Compelling Interest 18

2. The States Have Compelling Interests, Including the Protection of Unborn Life, Which Exist Throughout Pregnancy 20

3. Statutes Which Result in Fewer Abortions Would Reasonably Further the State's Interest in Protecting Unborn Life and Would Be Constitutional 21

4. Failure to Establish the Above Three Elements of the Undue Burden Test Would Result in Ad-Hoc, Multi-Factor Balancing, Yielding Unclear Guidelines 21

III. The Rational Basis Test Is Preferable to the Undue Burden Test 24

CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

CASES

American College of Obstetricians & Gynecologists v. Thornburgh, 737 F.2d 283 (3rd Cir. 1984), *aff'd*, 476 U.S. 747 (1986) 4
Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946) 8
Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (Cal. Ct. App. 1986) 12
City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) ..... *passim*
Colautti v. Franklin, 439 U.S. 379 (1979) 5, 6
Cruzan v. Director, 110 S. Ct. 2841 (1990) 12
CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987) 22
Davis v. Davis, No. E-14496, slip op. (Cir. Ct. for Blount Cty. Tenn. Sep. 21, 1989) 11
Davis v. Davis, 1990 WL 130807 (Tenn. App. 1990) 11
Dietrich v. Northampton, 138 Mass. 14 (1884) 8
Doe v. Bolton, 410 U.S. 179 (1973) ..... *passim*
Hernandez v. Garwood, 390 So.2d 357 (Fla. 1980) 9
H. L. v. Matheson, 450 U.S. 398 (1981) 15
Hodgson v. Minnesota, 110 S.Ct. 2926 (1990) 19, 24
Hogan v. McDaniel, 204 Tenn. 253, 559 S.W.2d 774 (Tenn. 1977) 9
Hollis v. Commonwealth, 652 S.W.2d 61 (Ky. 1983) ... 11
In re Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976) ... 12
Justus v. Atchison, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977) 9
Keeler v. Superior Court, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970) 11
Kelly v. Gregory, 282 A.D. 542, 125 N.Y.S.2d 696 (1953) 9

Margaret S. v. Edwards, 488 F.Supp. 181 (E.D. La. 1980) 4
Ohio v. Akron Center for Reproductive Health, 110 S.Ct. 2972 (1990) 24
People v. Smith, 59 Cal. App. 3d 751, 755, 129 Cal. Rptr. 498, 502 (1976) 11
Planned Parenthood Association of Kansas City, Missouri v. Ashcroft, 462 U.S. 476 (1983) 13
Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976) 16
Rodos v. Michaelson, 396 F. Supp. 768 (D. R.I. 1975), *vacated for lack of standing of plaintiffs*, 527 F.2d 582 (1st Cir. 1975) 5
Roe v. Wade, 410 U.S. 113 (1973) ..... *passim*
Scheinberg v. Smith, 659 F.2d 476 (5th Cir. 1981)..... 16, 20
Schulte v. Douglas, 567 F.Supp. 522 (D. Neb. 1981), *aff'd per curiam, sub nom. Womens' Servs., P.C. v. Douglas*, 710 F.2d 465 (8th Cir. 1983) 5
State v. Brown, 378 So. 2d 916 (La. 1979) 11
State v. Gyles, 313 So.2d 799 (La. 1975)..... 11
State v. Soto, 378 N.W.2d 625 (Minn. 1985)..... 11
Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986)..... *passim*
Toth v. Goree, 65 Mich. App. 296, 237 N.W.2d 297 (1975) 10
United States v. Vuitch, 402 U.S. 62 (1971)..... 4
Wallace v. Wallace, 120 N.H. 675, 421 A.2d 134 (1980). 10
Webster v. Reproductive Health Services, Inc., 492 U.S. 490 (1989)..... 3, 14, 17, 25
Werling v. Sandy, 17 Ohio St. 3d 45, 476 N.E.2d 1053 (1985)..... 10
Williamson v. Lee Optical, 348 U.S. 483 (1955) 25

CONSTITUTIONAL PROVISIONS, STATUTES & RULES

18 Pa. Cons. Stat. Ann. § 3210(c) 13
N.Y. Rev. Stat. pt. IV, ch. I, tit. II, §§ 8, 9 10
18 Pa. Cons. Stat. Ann. § 3209 15

OTHER AUTHORITIES

Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U.J. Public Law 181 (1989) 7, 12, 13
Bopp, Bostrom & McKinney, *The "Rights" and "Wrongs" of Wrongful Birth and Wrongful Life: A Jurisprudential Analysis of Birth Related Torts*, 27 Duq. L. Rev. 461 (1989)..... 10
Bopp, *Will There Be a Constitutional Right to Abortion After the Reconsideration of* Roe v. Wade?, 15 J. Contemp. L. 131 (1989)..... 7
Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 Cal. L. Rev. 1250 (1975)..... 10
Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term In Constitutional Adjudication*, 68 B.U.L. Rev. 917 (1988) 23
J. Mohr, *Abortion in America: The Origins and Evolution of National Policy*, 1800-1900 (1978) 10
Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 Notre Dame L. Rev. 349 (1970)..... 9
W. Prosser, *Handbook on the Law of Torts* (4th ed. 1971) 8
Prosser and Keeton on the Law of Torts (W. Keeton ed. 5th ed. 1984)..... 9
Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959) 21

BRIEF AMICUS CURIAE OF NATIONAL RIGHT TO LIFE COMMITTEE, INC. SUPPORTING RESPONDENTS/CROSS-PETITIONERS

INTEREST OF AMICUS CURIAE[1]

The National Right to Life Committee, Inc. is a nonprofit organization whose purpose is to promote respect for the worth and dignity of all human life, including the life of the unborn child from the moment of conception. The National Right to Life Committee, Inc. is comprised of a Board of Directors representing 51 state affiliate organizations and about 3,000 local chapters made up of individuals from every race, denomination, ethnic background, and political belief. It engages in various lawful political, legislative, legal, and educational activities to protect and promote the concept of the sanctity of innocent human life.

The members of the National Right to Life Committee, Inc. have been the primary promoters of laws restricting abortion to only those instances in which the mother's life is in danger. Since *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), the members of the National Right to Life Committee, Inc. have supported legislation to protect unborn human life within the limits set by those decisions and have sought, through lawful means, those changes in the law which would allow full legal protection for the unborn. The National Right to Life Committee, Inc. seeks to advance its interests by addressing the legal issues herein.

SUMMARY OF THE ARGUMENT

Because *Roe v. Wade* is unworkable and has no proper constitutional foundation, support for it is eroding. In place of

[1]This brief is filed with permission of all the parties. Letters indicating this permission have been filed with the Clerk of this Court.

Roe's strict scrutiny analysis, the United States Court of Appeals for the Third Circuit in this case employed the undue burden test, which Justice O'Connor previously suggested that this Court has applied to abortion legislation. However, the Third Circuit misunderstood the test and misapplied it with regard to the spousal notice provision which it struck down. As interpreted by the Third Circuit, the undue burden test is unworkable. If this Court should decide to establish an undue burden analysis to govern constitutional abortion jurisprudence, it must set out a clear and workable undue burden analysis. The focus of this analysis is whether the state has compelling interests throughout pregnancy. A majority of the Justices of this Court has recognized (directly or indirectly and in separate opinions) that there are compelling interests in protecting unborn life and maternal health which exist throughout pregnancy. This needs to be clearly established in order to make an undue burden analysis workable. However, the very existence of special constitutional protection for abortion is questionable and has no majority support on this Court. Therefore, it would be preferable to hold that the rational basis test governs constitutional abortion jurisprudence.

ARGUMENT

I. *Roe v. Wade* Is Unworkable.

A. Roe *Appeared to Give States Some Latitude to Restrict Abortion But Has Not Done So In Practice.*

This Court, in *Roe v. Wade*, declared that the right to abortion is not absolute: "The Court has refused to recognize an unlimited right of this kind in the past." Roe, 410 U.S. 113, 154 (1973). Rather, the Court stated, "[T]his right . . . must be considered against important state interests in regulation." *Id.* This is so, the Court noted, because the abortion privacy right "is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education . . . ." *Id.* at 159. The difference is that "[t]he pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus." *Id.*

The state interests justifying regulation of abortion mentioned by this Court were the interests in protecting maternal health and "the potentiality of human life." *Id.* at 162. Although the *Roe* majority appeared to give some effect to these interests by declaring them compelling at certain points in pregnancy, effectuation of these interests has proven elusive. The reality has been abortion on demand throughout pregnancy. Even modest attempts to regulate abortion have routinely been struck down. *See, e.g., Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 783 (1986) (Burger, C.J., dissenting) ("[T]oday the Court astonishingly goes so far as to say that the State may not require that a woman contemplating an abortion be provided with accurate medical information concerning the risks inherent in the medical procedure . . . .").

B. *The Trimester Framework Is Tied to Advances in Medical Technology, Making Legislative Enactment Virtually Impossible.*

Both petitioners and certain amici argue that *Roe's* trimester framework "fairly accommodates competing interests," "provides clear guidance to state governments and lower courts," and "provides a workable, predictable framework within which states can regulate abortion and courts can review such regulations."[2] Entirely apart from the arbitrary and essentially legislative nature of *Roe's* trimester regime,[3]

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[2]Brief of Petitioners, Cross-Respondents at 27-31; Brief Amici Curiae for Rep. Don Edwards et al. at 24 (herein); Brief Amici Curiae of the States of New York et al. at 13-14 (herein).

[3]*Roe*, 410 U.S. at 173 (Rehnquist, J., dissenting); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 460-61 (1983) (O'Connor, J., dissenting); *Thornburgh*, 476 U.S. at 789, 794-95 (White, J., dissenting), 814-15 (O'Connor, J., dissenting) (1986); *Webster v. Reproductive Health Services, Inc.*, 492 U.S. 490, 518-19 (plurality opinion by Rehnquist, C.J.) (1989).

the experience of the federal courts in trying to administer the trimester scheme indicates otherwise. Roe is "workable," but only in the sense that virtually no regulations designed to safeguard maternal health or protect fetal life are constitutional.

For example, in *Roe*, the Court held that after viability, "the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Roe*, 410 U.S. at 164-65. In the companion case *Doe v. Bolton*, the Court defined the scope of the health exception, relying upon its earlier opinion in *United States v. Vuitch*, 402 U.S. 62 (1971):

> [T]he medical judgment may be exercised in the light of all factors — physical, emotional, psychological, familial, and the woman's age — relevant to the well-being of the patient. All these factors may relate to health.

Doe, 410 U.S. at 192.

Given this expansive definition of "health," it is doubtful whether *any* statute attempting to limit post-viability abortions would be constitutional. The authority purportedly conferred upon the States to proscribe abortion after viability has proved to be illusory. In *American College of Obstetricians & Gynecologists v. Thornburgh*, 737 F.2d 283 (3rd Cir. 1984), *aff'd*, 476 U.S. 747 (1986), the Third Circuit, noting that "no Supreme Court case has upheld a criminal statute prohibiting abortion of a viable fetus," stated in dicta that had Pennsylvania attempted to prohibit post-viability abortions performed for psychological or emotional reasons, such a limitation would have violated *Bolton*. 737 F.2d at 298-99. Legislative attempts to restrict post-viability abortions have been uniformly rejected. *See, e.g., Margaret S. v. Edwards*, 488 F.Supp. 181, 191 (E.D. La. 1980) (Louisiana statute prohibiting abortions after viability unless necessary "to prevent permanent impairment to [the woman's] health" held

unconstitutional becuse "[p]reserving maternal health means more than preventing permanent incapacity" and "[a] rape or incest victim may not be able to prove that her mental health will be permanently impaired if she is forced to bear her attacker's child, but she might be able to show that it is necessary to preserve her immediate mental health"); *Schulte v. Douglas*, 567 F.Supp. 522 (D. Neb. 1981), *aff'd per curiam, sub nom. Women's Servs., P.C. v. Douglas*, 710 F.2d 465 (8th Cir. 1983) (statute which prohibited abortion after viability unless "necessary to preserve the woman from imminent peril that substantially endangers her life or health" held unconstitutional); *Rodos v. Michaelson*, 396 F. Supp. 768 (D. R.I. 1975), *vacated for lack of standing of plaintiffs*, 527 F.2d 582 (1st Cir. 1975) (striking down statute prohibiting post-quickening abortions except when "necessary to preserve the life of the mother").

Notwithstanding the Court's recognition of the states' interest in promoting maternal health, reasonable legislative measures intended to make sure that the abortion choice represents an *informed* decision after consultation with the woman's physician have also been routinely struck down. *See, e.g., Thornburgh*, 476 U.S. at 759-64; *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 442-49 (1983).

The trimester system has proven to be unworkable in other respects, as well. The "bright lines" drawn between the trimesters have become blurred. Attempts to set viability at a definite stage in pregnancy so that enforcement of the laws applicable after viability could be based on objective criteria have been struck down. *See Colautti v. Franklin*, 439 U.S. 379, 388-89 (1979).

And, although *Roe* itself indicated that states could require abortions performed after the end of the first trimester to be performed in hospitals, *Roe*, 410 U.S. at 163, this Court retreated from this position in the *Akron* case, striking down a second-trimester hospitalization requirement, *Akron*, 462

U.S. at 433-39. This change in doctrine was attributable to recent medical advances, under which the City of Akron's ordinance requiring second trimester hospitalization was no longer "reasonable" because it departed from "accepted medical practice." *Id.* at 436-38. The Court's approach to abortion regulation, i.e., making the determination of constitutionality turn upon medical standards in effect at the time the case reaches the Court, is "completely unworkable." *Id.* at 454 (O'Connor, J., dissenting). It requires a state to determine what is "acceptable medical practice" not only for each type of abortion performed, but also for each type of abortion at each week of pregnancy within each trimester. *Id.* at 456. States must not only "continuously and conscientiously study contemporary medical and scientific literature in order to determine whether the effect of a particular regulation is to 'depart from accepted medical practice' insofar as particular procedures and particular periods within the trimester are concerned," *Id.* at 456 (O'Connor, J., dissenting), but must also predict what the "accepted medical practice" will be four or five years in the future when the case may ultimately reach the Supreme Court. Even if the regulation is constitutional when enacted and is upheld by the Court, it could be attacked later based on new medical standards.

As a result of this Court's decisions in *Colautti* and *Akron*, the states have no practical ability to regulate according to the lines established by the trimester system in *Roe*. By tying the states' ability to regulate abortion to ever-shifting medical technology and "accepted medical practice," the Court effectively removed from the states' elected representatives the ability to regulate abortion and placed such decisions within the hands of the medical profession. Instead of engendering stability in the law, this has led to extreme instability in the law. This is additional evidence of the unworkability of the *Roe* trimester framework.

C. Roe *Did Not End the Abortion Controversy, But Has Distorted the Law in Many Areas.*

Roe v. Wade was intended to settle the issue of abortion in American law. However, recognizing *Roe's* weak constitutional foundation, abortion rights advocates continue to assert other constitutional theories. *See, e.g.*, Brief of Petitioners/Cross-Respondents at 15-16, 19 n.27, 33, 39-40, 46-48 (equal protection); Brief Amicus Curiae of 178 Organizations in Support of Planned Parenthood of Southeastern Pennsylvania at 8 (ninth amendment). *But see* Brief Amicus Curiae of Life Issues Institute in Support of Respondents/Cross-Petitioners (herein) (dealing with equal protection and ninth amendment claims); Bopp, *Will There Be a Constitutional Right to Abortion After the Reconsideration of Roe v. Wade?*, 15 J. Contemp. L. 131 (1989) (discussing and refuting alternative constitutional theories for an abortion right). Because of its weak foundation, *Roe* exacerbated the abortion controversy.

Moreover, *Roe* has proven to be inherently difficult to apply in any consistent and principled manner. Because of this fact, *Roe* has worked a distortion on the normal functioning of the law wherever abortion jurisprudence touches the law. This abortion distortion effect is evident in several areas set forth below.

1. *Roe* Has Confused the Law Protecting the Unborn in Non-Abortion Contexts.

One of the areas in which the abortion distortion effect is most evident is in the law designed to protect preborn human beings in non-abortion contexts. In these areas, *Roe* poses a direct obstacle to the realization of important objectives embodied in laws which recognize and protect unborn human life, in that it has inhibited development of the law in these areas. Examples include the rights of the unborn in tort law, wrongful death actions, in equity, in criminal law, and in laws relating to respect. *See* Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3

B.Y.U. J. Public Law, 181, 246-83 (1989) (discussing the abortion distortion effect of *Roe* on fetal rights in non-abortion contexts).

a. Tort Law — Development of Fetal Rights

The development of the law in the area of torts reveals the dramatic change in the legal protection of the rights of unborn human beings with the progress of scientific knowledge about the fact that each unique, individual human being comes into being at the moment of conception.

The first American case which dealt with fetal injury was the celebrated opinion by Judge Oliver Wendell Holmes, Jr. in *Dietrich v. Northampton*, 138 Mass. 14 (1884). Holmes interpreted the Massachusetts wrongful death act to preclude recovery for the death of a four to five month old fetus. He held that "the unborn child was a part of the mother at the time of the injury" and that "any damage to [the fetus] which was not too remote to be recovered for at all was recoverable by her." *Id.* at 17.

Dietrich was followed until 1946, when, in the words of William Prosser, there occurred "the most spectacular [and] abrupt reversal of a well settled rule in the whole history of the law of torts." W. Prosser, *Handbook on the Law of Torts* 336 (4th ed. 1971). In *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.D.C 1946), a federal court allowed the plaintiff infant to recover for injuries sustained when he was negligently taken as a viable fetus, from his mother's womb by the defendant doctor. *Id.* at 143. The *Bonbrest* court reasoned:

> As to the viable child being 'part' of its mother — this argument seems to me to be a contradiction in terms. True, it is in the womb, but it is capable now of extrauterine life — and while dependent for its continued development on sustenance derived from its peculiar relationship to its mother, it is not a 'part' of the mother in the sense of a constituent element — as that term is generally understood. Modern medicine is replete with

> cases of living children being taken from dead mothers. Indeed, apart from viability, a non-viable foetus is not a part of its mother.

Id. at 140.

Since *Bonbrest*, every state has recognized prenatal harm as a legitimate cause of action for a child subsequently born. *Prosser and Keeton on the Law of Torts* 368 (W. Keeton ed. 5th ed. 1984). Some states limit recovery to post-viability injuries, but the clear trend is toward recovery for all prenatal harm. *Prosser and Keeton, supra*, at 368-69; Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 Notre Dame L. Rev. 349, 357 (1970). The first court to abandon the viability standard declared what ought to be the guiding principle for all courts: "[L]egal separability should begin where there is biological separability." *Kelly v. Gregory*, 282 A.D. 542, 543, 125 N.Y.S.2d 696, 697 (1953). The court noted that it was the knowledge derived from medical science which powered the engine for change. *Id.* at 543-44, 125 N.Y.S.2d at 697-98. Yet despite the recognition of the rights of the unborn in this area, *Roe* has constrained the full development of tort law — especially inhibiting some courts from providing protection for the preborn before the point of viability — and as shown in the following examples.

b. Wrongful Death

A majority of jurisdictions now recognize a wrongful death cause of action for the death of a preborn human being — some rejecting the action unless the child is born alive and then dies and some allowing only post-viability actions. *Roe* has been cited by courts rejecting wrongful death actions for preborn humans[4] and by courts limiting the cause of action to viable

[4]*See, e.g., Justus v. Atchison*, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977) (en banc); *Hernandez v. Garwood*, 390 So.2d 357 (Fla. 1980); *Hogan v. McDaniel*, 204 Tenn. 253, 559 S.W.2d 774 (Tenn. 1977).

unborn children.[5] *Roe's* viability line makes no more sense in wrongful death actions than it made in *Roe*, but *Roe's* pernicious effect on this part of the law is clear.

c. Wrongful Birth

Roe v. Wade has even been used by courts recognizing wrongful birth claims, wherein parents seek damages for the birth of a "defective" child whom they would have aborted if they had been apprised of the defect. As of September 1988, seventeen state courts of appeal had recognized a wrongful birth claim. Bopp, Bostrom & McKinney, *The "Rights" and "Wrongs" of Wrongful Birth and Wrongful Life: A Jurisprudential Analysis of Birth Related Torts*, 27 Duq. L. Rev. 461, 462 (1989).

d. Homicide of the Unborn

Following the English statutory and common law pattern, early nineteenth century American law prohibited feticide by statutes and, in some cases, by common law, which also encompassed abortion. *See* Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 Cal. L. Rev. 1250, 1273-82 (1975). For example, New York in 1828 made it a felony to willfully cause the death of a fetus even before quickening. J. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* 26-27 (1978) (citing N.Y. Rev. Stat. pt. IV, ch. I, tit. II, §§8, 9 at 550). When *Roe v. Wade* swept away the state abortion statutes the protection provided the unborn from homicide was also swept away.

Roe has had a detrimental effect on the states' efforts to protect the unborn from homicide outside the abortion context.

[5]*See, e.g., Toth v. Goree, 65 Mich. App. 296, 237 N.W.2d 297 (1975); Wallace v. Wallace*, 120 N.H. 675, 421 A.2d 134 (1980) ("We remark also in passing that it would be incongruous for a mother to have a a federal constitutional right to deliberately destroy a nonviable fetus, Roe v. Wade [citation omitted], and at the same time for a third person to be subject to liability to the fetus for his unintended but merely negligent acts."); *Werling v. Sandy*, 17 Ohio St. 3d 45, 476 N.E.2d 1053 (1985).

For example, the California Supreme Court overturned a murder indictment brought against a man for killing an unborn child by kneeing his ex-wife's abdomen, saying, "I'm going to stomp it out of you." *Keeler v. Superior Court*, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970) (en banc), by applying the archaic born-alive rule. When the California legislature promptly redefined the homicide statute to expressly include the killing of a fetus, a California appellate court declared that *Roe* had removed the protection of a non-viable fetus because "as a matter of constitutional law the destruction of a non-viable fetus is not a taking of human life." *People v. Smith*, 59 Cal. App. 3d 751, 755, 129 Cal. Rptr. 498, 502 (1976). Following the California courts and *Roe*, many states have held that *Roe* denies the protection of homicide laws to the unborn.[6] This anomalous result shows *Roe's* distorting effect on the law.

e. Other Areas

Roe has also had a deleterious effect on other areas of the law relating to the rights of the unborn. In *Davis v. Davis*, No. E-14496, slip op. (Cir. Ct. for Blount Cty. Tenn. Sep. 21, 1989), a state court listened to exhaustive expert testimony as to whether frozen embryos were children, i.e., individual human beings, or property. Having determined from the scientific evidence that the embryos were children, the judge held that it was in their best interest to be awarded to their natural mother for implantation in her womb. On appeal, the Tennessee Court of Appeals relied in part on the state abortion statute imposed on that state by *Roe* to conclude that the unborn were not legal persons and the constitution protected Mr. Davis from becoming a parent against his will. The Court gave the Davises joint control of the embryos (as property) — dooming them to destruction. *Davis v. Davis*, 1990 WL 130807 (Tenn. App. 1990) (now on appeal to the Tennessee Supreme Court). Under the

[6]*See, e.g., State v. Gyles, 313 So.2d 799 (La. 1975); State v. Brown, 378 So. 2d 916 (La. 1979); State v. Soto, 378 N.W.2d 625 (Minn. 1985); Hollis v. Commonwealth, 652 S.W.2d 61 (Ky. 1983).*

influence of *Roe*, the court ignored the fact that Mr. Davis had already become a parent when he consented to in vitro fertilization with his sperm and the fertilization was accomplished.

2. *Roe* Has Been Used to Argue for an Expansive Interpretation of the Right of Privacy.

Roe has also served as the basis for claims for an expansive interpretation of the right of privacy. For example, it has been argued that there is a privacy right to die, which would encompass assisted suicide, contrary to long-standing public policy, and allow the withdrawal of nutrition and hydration from incompetent but not terminally ill patients. *See, e.g., In re Quinlan*, 70 N.J. 10, 355 A.2d 647, *cert. denied sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976) (euthanasia); *Bouvia v. Superior Court*, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (Cal. Ct. App. 1986) (suicide); Cruzan v. Director, 110 S. Ct. 2841 (1990). The notion that the right of privacy can be readily extended to encompass whatever someone might desire, springs from the manner in which Roe was created without a proper foundation in the Constitution.

3. *Roe* Has Distorted the Law Regarding Rules of General Application.

Roe v. Wade also set procedural precedents for distortion of common rules of adjudication. *See* Bopp & Coleson, *The Right to Abortion*, *supra*, at 299-350. This was especially evident in *Thornburgh*, 476 U.S. 747, the high-water mark of *Roe's* analysis.

a. Statutory Construction

The abortion distortion factor was at work in the *Thornburgh* decision where this Court ignored the principle that a court should avoid constitutional problems by giving a statute a constitutional construction where fairly possible. The

Pennsylvania law at issue in *Thornburgh* required a second physician to be present at post-viability abortions to care for the possibly surviving child. 18 Pa. Cons. Stat. Ann. §3210(c) (Purdon 1983). For emergency purposes, the law provided that it is "a complete defense to any charge brought against a physician for violating the requirements of this section that he had concluded in good faith, in his best medical judgment, . . . that the abortion was necessary to preserve maternal life or health." *Id.* Although in *Planned Parenthood Association of Kansas City, Missouri v. Ashcroft*, 462 U.S. 476, 482-86 (1983), this Court construed a similar second-physician provision to include an emergency provision for the life or health of the mother — even though none existed — this Court could not bring itself to do so in the Pennsylvania case and struck down the statute. *Thornburgh*, 476 U.S. at 771.

Justice White took the *Thornburgh* majority members to task for their willingness to disregard this principle of statutory construction:

> The Court's rejection of a perfectly plausible reading of the statute flies in the face of the principle — which until today I had thought applicable to abortion statutes as well as to other legislative enactments — that '[w]here fairly possible, courts should construe a statute to avoid a danger of unconstitutionality.' *Planned Parenthood Ass'n v. Ashcroft* [citation omitted]. The Court's reading is obviously based on an entirely different principle: that in cases involving abortion, a permissible reading of a statute is to be avoided at all costs.

Id. at 812 (White, J., dissenting). *See* Bopp & Coleson, *The Right to Abortion*, *supra*, at 315-32 (extended discussion of abuse of the above principle in abortion cases).

b. Evidentiary Standards Applicable to Preliminary Injunction Hearings.

Another example of the abortion distortion effect at work is found in *Thornburgh*, where this Court rushed to a judgment

on the merits from the appeal of a grant of a preliminary injunction. Shortly before the statute at issue in *Thornburgh* was to go into effect (but four months after the statute had been enacted), the plaintiff abortion providers filed forty affidavits, which became the basis of a court-ordered stipulation, and requested a preliminary injunction. Pennsylvania was not allowed to contest Plaintiffs' facts unless it could give evidence at the hearing on the preliminary injunction. Because of the limited time available, no evidence was submitted by the commonwealth. Brief for Appellant at 35-49, *Thornburgh*, 476 U.S. 747. The parties were assured that the stipulation would be used solely for the purpose of the hearing. *Id.*

However, on appeal, the appellate court went to the merits and held the Pennsylvania abortion law largely unconstitutional. *Id.* at 8. The *Thornburgh* Court followed suit. In dissent, Justice O'Connor noted the abortion distortion effect at work in these words: "If this case did not involve state regulation of abortion, it may be doubted that the Court would entertain, let alone adopt, such a departure from its precedents." *Thornburgh*, 476 U.S. at 814 (O'Connor, J., dissenting).

With such effects flowing from *Roe*, the erosion of support for *Roe* is unremarkable. The question of what standard will supplant *Roe* remains.

II. If the Undue Burden Test Is to Be Used, A Workable Standard Must Be Clearly Articulated.

This Court's failure to affirm *Roe* in recent cases suggests that the Court views *Roe's* trimester framework as unworkable. The Court's splintered *Webster* decision led the Third Circuit to adopt Justice O'Connor's undue burden test as the appropriate standard for reviewing abortion legislation. However, as understood and applied by the Third Circuit, that test is also unworkable. Your amicus submits that an undue burden standard should not be adopted unless a workable standard is clearly articulated and adopted by this Court.

A. *The Undue Burden Test Is Not Workable as Understood and Applied by the Third Circuit.*

1. The Third Circuit Failed to Understand That in Determining Whether the Burden Is Undue the Effect on the Class, Not Some Individuals, Must Be Considered.

The Third Circuit held that §3209, the spousal notice provision, "is likely to dissuade many from seeking an abortion if such notification is required" so that "§3209 constitutes an undue burden on a woman's abortion decision." *Planned Parenthood v. Casey*, Opinion of Third Circuit, Appendix to Petition for a Writ of Certiorari in No. 91-902 at 70a (1991). However, as dissenting Judge Alito correctly pointed out, "it appears clear that an undue burden may not be established simply by showing that a law will have a heavy impact on a few women but that instead a broader inhibiting effect must be shown." *Id.* at 90a (Alito, J., dissenting). Justice O'Connor has set forth the principle as follows: "the mere possibility that *some women* will be less likely to choose to have an abortion by virtue of the presence of a particular state regulation suffices to invalidate it." *Thornburgh*, 476 U.S. at 829 (O'Connor, J., dissenting) (emphasis in original). Thus, the Third Circuit misunderstood and misapplied the undue burden test with regard to its effect on some women. Clarifying this issue is especially important for upholding parental notice/consent statutes under the undue burden analysis. Although such requirements may prevent some minors from seeking abortion, that does not make of the requirements an undue burden. *See Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting) (finding no undue burden in the parental notice statute upheld in *H.L. v. Matheson*, 450 U.S. 398 (1981)).

2. The Third Circuit Failed to Recognize Compelling State Interests Which It Should Have Recognized.

Where compelling state interests exist, the undue burden test requires only that a statute "bears a rational relationship

to legitimate purposes such as the advancement of these compelling interests." *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting). Not only was the Pennsylvania spousal notice provision, §3209, not an undue burden, as demonstrated *supra*, but the presence of compelling interests meant that — even if the burden had been undue — Pennsylvania had only to show that its statute was rationally related to its legitimate purpose in advancing its compelling state interests. However, the Third Circuit failed to recognize compelling state interests as part of its analysis. Three such compelling interests apply to the review of abortion restrictions.

a. The Court Erred In Failing to Recognize the Father's Compelling Interests.

In the case of *Scheinberg v. Smith*, 659 F.2d 476 (1981), the Fifth Circuit considered an abortion spousal notice and consultation statute. In that case, Florida asserted two interests of the father as compelling: "maintaining and promoting the marital relationship; and protecting a husband's interest in the procreative potential of the marriage." *Id.* at 483. The Fifth Circuit telescoped these two interests into one, "a state interest in furthering the integrity of the state-created and regulated institutions of marriage and the family," and held this interest to be "sufficiently weighty to justify the burden on a woman's abortion decision imposed by the spousal notification requirement." *Id.* (citation omitted). The Fifth Circuit concluded that "[t]he state interest sought to be furthered by this legislation . . . [e]ncompasses furthering the institutional integrity of the marital relationship, and of the family. We have held that interest to be, in constitutional terms, compelling, and thus ample justification for establishing spousal notice and consultation requirements." *Id.* at 486.

By ignoring that legitimate and compelling interests a husband has in the integrity of the marriage relationship and in a particular preborn child, as well, *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 93 (1976) (White, J.,

J.) ("[T]he husband has an interest of his own in the life of the fetus which should not be extinguished by the unilateral decision of the wife."), the Third Circuit altered the undue burden analysis in a way fatal to §3209, the spousal notice provision.

b. The Court Erred in Failing to Recognize the Compelling Interests in Protecting the Unborn Throughout Pregnancy.

The Third Circuit also altered the undue burden analysis applicable to the Pennsylvania statute by failing to recognize the interest in protecting unborn life which exists throughout pregnancy. A majority of the Justices of this Court have recognized such an interest. *See Thornburgh*, 476 U.S. at 828 (O'Connor and Rehnquist, JJ., dissenting); *Webster*, 109 S. Ct. at 3055, 3057 (plurality opinion), 3064 (Scalia, J., dissenting) (calling for the plenary reversal of *Roe*, presumably thereby recognizing at least a compelling interest in protecting unborn life).

3. The Third Circuit Erred in Holding That the Spousal Notice Provision Would Have Been Impermissible Even With a Compelling Interest For Not Being Narrowly Drawn.

Finding that §3209, the spousal notice provision, imposed an undue burden, the Third Circuit said, "[W]e must apply strict scrutiny to determine if §3209 is narrowly tailored to serve a compelling state interest." *Planned Parenthood v. Casey*, Opinion of Third Circuit, Appendix to Petition for a Writ of Certiorari in No. 91-902 at 71a (1991). This was erroneous, for no narrowly tailored requirement is applicable under the undue burden test. "The Court has never required that state regulation that burdens the abortion decision be 'narrowly drawn' to express only the relevant state interest." *Akron*, 462 U.S. at 467 n.11 (O'Connor, J., dissenting). Rather, abortion

restrictions under the undue burden test need only "'reasonably related' to the state compelling interest." *Id.*

Therefore, the Third Circuit erred when it declared, "[E]ven if we were to assume that [keeping married individuals together in wedlock] does constitute a compelling state interest, we could not conclude that the Commonwealth has carried its burden of demonstrating that §3209 is narrowly tailored to promote that interest." Opinion of Third Circuit at 72a.

B. *Assuming the Continued Existence of Constitutional Protection for Abortion Above the "Rational Basis" Level, the "Undue Burden" Test Might Be Workable if This Court Sets Forth Clear Standards.*

If this Court should choose to employ an undue burden test for abortion jurisprudence, although your amici believe a rational basis test to be more workable and constitutionally correct, *see infra*, such a test might be workable if this Court sets forth clear guidelines. These include the following, as articulated in prior opinions by Justice O'Connor and other members of this Court.

1. Any Statute, Regardless of Whether It Imposes an Undue Burden, Will Be Upheld if It Reasonably Furthers a Compelling Interest.

The "undue burden" test is as follows:

> Under this Court's fundamental-rights jurisprudence, judicial scrutiny of state regulation of abortion should be limited to whether the state law bears a rational relationship to legitimate purposes such as the advancement of . . . compelling interests, with heightened scrutiny reserved for instances in which the State has imposed an "undue burden" on the abortion decision. . . . An undue burden will generally be found "in situations involving absolute obstacles or severe limitations on the abortion decision," not wherever a state regulation "may 'inhibit' abortions to some degree. . . .

> And if a state law does interfere with the abortion decisio to an extent that it is unduly burdensome, so that i becomes "necessary to apply an exacting standard o review, . . . the possibility remains that the statute wil withstand the stricter scrutiny."

Thornburgh, 476 U.S. at 828 (O'Connor, J., & Rehnquist, C.J. dissenting) (citations omitted). The legitimate purposes t which such regulations might be addressed include "compellin interests in ensuring maternal health and in protectin potential human life, and [those] interests exist 'throughou pregnancy.'" *Id.*

Applying the test involves the following steps:

1. A "threshold inquiry" into whether the nature an degree of the regulatory interference are rationall related to a legitimate governmental objective.
   a) if the regulatory burden is not rationally related to a legitimate governmental objective, the regulatio fails, *see Hodgson v. Minnesota*, 110 S.Ct. 2926, 295 (1990) (O'Connor, J., concurring in part, an concurring in the judgment in part) ("broad sweep" and "failure to serve the purposes asserted by the State in too many cases");
   b) if the regulatory burden is rationally related to a legitimate governmental interest, and its only impact is to "'inhibit" abortions to some degree,'" even a 'significant'" one, the rational basis findin ends the judicial inquiry, *Akron*, 462 U.S. at 463-6 (O'Connor & Rehnquist, JJ., dissenting);
   c) if, however, the nature and degree of the interference may fairly be described as one "involving absolute obstacles or severe limitations on the abortion decision" the burden is "undue" and "it becomes 'necessary to apply an exacting standard of review.'"
2. At this stage of the inquiry, the weight of the interests asserted by the State are examined, *Akron*, 462 U.S. at 465 nn. 10 & 11 (O'Connor & Rehnquist, JJ., dissenting);

a) If the State interests are not "compelling" the regulation fails;
b) Because the Court has never actually imposed a requirement that an abortion regulation needs to be "'narrowly drawn' to express only the relevant state interest" (notwithstanding implications to the contrary in *Roe*), *Akron*, 462 U.S. at 467 n. 11 (O'Connor & Rehnquist, JJ., dissenting), the regulation needs only to be rationally related to a compelling state interest in order to "withstand the stricter scrutiny."

Because there is no question, even under *Roe* itself, that the states have both a "legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient," and "*another* important and legitimate interest in protecting the potentiality of human life", *Roe*, 410 U.S. at 149-150, 162 (emphasis in original), *quoted in Akron*, 462 U.S. at 450 (O'Connor & Rehnquist, JJ., dissenting), the issue for the Court — should it decide to adopt the undue burden analysis — is whether those interests are "compelling" throughout pregnancy.

2. The States Have Compelling Interests, Including the Protection of Unborn Life, Which Exist Throughout Pregnancy.

As noted previously, *see supra* II-A-2-b, a majority of the members of this Court has recognized that states have compelling interests in unborn life and maternal health which exist throughout pregnancy. This needs to be established in a single, majority opinion, if the undue burden test is to be workable. In addition, it should be recognized, as the Fifth Circuit held in *Scheinberg*, *see supra* II-A-2-a, that husbands have special interests in the integrity of the marital unit and the procreative activity occurring therein which are separate compelling interests. These interests, too, should be

recognized by a majority of this Court if the undue burden test is to be employed.

3. Statutes Which Result in Fewer Abortions Would Reasonably Further the State's Interest in Protecting Unborn Life and Would Be Constitutional.

The recognition of a compelling interest in protecting unborn life throughout pregnancy, as a majority of the Justices have done, would not require the states to enact laws restricting abortion. However, it would allow them to do so if they so chose, provided it is done in a reasonable manner. Given the compelling interest in protecting unborn human life, any statute which results in fewer abortions would reasonably further that state interest. This needs to be clearly articulated for an undue burden test to be workable.

4. Failure to Establish the Above Three Elements of the Undue Burden Test Would Result in Ad-Hoc, Multi-Factor Balancing, Yielding Unclear Guidelines.

The critical legal issue to be determined here is how judges and legislators are to assign a constitutional "weight" to state and paternal interest in the preservation of "the individual fetus." Without such guidance, the "undue burden" test is unworkable.

One of the "the fundamental aspiration[s] of judicial decisionmaking" is to apply "neutral principles 'sufficiently absolute to give them roots throughout the community and continuity over significant periods of time.'" *Akron*, 462 U.S. at 458 (O'Connor & Rehnquist, JJ., dissenting) (citation omitted). *See* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 15-16 (1959) ("[T]he main constituent of the judicial process is that it must be genuinely principled, resting

with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved . . . .").

The alternative is ad hoc, multi-factor "balancing" which is, by its very nature, unpredictable and "ill suited to the judicial function," *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 94, (1987) (Scalia, J., concurring in part and concurring in judgment). Multifactor balancing is inconsistent with the undisputed power of the states to make and effectuate at least some political judgments concerning the balance to be struck between public and private interests in the abortion context. *See Roe*, 410 U.S. at 162-164 (post-viability); *Thornburgh*, 476 U.S. at 785-86 (White and Rehnquist, JJ., dissenting) ("decisions that find in the Constitution principles or values that cannot be fairly read into that document usurp the people's authority"); *Akron*, 462 U.S. at 458 (O'Connor & Rehnquist, JJ., dissenting) ("the Court's framework forces legislatures, as a matter of constitutional law, to speculate").

Moreover, making the *weight* of the relevant state and private interests depend upon a multi-factor balance was the way in which the Court departed from "evenhanded appli[cation of] uncontroversial legal doctrines," *Thornburgh*, 476 U.S. at 814 (O'Connor, J., & Rehnquist, C.J., dissenting), in Roe. Such balancing is the source of the "major distortion in [its] constitutional jurisprudence" wrought by the Court's abortion decisions, *id.*, and the reaason that "no legal rule or doctrine [involving regulation of abortion] is safe from ad hoc nullification." *Id.*

By rejecting the trimester analysis of *Roe*, but not addressing the nature of either the rights or the state interests necessarily implicated in abortion, a majority of the members of this Court have rejected multi-factor balancing as the standard of review for abortion cases. In

so doing, it has set the stage for a return to evenhanded application of black-letter constitutional law principles.

The Court can reverse the decision of the Third Circuit with respect to §3209 in either of two ways. First, it can adopt the view that nothing in the Constitution prohibits a finding that the state interest in the preservation of fetal life is "compelling" throughout pregnancy. See, e.g., *Thornburgh*, 476 U.S. at 795 (White, J., dissenting). In the alternative, it can recharacterize the nature of the right recognized in Roe as something less than "fundamental."

A decision limited to a discussion of the "compelling" nature of the State's interest would leave intact *Roe's* holding that there exists some quantum of constitutionally protected interest in the context of abortion (above the minimal protection provided by the rational basis requirement), and, necessarily, this Court's role in deciding what it is. A decision which recharacterizes the nature of the interest recognized in *Roe v. Wade* would effectively overrule the case and return the issue to the states from whence it came.

Justice White has correctly recognized that the difference between abortion and other reproductive decision-making "does not go merely to the weight of the state interest in regulating abortion; it affects as well the characterization of the liberty interest itself." *Thornburgh*, 476 U.S. at 792 n.2.

Your amici respectfully submit that the second option suggested above — overruling *Roe* — is more consistent with the Constitution because the weight *Roe* assigns to the interests are, as Professor Gottlieb suggests, "a complex choice, not a clear deduction from constitutional text." Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term In Constitutional Adjudication*, 68 B.U.L. Rev. 917, 949 (1988). Petitioners make essentially the same point in defense of their

argument that the undue burden test should be rejected, Petitioners' Brief at 34-38, but argue the opposite conclusion: that the Court should explicitly reaffirm the balance struck in *Roe*. Petitioners' Brief at 24-31 & nn.47-50. But if the ad hoc balancing which has characterized the case law since *Roe* is to be replaced with "black letter" constitutional law in most cases, it is essential that the states be free to act on their view that their legitimate interest in fetal life is "compelling." A single, familiar standard applicable to abortion cases is essential for legislatures, public officials who must interpret and apply the law, and — most importantly — for the courts called upon to engage in a constitutional review of such policy choices.

III. Rational Basis Test Is Preferable to the Undue Burden Test.

Directly or by implication, five Justices have required only a rational basis test in recent abortion litigation, indicating their belief that there is no general, fundamental abortion right. *Ohio v. Akron Center for Reproductive Health*, 110 S.Ct. 2972, 2977, 2983-84 (plurality opinion of Kennedy, J., joined by Rehnquist, C.J., and White and Scalia, J.J.); *Ohio*, 110 S.Ct. at 2981; *Hodgson v. Minnesota*, 110 S.Ct. at 2944 (Stevens, J., joined by O'Connor, J.); *id* at 2945 (the court); *id* at 2949 (O'Connor, J., concurring in part and concurring in the judgment in part).

A clear majority ruling on a rational basis would be preferable to employing the undue burden test for several reasons. First, it would not spawn additional ligitation as an undue burden test would. Second, the rational basis test has a long pedigree, is well indicated, and is easily applied. Third, the rational basis test squarely addresses the issue of whether there is a fundamental right to choose abortion. This needs to be done to eliminate the presumption of invalidity which automatically attaches to laws interfering with fundamental

rights and replace it with the assumption of validity whic accompanies rational basis review.

Strict scrutiny is not necessary since there is no fundamenta right. While the undue burden test, described ante, ma provide an adequate test, there is no reason to labor an confuse lower courts with a new test for which exploratory litigation will be necessary when federal jurisprudence alread has the fully developed and well understood rational basis test *Thornburgh*, 476 U.S. at 802 (White, J., joined by Rehnquist J., dissenting), *citing Williamson v. Lee Optical*, 348 U.S. 48 (1955).

The adoption of the rational basis test for abortion regulatio will also permit this court to avoid the intricate and comple regulation that fundamental rights or undue burde jurisprudence imposes on it. *Webster*, 109 S.Ct. at 305 (Rehnquist, C.J., joined by White & Kennedy, J.J.) an *Thornburgh*, 476 U.S. at 814 (O'Connor, J., dissenting). The issue remains rightfully with the states.

CONCLUSION

The *Roe* framework is unworkable and has resulted in confused constitutional application and an intricate and complex system of judicially imposed regulation. Provided abortion remains a limited fundamental right, an undue burden analysis would be workable, as a substitute for *Roe*, if the Court finds the state has a compelling interest in potential life.

However, because abortion is not properly a fundamental right, the Court should employ the well established rational basis test. That test provides clear rules of construction for presumptively valid statutes or regulations. This case offers the opportunity to end the long and distorted constitutional history of the so-called "right to abortion." In any event, this Court should affirm the decision in No. 91-744 and reverse the decision in No. 91-902.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

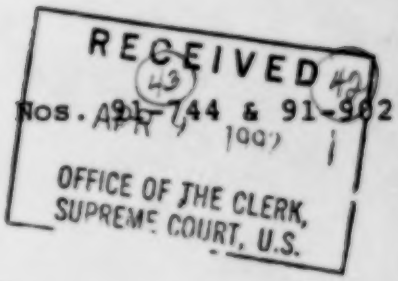
PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, et al.,

Petitioners,

v.

ROBERT P. CASEY, et al.,

Respondents.



Nos. 91-744 & 91-902

MOTION OF THE HONORABLE ARLEN SPECTER TO BE ADDED AS AMICUS CURIAE

Comes now the moving party, the Honorable Arlen Specter, a United States Senator from the Commonwealth of Pennsylvania and a member of the Bar of this Court, appearing pro se, and moves this Honorable Court to be added as one of the Members of Congress who are participating as amici curiae in support of petitioners in Planned Parenthood of Southeastern Pennsylvania, et al. v. Robert P. Casey, et al., Nos. 91-744 & 91-902.

In support of this motion, I state that I have read the brief on behalf of congressional amici submitted by Professor Walter Dellinger and concur in the points and arguments presented therein.

Counsel of record for the parties in this case have been contacted and consented to this motion. Professor Dellinger has also been contacted and expressed no objection to this motion.

3 pp

Accordingly, I respectfully request that this Honorable Court grant this motion and consider me as one of the Members of Congress appearing and listed as amici curiae in support of petitioners.

Respectfully submitted,

Arlen Specter, pro se
United States Senate
303 Hart Senate Office Building
Washington, DC 20510
Telephone: (202) 224-4254

April 10, 1992

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Motion Of The Honorable Arlen Specter To Be Added As Amicus Curiae by first-class mail and by telefax on April 10, 1992, upon the following counsel of record:

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MOTION OF THE ELLIOT INSTITUTE FOR SOCIAL SCIENCES RESEARCH FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Elliot Institute for Social Sciences Research (hereinafter "Elliot Institute") hereby moves pursuant to Supreme Court Rule 37.2 for leave to file an *amicus curiae* brief in support of Respondents, Robert P. Casey, et.al.. Consent for filing this brief was denied by the Respondent, on April 2, on the basis of a disagreement with the analysis of Elliot Institute justifying regulation of abortion as a birth control technology. This is a secondary issue touched upon in this brief and should not deter the Court from receiving the facts and analysis contained herein which relate directly to the issues of informed consent and waiting periods.

The Elliot Institute seeks to provide the Court with valuable information pertaining to the issue of informed consent for women seeking abortions. The Elliot

Institute is in a unique position to present first hand evidence of abortion patients' dissatisfaction with pre-abortion counseling at Planned Parenthood clinics, specifically, and at other abortion providers, as well.

David C. Reardon, director of research for the Elliot Institute, is the author of *Aborted Women, Silent No More*, a comprehensive reference book on the aftereffects of abortion which has been cited in several briefs filed before this Court in this case and in several other previous abortion cases. This work includes a major study of 253 women who sought counseling for post-abortion related problems an average of 10 years after their abortions. This was the first major study of the long term aftereffects of abortion and included patient evaluation of abortion services and counseling.

Specifically, this study revealed a high

rate of dissatisfaction with pre-abortion counseling on the part of the post-abortion women surveyed. Claims by physicians and counselors that counseling is adequate must be weighed against the views of patients who report that in retrospect the counseling was incomplete, biased, and even manipulative.

Elliot Institute research establishing a statistical link between inadequate pre-abortion counseling and increased severity of post-abortion reactions has been accepted for publication in a leading peer review journal of family and adolescent psychology.

Elliot Institute is not aware that these findings have heretofore been fully presented, or presented in any respect, to this Court, or the lower courts, in this case. A finding that those receiving counseling are in polar disagreement with abortion providers as to the quality of

that counseling is clearly relevant to this case and should be the basis for granting of this Motion.

Because the chief investigator for this research is associated with the Elliot Institute, the Elliot Institute is the most authoritative source for interpreting and explaining to the Court these research results which have a direct bearing on the issues of informed consent and waiting periods.

The research associates of the Elliot Institute are leaders in the investigation and documentation of the psychological aftereffects of abortion on women. The Elliot Institute has collected over 1500 case studies of women who have suffered psychological aftereffects of abortion. To Elliot Institute's knowledge, this is the largest case study collection of this type. The Elliot Institute has also published major reviews of the literature in this

field, and has published the results of two major surveys of post-abortion women.

Present research projects include a controlled, longterm study of the aftereffects of abortion using a random population of women. This is the largest such study ever done, with over 800 randomly selected participants.

The Elliot Institute, having demonstrated considerable expertise in the area of post-abortion trauma, and specifically in the area of informed consent as it relates to such trauma, respectfully requests the Court to accept this *amicus curiae* brief as an aid in its deliberations.

Respectfully submitted,

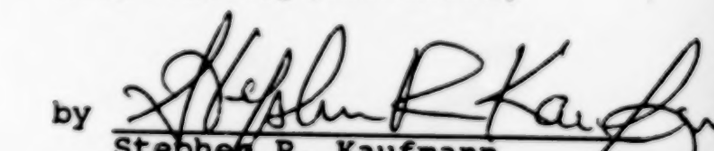
by 

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TABLE OF CONTENTS

TABLE OF AUTHORITIES vii

INTERESTS OF AMICUS 1

SUMMARY OF ARGUMENT 1

ARGUMENT 6

I. BIASES IN THE ABORTION INDUSTRY MAKE SELF-REGULATION OF INFORMED CONSENT IMPOSSIBLE. 6

A. PLANNED PARENTHOOD AFFILIATES, AND OTHERS IN THE ABORTION INDUSTRY, HAVE A RECORD OF WITHHOLDING INFORMATION ABOUT RISKS OF WHICH REASONABLE PATIENTS WOULD WANT TO BE INFORMED. 6

B. PLANNED PARENTHOOD, AND OTHER ABORTION PROVIDERS, HAVE A PHILOSOPHICAL BIAS TOWARD

page

ENCOURAGING CLIENTS TO CHOOSE ABORTION OVER CHILDBIRTH. . . . 9

II. ABORTION PATIENTS HAVE A GREATER NEED FOR A FULL DISCLOSURE OF RISKS THAN OTHER PATIENTS, AND THEREFORE "THERAPEUTIC PRIVILEGE," THE RIGHT TO WITHHOLD DISTURBING FACTS, DOES NOT APPLY. 20

A. SINCE "BASIC RESPONSIBILITY" FOR THE ABORTION DECISION HAS BEEN SHIFTED TO PATIENTS, THERE IS NO RATIONAL GROUNDS FOR WITHHOLDING ANY INFORMATION, EVEN THE MOST DISTURBING. 23

B. LACK OF FULL DISCLOSURE INCREASES THE INCIDENCE OF POST-ABORTION TRAUMA AND INCREASES THE SEVERITY OF THE TRAUMA. 25

VI. THE STATE MUST HAVE AN UNLIMITED RIGHT TO REGULATE ABORTION, AT ANY STAGE OF PREGNANCY, FOR A BROAD

page

RANGE OF HEALTH REASONS. 30

A. *ROE* DID NOT GRANT WOMEN A FUNDAMENTAL RIGHT TO ABORTION, BUT FOUND THIS NEW RIGHT AS EVOLVING FROM THE DEVELOPMENT OF NEW TECHNOLOGIES WHICH MAY HAVE MADE ABORTION "SAFER THAN CHILDBIRTH." 30

B. ABORTION TECHNOLOGIES INVOLVE HEALTH RISKS WHICH WERE NOT KNOWN, WERE NOT UNDERSTOOD, OR WERE OTHERWISE IGNORED IN *ROE V. WADE*. 34

V. THE STATES HAVE A LEGITIMATE INTEREST IN REGULATING BIRTH CONTROL TECHNOLOGIES, SUCH AS ABORTION, WHICH SHOULD NOT BE RESTRICTED. . . 36

A. THE RIGHT OF THE STATE TO REGULATE BIRTH CONTROL TECHNOLOGIES IS ALREADY ESTABLISHED IN CONSTITUTIONAL LAW. 37

page

B. STATES MUST BE FREE TO ADJUST REGULATION OF BIRTH CONTROL TECHNOLOGIES TO MEET CHANGING CONDITIONS. 42

C. STATE REGULATION OF BIRTH CONTROL TECHNOLOGIES IS NECESSARY BECAUSE PHYSICIANS, FAMILY PLANNING AGENCIES AND DRUG MANUFACTURERS ARE SOMETIMES MOTIVATED TO PROMOTE BIRTH CONTROL TECHNOLOGIES WHICH MAY HAVE DETRIMENTAL SIDE-EFFECTS OR MAY BE LESS THAN FULLY EFFECTIVE. 44

VI. THREATS TO TRUE REPRODUCTIVE FREEDOM FROM PRIVATE INTERESTS AND THE STATE REQUIRE THAT THE INDIVIDUAL'S NATURAL RIGHT TO REPRODUCTIVE FREEDOM MUST BE CLARIFIED AND STRENGTHENED. 46

pag

A. THE VAGUELY DEFINED "RIGHT TO PRIVACY" MUST BE REPLACED BY A MORE CAREFULLY DEFINED "NATURAL REPRODUCTIVE RIGHTS." . . . . .

B. THE NATURAL RIGHT OF REPRODUCTIVE FREEDOM, AS GUARANTEED IN THE CONSTITUTIONALLY RESERVED RIGHTS OF INDIVIDUALS, IS THAT RIGHT WHICH ARISES FROM A PERSON'S NATURAL REPRODUCTIVE BIOLOGY, IN RESPECT OF WHICH: 1) THE STATE MAY NOT LIMIT ANY PERSON'S NATURAL FERTILITY OR PREVENT PERSONS FROM NATURALLY CONCEIVING OR BEARING CHILDREN, AND 2) THE STATE MAY NOT FORCE ANY PERSON TO CONCEIVE CHILDREN NOR COMPEL ANY PERSON TO PROVIDE REPRODUCTIVE MATERIAL FOR THE ARTIFICIAL CONCEPTION OR GESTATION OF CHILDREN. 5

page

C. THE STATE'S REGULATION OF BIRTH CONTROL TECHNOLOGIES POSES NO THREAT TO THE INDIVIDUAL'S NATURAL RIGHT TO MAKE REPRODUCTIVE DECISIONS. 58

CONCLUSION 64

APPENDIX

Description of *Amicus* 1a

page

TABLE OF AUTHORITIES

<u>*Cases*</u>

Buck v. Bell, 274 U.S. 200 (1927) . . . 48

Cooper v. Roberts, 220 Pa. Super Ct. 260,267,286 A.2d 647, 650 (1971). . . . 21

Eisenstadt v Baird, 405 U.S. 438 (1971) 38-40, 55

Griswold v. Connecticut 381 U.S. 479 (1964) 37, 38

Poe v. Ullman, 367 U.S. 497 (1960) . . 37

Roe v Wade, 410 U.S. 113 (1973) . . . 4, 5, 30-32, 34, 50

Wells v Ortho Pharmaceutical Co., 615

page

F.Supp. 262 (N.D. Ga. 1985) 41

Wilkinson v. Vesey, 110 R.I. 606,624,295 A.2d 676,687 (1972) 21

Other Authorities

"Doctor's Abortion Business Is Lucrative", *San Diego Union*, Oct. 12,, 1980 B1:1. . 13

"The China Solution," *Science Digest*, 91:4, April 1983, 78. 17

Annas, *The Rights of Hospital Patients: The Basic ACLU Guide to Hospital Patient's Rights* (New York: Discus Books, 1975) 21

Barnard, "The Long-Term Psychological Effects of Abortion," (Portsmouth, N.H.: Institute for Abortion Recovery and

page

Research, 1990). 8

Bond, "Mother Files $1 Million Lawsuit Against Planned Parenthood, Alleges Officials Helped Daughter Obtain Life-Threatening Abortion," *National Right to Life News*, October 23, 1986, p6. . . . 12

Chase, *The Legacy of Malthus: The Social Costs of the New Scientific Racism* (New York: Alfred A. Knopf, 1977). . 13, 19, 47

Craven, "Abortion, Poverty and Black Genocide: Gifts to the Poor?", *Abortion and Social Justice*, eds. Hilgers and Horan, Sheed & Ward, New York, 1972. . . . 14, 47

Drogin, *Margaret Sanger* (Coarsegold, CA: CUL Publications, 1980). 49

Ehrenreich, et.al., "The Charge: Genocide,"

page

Mother Jones, November 1979. 18

Family Planning Perspectives, Special supplement-U.S. Population Growth and Family Planning: A Review of the Literature, vol. 2, no. 4, October 1970, ff.p.24. 15

FDA Consumer 25 (April 1976) 43

Francke, *The Ambivalence of Abortion*,(New York, Random House, 1978). 10

Franz and Reardon, "Different Effects of Elective Termination of Pregnancy On Adolescents and Adults," *1990 Annual Report*, West Virginia University, 40-43.2, 8, 26, 35

Friedman,et.al.,"The Decision-Making Process and the Outcome of Therapeutic

page

Abortion", *American Journal of Psychiatry* (December 12, 1974), vol.131, 1332. . . .27

Greer, *Sex and Destiny: The Politics of Human Fertility* (New York:Harper & Row, 1984). 13, 60

Hardin, "The Tragedy of the Commons," *Science* December, 1968, 1243-1248. . . 19

Jick, "Vaginal Spermicides and Congenital Disorders" 245 J.A.M.A. 1329-32 (1981). 41

Kasun, *The War Against Population: The Economics and Ideology of Population Control*, (San Francisco: Ignatius Press, 1988) 13, 19, 47, 48, 60

Kippley, *The Art of Natural Family Planning*, (Cincinnati: Couple To Couple League International, 1984.) 61

page

Kupelian and Gasper, "Abortion, Inc." *New Dimensions*, (October 1991) v5,n9-10, 12-25. . . . . 11, 25

Lader, *Abortion II: Making the Revolution* (Boston: Beacon Press, 1973). 16

Lazarus, "Psychiatric Sequelae of Legalized Elective First Trimester Abortion", *Journal of Psychosomatic Ob&Gyn*, (1985) vol.4, pp141-150. . . . . 27, 35

Ludmerer, *Genetics and American Society: A Historical Appraisal* (Boston: John Hopkins University Press, 1972) 49

Mendelsohn, *Male Practice: How Doctors Manipulate Women* (Chicago: Contemporary Books, 1981). 18

Miller, "Native American Peoples on Trail

page

of Tears Once More," *America*, 9 December 1978, 423 47

Pare and Raven,"Follow-up of Patients Referred for Termination of Pregnancy",*The Lancet* (1970) vol.1,pp635-638. . . 27, 35

Reardon, *Aborted Women - Silent No More*, (Chicago, Loyola University Press, 1987). . 2, 10-12, 20, 22, 27-29, 34-36, 47

Rue, Institute for Abortion Recovery and Research, "Pro-Abortion Counseling for Post-Aborted Women: The Implications" 1991 paper session of the Association for Interdisciplinary Research 26

Saltenberger, *Every Woman Has the Right to Know the Dangers of Legal Abortion*, (Glassboro, NJ, Air-Plus Enterprises, 1983) 28, 35

page

Schneyer, *Informed Consent and the Danger of Bias in the Formation of Medical Disclosure Practices*, 1976 Wis. L. Rev. 20

Schwartz, "Bringing the Sexual Revolution Home: Planned Parenthood's 'Five-Year Plan'", America 138:6, 18 February 1978, 114-116. 14

Senay, "Therapeutic Abortion: Clinical Aspects", *Archives of General Psychiatry* (1970),vol.23,pp408-415 27

Simon, *The Ultimate Resource* (Princeton: Princeton University Press, 1981). 13, 15, 19, 60

Strahan, *Major Articles and Books Concerning the Detrimental Effects of Abortion: An Annotated Bibliography*, (Charlottesville, VA, The Rutherford

page

Institute, 1990) 28, 35

Zeckman and Warrick, "Abortion Profiteers," Special Reprint, *Chicago Sun-Times*, (1978) 12, 36

Zimmerman, *Passage Through Abortion* (New York: Praeger Publishers, 1977) . . 2, 11, 22, 27, 28

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

No. 91-744 and 91-902

Planned Parenthood of Southeastern Pennsylvania, Reproductive Health and Counseling Center, Women's Health Services, Inc. Women's Suburban Clinic, Allentown Women's Center, and Thomas Allen, M.D., on behalf of himself and others similarly situated,

Petitioners and Cross Respondents,

v.

Robert P. Casey, Allan S. Noonan, and Ernest D. Preate, Jr., personally and in their official capacities,

Respondents and Cross-Petitioners.

On Appeal from the United States Court of Appeals for the Eighth Circuit

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BRIEF AMICUS CURIAE OF THE ELLIOT INSTITUTE FOR SOCIAL SCIENCES RESEARCH

INTERESTS OF AMICUS

The Elliot Institute for Social Sciences Research favors holding the 1988 and 1989 amendments to the Pennsylvania Abortion Control Act of 1982, statute, 18 Pa. Cons. Stat. Ann. §§3201-3220 constitutional in their entirety. Having performed and published extensive sociological research which demonstrates that women seeking abortion are often denied information which they would desire concerning the risks of abortion, *Amicus* believes that the State has a compelling interest to regulate abortion providers who often exploit women and minors who are at high-risk of suffering abortion related complications. *Amicus Curiae* supports State regulations which protect women from unwanted abortions and which preserves their natural rights to reproductive freedom.

SUMMARY OF ARGUMENT

Recent studies by Elliot Institute

researchers have found that nearly 85% of women who suffer post-abortion problems report that they were denied relevant information or were misinformed during pre-abortion counseling.[1] Statistical analysis of these women demonstrates a strong link between inadequate pre-abortion counseling and increased severity of subsequent psychological problems.[2]

Even research conducted by abortion advocates has also found that the majority of women seeking abortion have little or no prior knowledge about the abortion procedure, its risks, or fetal development.[3] For most women, the counseling they receive at the clinic, is the only information they

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[1]Reardon *Aborted Women - Silent No More*, (1987), 22. (Hereinafter Reardon). A copy is lodged with this brief.

[2]Franz and Reardon, "Different Effects of Elective Termination of Pregnancy On Adolescents and Adults," *1990 Annual Report*, West Virginia University, 40-43.

[3]Zimmerman, *Passage Through Abortion*,139 (1977) (hereinafter Zimmerman).

will receive about abortion and alternatives. If a counselor introduces bias, the results can be tragic.

Amicus will show that accurate counseling about the risks of post-abortion trauma, which may have a delayed onset of ten years or more, is not normally provided to abortion patients. Yet it is an undeniable fact that abortion involves both physical and psychological health risks. When abortion providers withhold potentially "stressful" information about abortion and its risks, they are paternalistically denying women the right to knowledgeably evaluate the risks of abortion against its perceived benefits. Pre-abortion counseling is biased by many factors and is clearly inadequate.

In an elective abortion, where the woman, not the physician, is held responsible for the wisdom of her decision, the practice of withholding potentially

stressful information cannot be justified.

The State has a right to judge the "significance" of health risks associated with any product or service and to regulate or prohibit trades or practices accordingly. This right includes the right to regulate reproductive technologies such as abortion.

Abortion, itself, is not a fundamental right, but rather an "evolved" right. In *Roe v Wade*, 410 U.S. 113, 163 (1973) this right was described as evolving from advances in medical technology by which the mortality rate of abortion may now be less than the maternal deathrate of childbirth. By extension of this reasoning, as technological changes reveal new dangers associated with abortion, the State's "compelling" interests in regulating abortion may increase or decrease proportionately. Thus, even within the framework of *Roe*, and with respect to *stare*

decisis, the statute in question stands.

Recent medical research has shown that there are far more health risks associated with abortion than were known at the time of *Roe*. Therefore, since abortion involves significant risks even in the first trimester, the State has a compelling interest in regulating abortion throughout pregnancy.

The fundamental issue before this Court is to identify the proper balance between the rights of individuals and the State. *Amicus* will argue that the State has a compelling right to regulate all birth control technologies, including abortion. At the same time, *Amicus* will argue that the State's right to regulate these technologies, is properly limited by the *inherent* and *natural* right of individuals to conceive and bear children.

Such a balance of natural reproductive rights versus regulation of technology can

and should be enunciated, especially now when individual rights are being threatened as never before. In the place of the present confusion surrounding "privacy" rights, *Amicus* offers the Court a clear rationale and timeless standard for protecting both the "natural reproductive rights" of individuals and the right of State to regulate technologies and commerce.

ARGUMENT

I. BIASES IN THE ABORTION INDUSTRY MAKE SELF-REGULATION OF INFORMED CONSENT IMPOSSIBLE.

A. PLANNED PARENTHOOD AFFILIATES, AND OTHERS IN THE ABORTION INDUSTRY, HAVE A RECORD OF WITHHOLDING INFORMATION ABOUT RISKS OF WHICH REASONABLE PATIENTS WOULD WANT TO BE INFORMED.

The Reardon Study found that 95% of

post-aborted women who received counseling or abortions at a Planned Parenthood facility report that they received little or no information about fetal development; over 80% said they received little or no information about the potential risks of abortion; and 64% report that when they asked questions, their questions were not thoroughly answered, or their concerns were trivialized. Nearly 85% of the women surveyed believe that they were misinformed or denied relevant information or during their counseling. Only 13% felt adequately prepared for the abortion and forewarned of risks after receiving counseling at a Planned Parenthood facility. Those who received counseling at facilities other than Planned Parenthood report even lower levels of satisfaction. [Reardon, 19] In retrospect, over 90 percent of women who suffer post-abortion trauma complain that they did not receive enough information at

the clinics on which to base an informed choice. [Reardon, 16-18]

Statistical analysis demonstrates that patient dissatisfaction with abortion counseling is a highly significant predictor ($p<.0001$) of severe psychological reactions after an abortion.[4]

The scope of this problem is just now being understood. In 1990, psychologist Catherine Barnard found that at three to five years post-abortion, 18.8% of aborted women had developed "diagnosable post-traumatic stress disorder (PTSD)" a psychological dysfunction which can severely limit a person's ability to engage in normal relationships and work. Approximately half had many, but not all, symptoms of PTSD.[5]

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[4]Franz and Reardon, 43.

[5]Barnard, "The Long-Term Psychological Effects of Abortion," (Portsmouth, N.H.: Institute for Abortion Recovery and Research, 1990).

B. PLANNED PARENTHOOD, AND OTHER ABORTION PROVIDERS, HAVE A PHILOSOPHICAL BIAS TOWARD ENCOURAGING CLIENTS TO CHOOSE ABORTION OVER CHILDBIRTH.

According to the Reardon Study, only 25% of the post-aborted women surveyed who were counseled at Planned Parenthood affiliates described themselves as already firm in their decision to have an abortion at the time they went in for counseling. Over 60% were still looking for *another* option to abortion. Fully 93% said it was possible that they would have chosen differently if they had not been so strongly encouraged to abort by others, including their abortion counselor. When asked "Did the clinic, doctor, or counselor help you to explore your decision?" fully 85% of Planned Parenthood clients replied "not at all," and an additional 13% answered "very little." In retrospect, 72% percent said their counselors advice was very "biased"

toward choosing abortion. [Reardon, 18-19]

When a woman is experiencing such ambivalence, counselors have an inordinate influence over their decisions. When faced with clients who express a desire to keep their child, abortion counselor Betty Orr says: "I ask them who is going to take care of the baby while they're in school. Where are they going to get money for clothes?"[6] Other counselors bluntly tell the woman to forget the motherhood fantasy and "get realistic." Raising a child, they are told, costs hundreds of thousands of dollars. Faced with such antagonism, from parents, boyfriends, and their "health-care" advisors, is it any wonder that young women cave in to the unrelenting pressures to abort even when 60% or more would actually prefer to keep their babies?[7]

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[6] Francke, *The Ambivalence of Abortion*, 179

[7] Zimmerman, 139, also Reardon, 16-18.

Pressured into "choosing" abortion by Planned Parenthood counselors at the age of 13, Kathy Walker charges: "I felt like my family had no control over anything. My parents felt as deceived as I was; we never really made an informed decision. Planned Parenthood railroaded us...But nobody ever really asked me what I wanted to do."[8]

In another case, an Indiana Planned Parenthood affiliate ignored the warnings of Kathleen Kitchen's own physician who believed an abortion could be fatal because she suffered from certain birth defects. Evading two court orders blocking the abortion, counselors procured a dangerous out-of-state abortion for the girl which resulted in hospitalization for abortion related complications.[9] These events

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[8] Kupelian, "Abortion, Inc." *New Dimensions*, (October 1991) 14.

[9] Bond, "Mother Files $1 Million Lawsuit," National Right to Life News, October 23, 1986, p6.

demonstrate that a pro-abortion bias may overcome even the most basic evaluation of abortion's dangers for high risk patients.

Part of abortion counselors' bias is financially motivated. Some see themselves in the "business" of selling abortions.[10] Some act paternalistically, honestly believing that abortion is the best solution to every problem pregnancy.[11] Others have openly expressed misogynist and racist attitudes, defending abortion as a means of eliminating the poor. These persons provide abortions as a means to prevent these "unfit" persons from raising "unfit" children.[12]

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[10] Zeckman and Warrick, "Abortion Profiteers," Special Reprint, *Chicago Sun-Times*, 1978

[11] Reardon, 251-243.

[12] Dr. Edward Allred, owner of the largest chain of abortion clinics in California is a staunch advocate of abortion as a method of controlling the population of minority groups: "Population control is too important to be stopped by some right-wing pro-life types. Take the new influx of Hispanic immigrants. Their lack of respect of democracy and social order is frightening. I hope I can do something to stem

Perhaps the widest spread bias is an ideological commitment to population control. The primary purpose of the Planned Parenthood Federation of America, for example, is to serve as a population control advocate. Any health care services it provides are subservient to that goal.[13]

According to the PPFA's organizational documents, population control, "is a most essential step, if not the most essential step ... to solve the most critical problems of hunger, deprivation and the hopelessness of poverty, as well as

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that tide; I'd set up a clinic in Mexico for free if I could.... When a sullen black woman can decide to have a baby and get welfare and food stamps and become a burden to all of us it's time to stop." "Doctor's Abortion Business Is Lucrative", *San Diego Union*, Oct. 12,, 1980 B1:1.

[13] Ample documentation of this can be found in the following: J. Kasun, *The War Against Population: The Economics and Ideology of Population Control*, (1988) (hereinafter Kasun); A. Chase, *The Legacy of Malthus: The Social Costs of the New Scientific Racism* (1977) (hereinafter Chase), J. Simon, *The Ultimate Resource* (1981) (hereinafter Simon); G. Greer, *Sex and Destiny* (1984) (hereinafter Greer).

deterioration of our water, land and air."[14] Other PPFA documents declare that population control is also crucial for bringing about world peace.

In their view, population control is a virtual panacea. It is so important that the PPFA officials have frequently supported the right of governments to force abortion on women who become pregnant without government consent.[15] Even though

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[14] Schwartz, "Bringing the Sexual Revolution Home: Planned Parenthood's 'Five-Year Plan'", America 138:6, 18 February 1978, 114-116.

[15] Planned Parenthood has frequently supported coercive population control. For example, at the White House Conference on Hunger in 1969, Dr. Alan Guttmacher of Planned Parenthood supported a national plan of (1) mandatory abortion for any unmarried girl found pregnant within the first three months of pregnancy, and (2) mandatory sterilization of any such girl giving birth out of wedlock for a second time. (E. Craven, "Abortion, Poverty and Black Genocide: Gifts to the Poor?", *Abortion and Social Justice*, eds. Hilgers, 235 (1972).)

Similarly, Frederick Jaffe, Vice President of the Planned Parenthood/World Population and head of research for Alan Guttmacher, has argued for government population programs which would require "permits for children", "compulsory sterilization of all who have two children", "compulsory abortion", "encourage homosexuality", and "fertility control agents in water supply." (*Family Planning Perspectives*, Special supplement-U.S. Population Growth and Family Planning: A Review of the Literature, vol. 2, no. 4, October 1970, ff.p.24.)

Planned Parenthood president Faye Whattleton has likewise promoted an us-against-them, rich-versus-poor mentality as motivation for population control at any price. (Simon, 327)

they have lost U.S. funding because of this stance, PPFA's international affiliates continue to provide assistance to the Chinese government's program in which unlawfully pregnant women are "handcuffed, tied with ropes, or placed in pig's baskets" while awaiting their forced abortions.[Kasun, 91]

Other examples of abortion proponents who support coercive population control, including forced abortion, are numerous. For example, Lawrence Lader, founder of the National Abortion Rights Coalition, and author of the pro-abortion tract *Abortion* (1966) which was cited as an authority eight times in *Roe v. Wade*, is also a radical proponent of coercive population control, arguing that forced population

control is "imperative," both at home and abroad, since "We must accept the principle that having a child is no longer a matter of private will, but of public welfare."[16] In a review of the Chinese program of forced population control which includes forced abortion, forced sterilization, forced contraceptive implants, and infanticide of handicapped newborns, and infanticide of undesirable female offspring, Lader has only the highest praise.[17]

Similarly, former N.O.W. president Molly Yard has defended the Chinese anti-choice policy, saying: "I consider the Chinese governments policy among the most intelligent in the world."[18]

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[16] Lader, *Abortion II: Making the Revolution*, (1973) 218-222.

[17] Lawrence Lader, "The China Solution," *Science Digest*, 91:4, April 1983, 78.

[18] Transcript of "Oprah Winfrey Show," July 6,

Persons or organizations who advocate coercion, privately or publicly, would certainly not hesitate to conceal or understate the risks of abortion. Indeed, such population control zealots have frequently defended the use of dangerous or insufficiently tested birth control technologies on the grounds that injured women are a "secondary" concern compared to "overpopulation."[19]

1989.

[19] In 1970, Planned Parenthood President, Dr. Alan Guttmacher testified before a Senate subcommittee that the health dangers of the Pill are secondary to the social "dangers" of pregnancy and overpopulation. ("Expert Decries 'Alarm' on Birth Control Pill," *New York Times*, Feb. 26, 1970, 50:3)

As another example, at a 1962 conference sponsored by the Population Council, the IUD was being promoted as the panacea for controlling the world's "overpopulation." Arguing that the risks of IUD use were acceptable, Dr. J. Robert Willson, of the University of Michigan School of Medicine defended its wide-spread promotion saying: "If we look at this from an overall, long-range view, perhaps the individual patient is expendable in the general scheme of things, particularly if the infection she acquires is sterilizing but not lethal." (Mendelsohn, *Male Practice: How Doctors Manipulate Women*, 120)

Similarly, Dr. Ravenholt, head of AID's population control programs, defended the widespread promotion of Depo-Provera, despite initial negative results, on grounds that the ill-effects could not be fully

Since PPFA's organizational mandate is to reduce birth rates, here and abroad, especially among the poor, its "family planning" services are merely a means to that "all-important" end. Their counseling services are therefore biased by this perspective.

If a few women, or even 80%, suffer minor to severe post-abortion trauma, population controllers may deem this a small price to pay for world peace, prosperity, and environmental purity. Abortion is an essential tool for population control, and they will continue to promote it even if it means hiding the risks from pregnant women.[20]

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ascertained until tested on tens of millions of women. (Ehrenreich, et.al., "The Charge: Genocide," *Mother Jones*, November 1979, 30)

[20] While the sincerity of population controllers beliefs is not questioned here, it is noteworthy that the myth of overpopulation has been thoroughly debunked. Indeed, the overwhelming benefits of population growth are only now becoming fully appreciated. (See the exhaustive works of Simon, Kasun, Chase.) Notably, even population controllers admit that the evidence against their theories of overpopulation problems is impossible to refute, but they insist that their approach of forced population control is still a safer bet. (Hardin, "The Tragedy of the Commons," *Science*, December, 1968, 1243-1248) Hardin, incidentally, claims to have been the first to develop the rhetoric of a "woman's right to control her own body," yet in practice he too supports coercive population control programs, especially of "feeble-minded" groups, because "Injustice is preferable to total ruin." *Ibid.*

II. ABORTION PATIENTS HAVE A GREATER NEED FOR A FULL DISCLOSURE OF RISKS THAN OTHER PATIENTS, AND THEREFORE "THERAPEUTIC PRIVILEGE," THE RIGHT TO WITHHOLD DISTURBING FACTS, DOES NOT APPLY.

As described above, the abortion industry is plagued with a widespread population control fanaticism, paternalistic and racist attitudes, and simple greed. These attitudes produce a manipulative brand of counseling which promotes abortion and denigrates the option of childbirth.[21]

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[21] The record of abortion providers withholding information about the risks of abortion for fear of discouraging their client from "the right choice" has been well documented by numerous sources. For a

Whenever any bias, about any medical procedure, exists, it tends to produce a bias in favor of underdisclosure of risks, thereby making a "community medical standard" for disclosure inadequate.[22] "As the patient must bear the expense, pain and suffering of any injury from medical treatment, his right to know all material facts pertaining to the proposed treatment cannot be dependent upon the self-imposed standards of the medical profession."[23]

Even when a treatment is life-saving, the option of withholding potentially upsetting information from patients, "therapeutic privilege," is very narrow. This option is narrowed even further in the

review of the literature see Reardon, 232-271.

[22] Schneyer, *Informed Consent and the Danger of Bias in the Formation of Medical Disclosure Practices*, 1976 Wis. L. Rev. 124.

[23] *Cooper v. Roberts*, 220 Pa. Super Ct. 260,267,286 A.2d 647, 650 (1971). See also *Wilkinson v. Vesey*, 110 R.I. 606,624,295 A.2d 676,687 (1972);

case of an *elective* procedure such as abortion.[24]

Since a decision against an *elective* abortion is, by definition, never life-threatening, the withholding of "upsetting" information is never justified. A decision to forego a previously desired elective abortion because of possible risks, even remote ones, is always reasonable. When physicians or counselors withhold information because they fear the information will lead to an "unreasonable" choice for childbirth, they are reflecting their own bias into the decision making process, a bias that has no medical basis.

This is especially true since the majority of abortion patients are ambivalent about their choice in the first place, and 84% say they have kept the pregnancy

[24] Annas, *The Rights of Hospital Patients: The Basic ACLU Guide to a Hospital Patient's Rights*, 68.

under better circumstances.[25] Because this decision to abort is often tentative, or even resisted, "upsetting" information may be *exactly* what a woman is looking for as an excuse to keep her child when everyone else is pressing her into an unwanted abortion.

It is often far easier for a reluctant woman to tell her pressuring boyfriend, or parents, that "The doctor says abortion is dangerous," than "I want this baby, even if you don't." When everyone around her is insisting that abortion "is the best solution" and will be "safe and easy," it is hard to resist this pressure without appearing "irrational." Displaying fear about even modest risks, may be her only lifeline for escaping an unwanted abortion.

A. SINCE "BASIC RESPONSIBILITY" FOR THE

[25] Reardon, 11-20. Zimmerman, 110-112,143.

ABORTION DECISION HAS BEEN SHIFTED TO PATIENTS, THERE IS NO RATIONAL GROUNDS FOR WITHHOLDING ANY INFORMATION, EVEN THE MOST DISTURBING.

In *Roe*, the Court held that "basic responsibility for it [the abortion decision] must rest with the physician." (at 166) In practice, however, the mere fact that a woman wants an abortion is viewed by abortionists as sufficient reason to provide one; it is the woman is who is expected to bear responsibility for the wisdom of her decision, not the physician.

When abortion providers shift "basic responsibility" for the abortion decision to the patient, it becomes even more important that the patient receive *all* available information about the risks of the procedure, options, and fetal development. *Amicus* would argue that in the absence of a close physician-patient relationship, the option of withholding

potentially upsetting information for an elective abortion disappears completely.

If the burden of evaluating her health needs is to be shifted entirely to the patient, than *all* available information should be given to the patient. Since the patient's initial decision to have an abortion is often made out of desperation, or even coercion from her family and friends, a thorough education about risks, options, and fetal development is clearly necessary in order to rationally and reasonably evaluate that decision in light of its possible negative effects on her future reproductive, psychological, and social health.

B. LACK OF FULL DISCLOSURE INCREASES THE INCIDENCE OF POST-ABORTION TRAUMA AND INCREASES THE SEVERITY OF THE TRAUMA.

Post-abortion women who suffer physical or psychological complications about which

they were not warned, or who later learn of fetal development from another source, suffer delayed trauma and have increased feelings of having been exploited.[26] Increased levels of psychological trauma have been measured among women who perceive that they received poor or inadequate counseling, among women who feel they rushed through their decision, and among those who claim their decision was not "well thought out."[27] Additional information, and waiting periods, provide an essential safeguard for many women.

Coercion and moral ambivalence are 2 of the 14 identified criteria which determine whether or not a woman is at high risk of

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[26] Reardon, 115-142. Dr. Vincent Rue, a clinical psychologist with an extensive practice in post-abortion counseling reports: "I have seen hundreds of patients in my office who have had abortion who were just lied to by the abortion counselor. Namely: 'This is less painful than having a tooth removed. It is not a baby.' Afterwards, the woman sees *Life* magazine [cover of a developing fetus] and she breaks down and goes into a major depression." Kupelian, 16.

[27] Franz and Reardon, 43.

suffering long-term mental health problems as a result of her abortion.[28] Over half of post-aborted women report feeling "forced" to have abortion by others.[29]

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[28] These 13 high risk characteristics are: 1) ambivalence about the decision; 2) pressure in the decision; 3) a prior abortion; 4) prior children; 5) adolescence; 6) religious or conservative values; 7) a desire to keep the abortion secret; 8) lack of partner's support; 9) lack of parents' support; 10) prior emotional or psychiatric problems; 11) prior low self-image; 12) abortion of planned child due to fetal abnormalities; 13) second or third trimester abortion; 14) a history of sexual assault, especially if the pregnancy is the result of sexual assault. Rue, Institute for Abortion Recovery and Research, "Pro-Abortion Counseling for Post-Aborted Women: The Implications" 1991 paper session of the Association for Interdisciplinary Research; Senay, "Therapeutic Abortion: Clinical Aspects", 23 *Archives of Gen. Psych.*, 408-415; Friedman,et.al.,"The Decision-Making Process and the Outcome of Therapeutic Abortion", *Am. J. Psychiatry*, v.131, 1332-1337 (1974); (1970); Lazarus, "Psychiatric Sequelae of Legalized Elective First Trimester Abortion", 4 *J. of Psychosomatic Ob&Gyn*, 141-150 (1985); Pare and Raven,"Follow-up of Patients Referred for Termination of Pregnancy",*The Lancet*, v.1, 635-638 (1970); Reardon, 131-38.

[29] Between 30 and 60 percent of women having abortions have a positive desire to carry the pregnancy to term and keep their babies. [Zimmerman,110-12,120; Reardon, 12,51] This desire to keep the child is overcome only by external pressures. In a study of over 250 women who had suffered physical or psychological aftereffects from abortion, 54 percent felt "forced" into an unwanted abortion by others and 64 percent felt "forced" by their circumstances. Only 33 percent felt free to make their own decision, and 61 percent felt their lives and decisions at that time were very much "controlled by others." [Reardon, 10-11] Pro-choice researchers have similarly found that over two-thirds of the women made statements suggesting they had "no

Nearly 70 percent of women seeking abortions have a negative moral view of abortion.[30] Clearly, the majority of women having abortion have one or more characteristics of high risk patients.

For high risk patients the resulting post-abortion trauma can literally destroy a woman's self-image, resulting in: drug and alcohol abuse, suicidal behavior, emotional numbness, emotional breakdown, radical personality changes, memory loss, sleep disorders, sexual dysfunction, increased tendency toward violence, child abuse, difficulty bonding with later children, psychosomatic illnesses, and more.[31]

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choice" or were "forced" to have an abortion. [Zimmerman, 193]

[30] Zimmerman, 69; Reardon, 13

[31] Strahan, *Major Articles and Books Concerning the Detrimental Effects of Abortion: An Annotated Bibliography*, contains the most extensive collection of findings published in the journals of medicine and psychology. See also, Saltenberger, *Every Woman Has the Right to Know the Dangers of Legal Abortion*, and Reardon, 115-142. A summary of a detailed survey of

Sixty to eighty percent of all women having illegal abortions can be classified as high-risk aborters who choose abortion only to please others, or because they feel at a loss for other options.[32] For these women, abortion is at best a marginal choice. At worst, it is a choice which is literally forced upon them.

Very few of these women would freely choose abortion in the presence of emotional, social, or financial support. Many would have chosen differently, if given adequate information about the risks of abortion, fetal development, or alternatives. Provision of this information to significant others, including family, husbands, and boyfriends,

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100 high-risk abortion patients, entitled "Post-Abortion Reactions of High Risk Abortion Patients," undertaken by Reardon for the Elliot Institute has also been lodged with this brief.

[32] Reardon, 131-134,297-300.

would also reduce the pressure on these women to undergo unwanted, and potentially dangerous abortions.

VI. THE STATE MUST HAVE AN UNLIMITED RIGHT TO REGULATE ABORTION, AT ANY STAGE OF PREGNANCY, FOR A BROAD RANGE OF HEALTH REASONS.

A. *ROE* DID NOT GRANT WOMEN A FUNDAMENTAL RIGHT TO ABORTION, BUT FOUND THIS NEW RIGHT AS EVOLVING FROM THE DEVELOPMENT OF NEW TECHNOLOGIES WHICH MAY HAVE MADE ABORTION "SAFER THAN CHILDBIRTH."

The abortion right enumerated in *Roe* rests entirely on the much disputed "fact" that advances in medical technology make "abortion in early pregnancy...relatively safe"(at 149) and that today "mortality in abortion may be less than mortality in normal childbirth." (at 163).

But how can a "fundamental" human right

come into existence only *when* abortion appears to be safer than childbirth? If it is a fundamental right, then it is a right which exists regardless of its dangers. By what power can any *fundamental* right be expanded or contracted merely by changes in medical technology?

The answer is that abortion is not a fundamental right. Rather, it is an *evolved right* which rests upon advances in medical science.

Because it was dealing with an evolved right, the *Roe* majority erred in thinking that the medical "facts" which it found to be compelling in 1973 would not change with the acquisition of new knowledge and new technologies. If at one moment in history the State's "legitimate interests in protecting both the pregnant woman's health and the potentiality of human life" (*Roe* at 115, 149) can contract, then at another point in history they can expand.

If, for example, new technologies make unsuspected risks more apparent, the State's rights may expand. Similarly, knowledge of fetal development, new theories of "meaningful life," and advances in fetal medicine and artificial wombs may also change the States "compelling" interests over time.[33]

Recognition of this fact that abortion is at best an "evolved right," would allow States great latitude in regulating abortion in accordance to new findings of fact, while at the same time respecting the doctrine of *stare decisis*.

Additional evidence that access to abortion technology is not a fundamental right is seen in the fact that *Roe* assigns

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[33] In its eagerness to grant physicians the right to perform "safe" abortions, which many States were already recognizing, the Roe majority's fundamental error was in granting itself the authority to restrict and define those interests which the State could find to be "compelling." If the State is not free to be guided by its own judgment of what is compelling, then the State is not free at all.

responsibility and control over abortion primarily to the attending physician. (at 163 and 166) But if the consultation and consent of a single physician can be required in the making of this health decision, why not the consultation and consent of parents, or a panel of physicians, or a State agency? Parents, husbands, physicians, and the State all have legitimate and compelling interests in safeguarding the health of women.

A husband, for example, deserves, at the very least, notification of an abortion not only to enable him to safeguard his child, but also his wife. If physical or psychological aftereffects occur, the husband must be in a knowledgeable position to help his wife in seeking treatment. Ironically, while petitioners maintain that husbands may brutalize their wives if notified of a pending abortion, the evidence suggests that abusing husbands are more likely to

brutalize wives who *refuse* to abort a pregnancy which *he* does not want.[34]

This interest of outside parties is especially valid when the stress of an unplanned pregnancy may cause a young woman to make a rash and ill-informed decision which may have severe negative effects on her life. This interest is further increased when a woman is vulnerable to being pressured into an unwanted abortion.

B. ABORTION TECHNOLOGIES INVOLVE HEALTH RISKS WHICH WERE NOT KNOWN, WERE NOT UNDERSTOOD, OR WERE OTHERWISE IGNORED IN *ROE V. WADE*.

While *Roe* considered only the mortality rate of abortion in its determination that abortion is "safe," new evidence suggests that there are unforeseen psychological and

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[34] Reardon, 31,78,210. Over 50% of women who suffer post-abortion trauma report being pressured into the abortion by boyfriends or husbands. Reardon, 11.

reproductive complications resulting from abortion.[35]

Abortion's defenders do not deny its risks so much as downplay them, arguing that this or that risk is "negligible." But such evaluations are clearly value judgments. If the State can be concerned about unintended deaths from abortion, why not subsequent miscarriages or ectopic pregnancies? Who is to decide what the "acceptable" limits of abortion induced depression, guilt, suicide, or child abuse are to be?

Given the uncertainty surrounding the impact of all technologies, the State's compelling interests may change with time. The State must be free to regulate any technology, including abortion, in accordance with such new information.

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[35] See Strahan for approximately 750 citations relevant to aftereffects of abortion which have been studied since 1973. See also Reardon, Franz, Zimmerman, Pare, Lazarus, and Saltenberger.

Since abortion has health risks, even during the first trimester, the State may find in these risks a compelling interest to protect women from these risks throughout pregnancy.[36] Given the State's two-fold interest in protecting the health of women, and protecting the life of human embryos, there is can be no absolute right to use abortion technologies.

V. THE STATES HAVE A LEGITIMATE INTEREST IN REGULATING BIRTH CONTROL TECHNOLOGIES, SUCH AS ABORTION, WHICH SHOULD NOT BE RESTRICTED.

Abortion should not be any more exempt from State regulation than any other birth

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[36] The State's right to regulate this technology is especially important since there is no guarantee that women considering abortions will be adequately and accurately informed of the health risks or will be in the proper emotional state to rationally weigh these risks. The record of abortion providers withholding information about the risks of abortion for fear of discouraging their client from "the right choice" has been well documented by numerous sources. See Zeckman. For a review of the literature see Reardon, 232-271.

control technology. If anything, it should be subject to even greater regulation, given the State's legitimate interest in the inter-uterine human life, or "potential person." But even if this secondary interest is ignored, the State should be free to regulate abortion for reasons of health and morals, just as it is allowed to regulate other birth control technologies.

A. THE RIGHT OF THE STATE TO REGULATE BIRTH CONTROL TECHNOLOGIES IS ALREADY ESTABLISHED IN CONSTITUTIONAL LAW.

In *Griswold v. Connecticut* 381 U.S. 479 (1964), at 485 and 507, the Court recognized that the State could regulate the manufacture, sale, and distribution of contraceptives in the same way that it is empowered to regulate any other trade or commerce.[37]

[37] In his dissent in *Poe v. Ullman*, 367 U.S. 497 (1960), which anticipated his majority opinion in *Griswold*, Justice Douglas recognizes that States would have a right to ban completely the sale of contraceptives through drug stores, or even ban the manufacture of contraceptives because: "Where either the sale or the manufacture is put under regulation, the strictures are on business and commercial dealings that have had a long history with the police power of the States. The present law, however, deals not with sale, not with manufacture, but with *use*." (at 519).

As emphasized in *Griswold*, the failure of the Connecticut law was not that its goals, or even that its means were illegitimate, but rather that its means were incongruous with other laws. To allow the manufacture and distribution of contraceptives, but to ban their "use" is unreasonable. Such means "sweep unnecessarily broadly" in the absence of less intrusive controls over manufacture and sale. (at 485)

Similarly, in *Eisenstadt v Baird*, 405 U.S. 438 (1971) (White concurring, at 463), the plurality continued to recognize that contraceptives may be regulated for the purposes of protecting health, or even

promoting morals. (at 448, 450, and White concurring at 463) But the Court struck down the Massachusetts law because it was "so riddled with exception" (at 449) that the legislature's true intent was apparently not the protection of health or morals, but rather the limitation of "contraception in and of itself." (at 443)

Specifically, the Court questioned the sincerity of the claim that the regulations were based on moral grounds because the State allowed for the "exception" of unregulated distribution of condoms.(at 448,449) But this "exception" existed because the State chose to classify condoms as being primarily a prophylactic with a secondary effect as a contraceptive. For logical reasons the State therefore chose to regulate prophylactics differently than other contraceptives, even though the prophylactic could also be used for a contraceptive purpose.

Given the present AIDS crisis, the State's preferential treatment of condoms now appears entirely reasonable. In hindsight, the *Eisenstadt* decision dismantled an important public health policy by which the State limited access of non-prophylactic birth control technologies to a group at high risk of transmitting venereal disease (unmarried persons) so as to compel this group to either abstain from sexual intercourse or use prophylactic birth control devices.

In addition, the *Eisenstadt* majority concluded that the contraceptives regulated by the State had no health risks, and so could not be regulated for health reasons. (at 451, White concurring, 464) But spermicidal agents, the contraceptive at issue in *Eisenstadt*, are *now* known to carry the risk of causing serious fetal malformation, miscarriage, genital irritation, and

infection.[38] Since the health effects of any technology can remain undetected for many years, it is clearly imprudent for the Court to ever classify any technology as "safe" merely on the evidence available at one point in time. Determination of when a contraceptive has been sufficiently proven to be "risk-free" is properly left to the State.

Furthermore, spermicides, like many other contraceptive devices, have a high failure rate in preventing conception. Therefore, State regulation of those who distribute and counsel others in the use of birth control technologies is clearly reasonable when the State's "health" interests are broadly construed to include concern for unplanned pregnancies. And

[38] Jick, "Vaginal Spermicides and Congenital Disorders" 245 J.A.M.A. 1329-32 (1981). In *Wells v Ortho Pharmaceutical Co.*, 615 F.Supp. 262 (N.D. Ga. 1985), plaintiffs were awarded $5.6 million in compensatory damages for birth defects resulting from spermicide use.

since pregnancies resulting from contraceptive failures pose a greater "potential danger" for unmarried persons, because they are less prepared to raise a child in a stable home, the State should be able to regulate the distribution of potentially faulty birth control devices to this group for which contraceptive failures pose the greatest health risk.

If one takes a broad view of the State's health concerns, it is clear that the State should enjoy latitude in regulating birth control technologies, including abortion.

B. STATES MUST BE FREE TO ADJUST REGULATION OF BIRTH CONTROL TECHNOLOGIES TO MEET CHANGING CONDITIONS.

Birth control technologies have a great number of health, moral, and public policy implications. These costs and benefits must be weighed and adjusted with the needs of the time. For example, during a time of

a great venereal disease threat such as AIDS, it is conceivable that the State may seek to promote prophylactic contraceptives and discourage other methods. At other times, the State may wish to ban contraceptives which are less effective and result in a higher incidence of unplanned pregnancies. At still other times, the State may ban technologies for which there are safer alternatives.[39]

At most times, the State is likely to attempt to balance these competing concerns of health, morals, and effectiveness. Such laws, while a sincere attempt to protect and serve the people, will be imperfect because the technology is imperfect.

Judicial intervention in the regulation of birth control technologies threatens the

[39] Such was the case when the FDA forced the removal of "sequential pills" from the market because, according to current data, combination pills are more effective and have fewer risks. FDA Consumer 25 (April 1976).

ability of the States to respond to changing moral and public health needs. In the cases of *Eisenstadt* and *Roe*, the Court forced changes upon the States which the legislatures were already freely considering in the light of individual and public health needs. Let the State legislate, and eventually it may get it right on its own.

C. STATE REGULATION OF BIRTH CONTROL TECHNOLOGIES IS NECESSARY BECAUSE PHYSICIANS, FAMILY PLANNING AGENCIES AND DRUG MANUFACTURERS ARE SOMETIMES MOTIVATED TO PROMOTE BIRTH CONTROL TECHNOLOGIES WHICH MAY HAVE DETRIMENTAL SIDE-EFFECTS OR MAY BE LESS THAN FULLY EFFECTIVE.

The birth control and abortion industries in America encompass a multi-billion dollar market. Drug manufacturers, physicians, and family planning agencies all enjoy a share in these profits, and all of these parties have a financial interest

in these technologies.

Part of this promotion includes defending their technologies from charges of being unsafe. The controversies surrounding the health risks of abortion, the IUD, and the Pill, for example, have gone on for decades and are still unresolved.

Thus, while evidence exists to defend or condemn any birth control method, those who sell these products will tend to believe and promote the evidence which supports their interests. It is the proper role of the State to consider evidence both for and against a birth control method, and to regulate these methods according to its own assessment of effectiveness, risks, and social costs. At times the State's decision ~~may~~ be manipulated by the "facts" of one party or another, but this risk is no greater than the risk that the judiciary will be deceived.

State regulation of birth control

technologies is also justified because many physicians, family planning agencies and drug manufacturers are ideologically bound to reducing births among some classes of women regardless of the detrimental side-effects which their technologies will impose on women. Evidence of this population control bias was offered earlier in this brief.

VI. THREATS TO TRUE REPRODUCTIVE FREEDOM FROM PRIVATE INTERESTS AND THE STATE REQUIRE THAT THE INDIVIDUAL'S NATURAL RIGHT TO REPRODUCTIVE FREEDOM MUST BE CLARIFIED AND STRENGTHENED.

While *Amicus* asks the Court to explicitly affirm the State's right to regulate birth control technologies, such as abortion, *Amicus* also recognizes a need to clarify and strengthen the legitimate and inherent reproductive rights of all persons.

As noted above, population controllers pose a real threat to reproductive freedom. The State in turn may also pose such a threat. Federally funded family planning programs have periodically come under attack from recipients who felt coerced into "voluntary" sterilizations or "elective" abortions.[40] American policy has similarly encouraged coercive population control programs in numerous other Third World nations as a precondition to foreign aid.[41]

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[40] "[T]here is uncontroverted evidence in the record that...poor people have been improperly coerced into accepting sterilization..." U.S. District Court of D.C., Judge Gesell, *Relf V. Weinberger*, civil actions Nos. 73-1557,74-243, March 1974.) See also Craven, 263; Reardon 272-278; and Chase, 16-19. In a study of four Indian Health Service hospitals between 1973 and 1976, the GAO found that 3406 sterilizations were performed without the patient's informed consent as a result of a general policy to restrict population growth of Indians. Miller, "Native American Peoples on Trail of Tears Once More," *America*, 9 December 1978, 423.

[41] Kasun,79-94. For example, in 1976 the U.S. government pressured India into forcibly sterilizing three million people in mobile tent-camps. [Kasun, 85-86] At approximately the same time, Dr. Ravenholt, director of AID's Office of Population insisted that one-quarter of the fertile women of the world must be sterilized to meet U.S. goals of population control and to maintain "the normal operation of U.S. commercial interests around the world." [ibid, 81]

In *Buck v. Bell*, 274 U.S. 200,207 (1927) the Court explicitly allowed the State to force sterilization on any person considered a "potential parent of socially inadequate offspring" because it is "better for all the world, if instead of waiting to execute degenerate offspring for crime, or let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind."[42]

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[42] Two years prior to *Buck v. Bell*, an unknown European foreshadowed Holmes' decision claiming that the unfit were sapping the strength of the State, and in order regulate their births, "the State will have to avail itself of modern medical discoveries. It must proclaim as unfit for procreation all those who are afflicted...and practical measures must be adopted to have such people rendered sterile." The book calling for control of reproduction as a cornerstone of social policy was *Mein Kampf*, by Adolf Hitler. [Chase,135]

By 1932, American sterilization programs had forcibly sterilized 15,000 persons. German health officials, in turn, structured German eugenic programs on the American model. Ludmerer, *Genetics and American Society* 118 (1972); Drogin, *Margaret Sanger*, 24 (1980). When the Germans surpassed America's population control efforts, Paul Popenoe of the American Birth Control League (later renamed Planned Parenthood), praised the Germans for

True reproductive freedom does not exist under the present interpretation of Constitutional rights. If under *Bell* the State has the right to prevent the reproduction of undesirable persons, then surely this would encompass the right to implement forced abortions, or forced contraceptive implants.

A. THE VAGUELY DEFINED "RIGHT TO PRIVACY" MUST BE REPLACED BY A MORE CAREFULLY DEFINED "NATURAL REPRODUCTIVE RIGHTS."

Amicus argues that the first step which must be taken toward restoring reproductive freedom is the abandonment of the umbrella "right of privacy." It must be recognized that when the Court first began to articulate this "right," it burdened itself

"proceeding toward a policy that will accord with the best thought of eugenicists in all civilized countries." Ludmerer, 117.

with vague terminology which by its very nature can be either totally meaningless or irresistibly powerful.[43]

Envisioned as arising from the shadowy penumbra of the Constitution, this "right" lacks clear guiding principles or even a common understanding which can serve to protect the people, guide the judiciary, or justly restrict the legislatures. Thus, if only for the sake of clarity, this catch-all "right of privacy" must be replaced with a more precisely defined term.

Amicus argues that in the place of the "right of privacy" the Court should recognize the "natural reproductive right" of individuals. This more narrowly defined right addresses the issues raised by the

[43] The right of privacy presently guiding judicial decision is an undefinable enigma; it "cannot be said to be absolute" [Roe, 154] yet it is a "fundamental" right which repeatedly prevails over State interests. Does the "right of privacy" include only sexual behavior? Birth control access? Reproductive freedom? All private behaviors? Semi-private behaviors?

contraception and abortion cases, and draws a clear line between the rights of individuals and the privileges of the State.

With seventy years of legal confusion surrounding issues related to reproductive freedom, such a clarification of the law is urgently and immediately needed from the Court. A logical and timeless framework for defining the "natural reproductive rights" of persons is described in the remainder of this brief.

B. THE NATURAL RIGHT OF REPRODUCTIVE FREEDOM, AS GUARANTEED IN THE CONSTITUTIONALLY RESERVED RIGHTS OF INDIVIDUALS, IS THAT RIGHT WHICH ARISES FROM A PERSON'S NATURAL REPRODUCTIVE BIOLOGY, IN RESPECT OF WHICH: 1) THE STATE MAY NOT LIMIT ANY PERSON'S NATURAL FERTILITY OR PREVENT PERSONS FROM NATURALLY CONCEIVING OR BEARING CHILDREN, AND 2) THE STATE MAY NOT FORCE ANY PERSON TO CONCEIVE CHILDREN NOR

COMPEL ANY PERSON TO PROVIDE REPRODUCTIVE MATERIAL FOR THE ARTIFICIAL CONCEPTION OR GESTATION OF CHILDREN.

Whether or not one believes the Declaration of Independence's claim that the inalienable rights of all persons are endowed upon them by their Creator, the natural reproductive rights of all people are clearly central to our biological humanity. Any law which transgresses these inherent rights for the sake of any social goal, whether to eliminate the "unfit" or to "create a race of thoroughbreds" through eugenic manipulations, violates all human dignity and freedom.

History demonstrates that the more totalitarian a State becomes, the more likely it is to seek to control every aspect of life, even human reproduction, so as to control both the "quality" and quantity of its population. Accordingly, no just government has the right to coerce

or force sterilization, contraception, or abortion upon any person or group of persons. Recognition of this right must begin with a rejection of *Buck v. Bell*.

Amicus would further argue that the right to natural fertility includes the right to enter into a heterosexual marriage for the purpose of establishing a family.

But while the right to intercourse within marriage is an inalienable corollary to the natural right of reproduction, sexual activity outside of the marital covenant is not similarly included. The distinction lies in the fact that extramarital intercourse is rarely intended as an exercise of reproductive freedom, but instead is an exercise of sexual self-gratification. Furthermore, the State has had a long standing, and well recognized interest in safeguarding and promoting the special nature of marital relations and protecting the stability of the family unit. Sexual

activity outside of marriage such as fornication, adultery, homosexuality, incest, statutory rape, and bestiality have never been recognized as natural rights, and the State should retain the power to legislate against such activities. Such non-reproductive, extra-marital activities are contrary to nature, destructive of the family, exploitive of persons, diminish human dignity, and risk begetting children into unstable families.

On the other hand, the State's right to *discourage* sexual activity outside of marriage must still be limited to the extent that it may not forcibly limit the natural fertility of persons engaged in extra-marital activities. Furthermore, the children of illicit unions should be accorded the same rights and status of all other persons since by their conception, their parents entered into a *de facto* marriage covenant, though perhaps a bigamous one, which in-

vokes mutual responsibilities and duties toward their children and each other.

Natural reproductive freedom was alluded to by the Court in *Eisenstadt v. Baird*, at 453, in its statement regarding the right to self determination with regard to an individual's "decision whether to bear or beget a child."

While *Amicus* agrees with the core principle of individual reproductive rights which underlies this statement, the conclusions reached in *Eisenstadt* are overly broad. For while every individual has the right to control his or her natural reproductive powers, this right does not include the right to use any means or technology a person wants to control the bearing and begetting of children.

While the State must be prohibited from infringing on natural reproductive rights, the State does have a legitimate right to regulate and even proscribe birth control

technologies which can be used to limit fertility, enhance fertility, or artificially create new human, or non-human, life. Since all technologies have social and economic consequences, health consequences, moral consequences, and very frequently, unforeseen consequences, and are subject to abuse, nearly all technologies have at one time or another been subject to liability claims in the courts and regulation by duly empowered governments.[44]

With regard to birth control technologies, a term which includes artificial conception and gestation technologies as well as contraceptive and abortifacient technologies, the consequences of these technologies are becoming increasingly complex.

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[44] The only types of technology which might have some claim to Constitutional protection are technologies related to the right to bear arms. But even this technology cannot be given an absolute status. Individuals are not entitled to own any conceivable weapon, but rather are entitled to "reasonable" access to firearms.

For example, the issues of surrogate mothers, custody of frozen human embryos, *in vitro* fertilization, and visitation rights of sperm donors, are even now perplexing both the judiciary and the legislature. In the future, such issues as genetic engineering, artificial wombs, animal wombs, cloning for replacement organs, and a whole host of other technologies will arise which will dwarf the present quagmire. Surely the State has a legitimate interest in regulating present as well as future birth control technologies.

There is no Constitutional basis for distinguishing between birth control technologies and any other technology. Therefore, the Court cannot and should not treat birth control technologies as a "favored technology" and impose restraints on the right of States to regulate this class of technologies.

To limit the right of States to regulate

technology on the basis of a shadowy "right of privacy" which is dimly perceived within the Constitution and hazily-defined within this Court's rulings, is a short-sighted course which will surely lead to ever more confusion in the decades ahead. Perhaps worse, such a limitation on the States will serve as an invitation to technocrats to exploit men and women with ill-conceived and dangerous technologies which will wreak havoc on individuals and society.

C. THE STATE'S REGULATION OF BIRTH CONTROL TECHNOLOGIES POSES NO THREAT TO THE INDIVIDUAL'S NATURAL RIGHT TO MAKE REPRODUCTIVE DECISIONS.

While the State has a right to regulate birth control technologies, it is obvious that the State has no interest or desire to enact a general prohibition of birth control technologies. Indeed, quite to the contrary, federal, state, and local govern-

ments have been spending hundreds of millions of dollars promoting contraceptive use. Given the overwhelming public and government support for increasing contraceptive use, there is no realistic basis in the allegations of abortion proponents that allowing the States to regulate reproductive technologies would lead to a ban against all birth control. Even if some States were to choose to regulate some birth control technologies for reasons of health or morals, it is evident that such regulation would be accompanied by the promotion of better, substitute methods.

Furthermore, even the abstract possibility that the State might one day seek to "force" population growth by a ban on contraceptives poses no threat to reproductive freedom. The history of population growth, around the world, shows that even without access to contraceptive technology or abortion, peoples of all eras and

nationalities have limited their births according to their needs through the employment of delayed marriage, withdrawal, periodic or total abstinence, or even with the unreliable rhythm method.[45]

These natural methods of fertility regulation have been surpassed in the last twenty years by the discovery of at least six new methods of natural family planning, each with many variations, which employ from one to seven body symptoms for identifying the exact time of female fertility. The most commonly recommended methods have method effectiveness ratings for avoiding pregnancy of from 97-99 percent, rates which are at least comparable to the Pill, and easily exceed the effectiveness rates of IUDs, condoms, jellies and the rest.[46]

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[45] See authorities Greer, Kasun and Simon

[46] The final report of a 1978 federal study of NFP, found a 100 percent method effectiveness rate for a Sympto-Thermal variation of NFP and a 94% effectiveness rate for the Ovulation Method. The

These natural methods of fertility control, both the old and the new, employ no technology, only self-knowledge. The dissemination of such knowledge would be protected by First Amendment rights. Therefore, it is unreasonable to believe that even an oppressive government's ban against all birth control technologies could ever "force" people into conceiving "unwanted" children.

The existence of natural methods of birth control demonstrates that individuals will always have reasonable alternatives to birth control technologies and a reasonable opportunity to exercise their reproductive freedom. The State is not obligated to guarantee any more than these natural opportunities, though in its sovereignty it

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highest tested effectiveness rate ever reported belongs to a variation of the Temperature-Only method which has been demonstrated to have only 7 unplanned pregnancies per 10,000 fertile woman-years, a rate which is less than half the failure rate for vasectomy. J. Kippley, *The Art of Natural Family Planning*, 14-17 (1984).

is certainly free to provide technological aids if it so chooses.

In some ways, natural reproductive rights are similar to the right of free speech. Ultimately, the inalienable right to free speech is guaranteed by the natural abilities of humans to communicate. But while the right of free speech is enhanced by mass communication technologies, not all persons have equal access to these technologies, nor is the State required to provide access to these technologies. Clearly, while speech is a natural right which the State may not infringe upon, technological enhancements of this right are open to regulation.

The Court's only constitutional obligation, in this matter, is to protect the natural right of reproduction which is inherent in every person's biology. Beyond that, the people, acting through their elected representatives, must be free to

regulate the technologies they desire to enhance their natural rights. Left alone, the laws passed by properly elected legislatures will eventually come to reflect the "compelling" interests of the people.

Such laws regulating birth control technologies cannot, by definition, oppress the inherent rights of individuals. All inherent rights are natural to and arise from the God-given dignity of every human person. The right to free speech, the right to assembly, the right to travel, the right to defend oneself from aggression, these are inherent, natural rights obvious from the nature of social persons with hands, feet, mouths, and minds. Technologies, on the other hand, have no rights.

CONCLUSION

In summary of the above arguments, *Amicus* respectfully petitions the Court to: (1) reject the "right of privacy" as

unconstitutionally vague; (2) recognize the "natural right of reproductive freedom" as a fundamental and inalienable right of all human beings; (3) recognize the State's right to regulate birth control technologies, including abortion, for any broadly defined health reasons considered significant by the State; and (4) hold that the amended 18 Pa. Cons. Stat. Ann. §§3201-3220 is a constitutional regulation of a birth control technology which does not infringe on the "natural rights of reproductive freedom."

It is clear that the confusion created by the poorly defined "right to privacy" has led to the conflict at hand. The natural right of reproductive freedom suggested here is in keeping with the historical and moral values of both the Western and Eastern heritages, and is in accord with the natural law, right reason, and a fundamental respect for individual

human dignity. Such a timeless principle would certainly have received the unanimous consent of America's Founding Fathers.

Sixty years of judicial activism in the area of reproductive control must be reversed swiftly and completely. *Amicus* urges the Court to recognize the right of States to completely regulate reproductive technologies for broadly defined reasons of health, including physical, psychological, moral, and social health. At the same, *Amicus* urges the Court to restore immutable protection in the law for every individual's natural right to reproductive freedom.

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APPENDIX

DESCRIPTION OF *AMICUS*

The Elliot Institute for Social Sciences Research is an independent, not-for-profit research group committed to a program of original research in the areas of abortion, birth control, and population control.

The research associates of the Elliot Institute are leaders in the investigation and documentation of the psychological aftereffects of abortion on women. The Elliot Institute has collected over 1500 case studies of women who have suffered psychological aftereffects of abortion. It has also published major reviews of the literature in this field, and has published the results of two major surveys of post-abortion women.

Present research projects include a controlled, longterm study of the aftereffects of abortion using a random population of women. This is the largest such study ever done, with over 800 randomly selected participants. In addition, the Elliot Institute is undertaking a case study of approximately 80 women who suffered post-abortion trauma after aborting children conceived by sexual assault and a comparable sample of women who carried sexual assault pregnancies to term.

Elliot Institute research establishing a statistical link between inadequate pre-abortion counseling and increased severity of post-abortion reactions has been accepted for publication in a leading peer review journal of family and adolescent psychology.